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LIST OF ABREVIATIONS

AFR	–	Automated Facial Recognition
AFSJ	–	Area of Freedom, Security and Justice
AI	–	Artificial Intelligence
AIA	–	Artificial Intelligence Act
app.	–	application
art.	–	article(s)
ASEAN	–	Association of Southeast Asian Nations
ATS(s)	–	alternative trading system(s)
BRIS	–	Business Register Interconnection System
BVB	–	Bucharest Stock Exchange
CA	–	Court of Appeal
CC	–	Romanian Civil Code (Law no. 287/2009)
CCR	–	Constitutional Court of Romania
CFREU	–	Charter of Fundamental Rights of the European Union
CFSP	–	Common Foreign and Security Policy
CIA	–	Central Intelligence Agency
CISA	–	Convention implementing the Schengen Agreement
civ. dec.	–	civil decision
civ. s.	–	civil section
civ. sent.	–	civil sentence
CJEU	–	Court of Justice of European Union
CN	–	Combined Nomenclature
coord.	–	coordinator(s)
CP 1969	–	Romanian Criminal Code from 1969
CP	–	Romanian Criminal Code (Law no. 286/2009)
CPC	–	Romanian Civil Procedure Code (Law no. 134/2010)
CPP 1968	–	Romanian Criminal Procedure Code from 1968
CPP	–	Romanian Criminal Procedure Code (Law no. 135/2010)

CRD – Consumer Rights Directive

crim. dec. – criminal decision

crim. s. – criminal section

crim. sent. – criminal sentence

CVM – Cooperation and Verification Mechanism

DCFTA – Deep and Comprehensive Free Trade Area

dec. – decision/judgement

DIICOT – Romanian Directorate for Investigating Organized Crime and Terrorism

DMFSD – Directive 2002/65/EC on distance marketing of financial services

DNA – Romanian National Anticorruption Directorate

DSA – Digital Services Act

e.g. – *exempli gratia* (lat.) / for example (engl.)

EaP – Eastern Partnership

EC – European Council

ECHR – European Convention of Human Rights

ECtHR – European Court of Human Rights

ed. – edition

EE – Entrepreneurship Education

EFSA – European Food Safety Authority

EI – Enterprise Interoperability

EIO – European Investigation Order

ENI – European Neighbourhood Instrument

ENP – European Neighbourhood Policy

ENPI – European Neighbourhood and Partnership Instrument

EPO – European Protection Order

EPPO – European Public Prosecutor’s Office

et al. – *et alii* (lat.) / and others (engl.)

et seq. – *et sequens* (lat.) / and the following (engl.)

etc. – *et caetera* (lat.) / and so on (engl.)

EU – European Union

EUIPO – European Union Intellectual Property Office

EURATOM	–	Treaty establishing the European Atomic Energy Community
EuSEF	–	European Social Entrepreneurship Funds
EuVECA	–	European Venture Capital Fund
EV	–	electric vehicle
FSA	–	Financial Supervisory Authority
GD	–	Government Decision
GDP	–	gross domestic product
GDPR	–	General Data Protection Regulation
GEO	–	Government Emergency Ordinance
GMO	–	genetically modified organisms
GO	–	Government Ordinance
HC	–	Hague Convention from 1980
HCCH	–	Hague Conference on Private International Law
HCCJ	–	High Court of Cassation and Justice of Romania
i.e.	–	*id est* (lat.) / that is (engl.)
ICJ	–	International Court of Justice
ICT	–	information and communication technology
IMF	–	International Monetary Fund
INML	–	Romanian National Institute of Legal Medicine
JHA	–	Justice and Home Affairs Council
LGDJ	–	Librairie Générale de Droit et de Jurisprudence
LNG	–	liquified natural gas
loc. cit.	–	*loco citato* (lat.) / in the place cited (engl.)
MLQ	–	Multifactor Leadership Questionnaire
MTF(s)	–	multilateral trading facility(ies)
NATO	–	North Atlantic Treaty Organization
no.	–	number
NRRP	–	Romania's national resilience and recovery plan
NSA	–	National Security Agency
OECD	–	Organization for Economic Co-operation and Development
OJ	–	Official Journal of the European Union

OMESR – Order of the Minister of Education and Scientific Research

ONJN – Romanian National Gambling Office

ONRC – Romanian National Office of the Trade Register

op. cit. – *opere citato* (lat.) / in the work cited (engl.)

ORDA – Romanian Copyright Office

OLAF – European Anti-Fraud Office

OSIM – Romanian State Office for Inventions and Trademarks

OTF(s) – organized trading facility(ies)

p./pp. – page(s)

para. – paragraph(s)

PCA – Partnership and Cooperation Agreement

PO – Protection Order

PPPs – public-private partnerships

PUF – Presses Universitaires de France

RIDA – Revue Internationale du droit d'auteur

RIPA – Regulation of Investigatory Powers Act

ROA – rate of return on assets

ROE – rate of return on equity

RRDPI – Romanian Journal of Intellectual Property Law

RRM – Recovery and Resilience Mechanism

SDGs – Sustainable Development Goals

SE(s) – Social enterprises

s.n. – author(s) underlining

SEA – Single European Act

sent. – sentence

SIB(s) – social impact bonds

SME(s) – small and medium-sized enterprise(s)

SSE – Social and Solidarity Economy

ST/BT – Territorial Service (Office) of DIICOT

TEC – Treaty establishing the European Community

TEEC – Treaty establishing the European Economic Community

TEU	–	Treaty on the European Union
TFEU	–	Treaty on the Functioning of the European Union
TPO	–	temporary protection order
Trib.	–	tribunal
UAV(s)	–	unmanned aerial vehicle(s)
UK	–	United Kingdom
UN	–	United Nations
UNESCO	–	United Nations Educational, Scientific and Cultural Organization
US(A)	–	United States of America
v.	–	*versus* (lat.)
VAT	–	value-added tax
vol.	–	volume
WIPO	–	World Intellectual Property Organization
WTO	–	World Trade Organization

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LEGAL NATURE AND FORM OF THE EUROPEAN INVESTIGATION ORDER

Alina ANDRESCU*

Abstract

The study exposes, in a structured way, the essential aspects that sum up and define the set of procedural documents composing the European Investigation Order (EIO). In addition to the dynamics of the procedural document requesting the administration of some evidence, the legal nature of the procedural documents issued by the judicial body from the structures of the requested state is also analyzed, in order to highlight the complexity of the principles of legality and finding the truth at the European level.

The content of the study shows the intrinsic and extrinsic elements of an effective judicial instrument in the activity of procedural administration of the evidence necessary to find out the objective truth, in the spirit of art. 5 para. (1) CPP. The contribution of the study in the study and clarification of the researched object is decisive, original, adding an extra step to the act of knowledge of the legal nature and form of the EIO.

Keywords: *international judicial cooperation in criminal matters, EIO, Law no. 302/2004 on international judicial cooperation in criminal matters.*

1. Introduction

In a synthetic way, both the inter-war[1] and the post-war doctrine[2] define the criminal process as a procedural (judicial) activity, having a progressive character, taking place over time, in a coordinated manner, based on the set of procedural acts and procedures ordered/issued by the participants in the criminal process, with the aim of achieving criminal justice[3].

In the view of the classic procedural-penal doctrine, the determining feature of the qualification of the criminal process seems to be represented by relationism and the interdetermination of procedural acts (in the sense of *instrumentum*), escaping analysis precisely the object of the criminal process, in both its components the object of the material, represented by the concrete act committed (the substantial positive aspect) and the legal object, represented by the legal conflict report from substantive law[4].

The legal object of the criminal process generates the criminal procedural legal report, in which the active subject is the Statute, which acts through its judicial bodies (qualified participants), and the passive subject is accused.

In the framework of the criminal procedural legal report, on the one hand, the Statute seeks to prove the existence of the crime, the committee by the accused (suspect or defendant) with the guilt required by the norm of incrimination from the material law (accountability) and the criminal liability of the perpetrator of the crime (punishment of the guilty) and, on the other hand, the accused can maintain a passive position throughout the trial, enjoying the presumption of innocence, in which sense he can avail himself of the right not to make statements[5], or he has the possibility, through the defenses exercised, to prove the opposite of the accusations,

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[1] V. Dongoroz, *Treatise on Law and Criminal Procedure*, 2nd ed. of Ioan Tanoviceanu's Law and Criminal Procedure Course from 1912-1913, revised and supplemented by V. Dongoroz, C. Chiseliță, Șt. Laday, E. Decuseară, vol. V, Curierul Judiciar, Bucharest, 1927, pp. 2, 4, (comments on points 532[1] and 532[3]).

[2] Tr. Pop, *Criminal procedural law*, *vol. III - General part*, Cluj, 1946, p. 1.

[3] „Realization of criminal justice" appears as the goal in the qualification given to the criminal process by Prof. T. Pop, in *Criminal procedural law*, p. 1, while Professor Gh. Mateuț no longer mentions the purpose within the definition of the criminal process, in this sense, see Gh. Mateuț, *Treatise on criminal procedure - General part*, vol. II, C.H. Beck Publishing House, Bucharest, 2012, p. 753; from our point of view, the *purpose of the criminal process* should not be seen as an extrinsic element to it, but as a component of it, considering that the execution of the criminal decision represents a phase within the process, and not an autonomous, subsequent and independent „entity" the criminal process.

[4] Regarding the bivalence of the *object of the criminal process*, see V. Dongoroz, *Introductory explanations*, from *Theoretical explanations of the Romanian Criminal Procedure Code - General Part*, vol. I, by V. Dongoroz, S. Kahane, G. Antoniu, C. Bulai, N. Iliescu, R. Stănoiu, R.S.R. Academy Publishing House, Bucharest, 1975, p. 11.

[5] Art. 78 CPP called the *rights of the suspect*, in which it is stipulated that „the suspect has the rights provided by law for the defendant", and art. 83 para. (1) letter a) CPP, in which it is mentioned that „during the criminal trial, he has the right not to give any statement (...)".

namely the non-existence of the act or the lack of elements of objective or subjective typicality of the concrete facts, or to present an alibi from which it would result that he did not commit the criminal act, or highlight the lack of conclusion/value evidence of the evidence administered in his accusation, or to invoke any situation that would lead to the termination of the criminal process[6].

From a procedural point of view, the material object of the criminal process, represented by the crime specifically investigated[7], determines the competence of the judicial bodies, the incidence of certain procedural rules that prescribe the conduct of procedural activities (for example, the obligation to provide legal assistance), the application of special methods of supervision or research that offers a certain regime to the obtained evidence or the issuance of procedural documents for requesting and obtaining evidence located on the territory of a foreign state, but also for the application of preventive or preventive procedural measures.

Taking into account all these aspects, we believe that the criminal process represents the judicial activity, regulated by law, in which the main procedural subjects (the suspect and the injured person) and the parties (the defendant, the civil party and the civilly responsible party), exercise their procedural rights directly and adversarial for the purpose of finding out the truth about the existence or non-existence of a crime, so that no guilty person goes unpunished and no innocent person is prosecuted/punished[8].

2. National law

According to the legal orientation adopted by the Romanian legislator in 2014, although all the procedural rights of the parties are exercised through the competent bodies[9], the State is neither a party nor the main procedural subject in the criminal process. The rationale considered by the legislator was that of including in the category of main procedural subjects or parties only those participants who have patrimonial or non-patrimonial, direct and indirect interests that they can exercise within the criminal process, the State, through its organs, having only the role of managing the exercise of those rights by the main procedural parties or subjects. The reasoning seems to be contradicted by the way in which the parts were defined in the content of art. 32 para. (1) CPP, respectively procedural subjects exercising or against whom a judicial action is exercised, after which, in art. 33 para. (1) CPP, it is stipulated that the injured person and the suspect are part of the scope of the procedural subjects.

If the criterion for the exercise of the judicial action is the determining component of the quality of party, it is obvious that the injured person does not have the right to exercise the criminal action, this right being, in the current regulation of criminal procedure, the exclusive attribute of the State (state monopoly), the public action being exercised through his representatives, respectively through the competent judicial bodies.

It could be argued, as the criminal procedural doctrine also does, that the State exercises the criminal action in the name and procedural interest of the injured person. But this claim does not cover the legal scope of its exercise since the criminal action represents an attribute and right of the state, *sui generis*, which exercises the public action as the direct holder, the exercise being done in its name, and not as a right of to the injured person, justified only by the rationale of restoring/confirming the legal order affected by the commission of the crime.

However, the definition of the criminal process offered by the classical Romanian doctrine, otherwise taken over by the majority of the contemporary doctrine, has the merit of highlighting the legal structure of the criminal process, represented by the procedural and procedural acts, expression of the principles of legality and officiality of the criminal process, through which the dynamism of judicial activity takes place.

Starting from these premises, the general cause of the adoption by the participants in the criminal process of a certain act or certain procedural acts must be analyzed, depending on the cause, they may reach a scientific qualification.

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[6] The cases from art. 16 para. (1) letters a)-d) CPP, which would attract the classification/acquittal, depending on the procedural phase in which one or more of the listed situations was proven, or the cases listed under letters e)-i) of art. 16 para. (1) CPP, which would lead to the termination of the criminal process, according to art. 396 para. (5), (6) CPP.

[7] We have in mind the concrete application, from a procedural point of view, of the personality principles of the criminal law - provided by art. 9 CP, the reality of the criminal law - provided by art. 10 CP, and that of the universality of the criminal law - provided by art. 11 CP, in the case of which the Romanian criminal law applies to offenses committed outside the territory of the country.

[8] In a sense close to the given definition, the criminal procedural doctrine was also expressed, in this sense, see I. Neagu, M. Damaschin, *Criminal Procedure Treaty - General Part,* IVth ed., revised and added, Universul Juridic Publishing House, Bucharest, 2022, pp. 37-38.

[9] The specialized bodies of the State that carry out judicial activity are listed in art. 30 CPP.

Of course, the issuance of procedural documents[10] cannot be without reason, but must be based on the procedural rights and interests (formal or substantial) of the participants[11].

The exercise of the procedural right, as an external form of manifestation of the will, includes the procedural interest of the owner participating in the process (procedural act), most often materializing on a certain support (procedural act) in a form and according to a content standard provided by law. Such a procedural act generates legal consequences, dynamizes and procedurally guides the case under judicial investigation towards a concrete finality, the process and incident procedures thus gaining objectivity, coherence, providing a level and a standard of predictability, necessary for the participants in the criminal process.

From a positivist perspective, in the criminal process, the procedural interests of the participants are neither identical nor do they pursue the same procedural finality. Most of the time they are placed in opposition, they are antagonistic, a fact for which the legislator recognized and legislated adversariality as a natural procedural conduct both in the criminal investigation phase and in the trial phase.

3. European legislation

The freedom of movement of the citizens of the EU and the movement of goods and capital in the Union space, corresponds to the guarantee of security and the protection of rights at its level. The guarantees provided to citizens and legal entities represent the obligations and contribution of the member states. „Security and justice" can only be ensured through an effective, flexible and fast collaboration of the judicial bodies belonging to the member states. The pillar of justice generates a single European judicial space, within which judicial cooperation in order to bring criminal responsibility is a common goal of the member states.

In order to achieve this common goal, the states, through the European Institutions, must build from a legal point of view levers, color of legal communication, so that the legal force (obligatory and enforceable nature) of the judicial acts issued by the competent authorities of any member state EU to be recognized and to produce their effects on the territory of any of the member states. In this sense, by art. 87 of the Consolidated Version of TEU and TFEU (2010/C83/01), a cooperation was established involving all the competent judicial authorities within the member states whose main objective is the collection, storage, processing and analysis information in the judicial field, as well as the exchange of information between the authorities of the member states, the use of common investigative techniques regarding the detection and documentation/investigation of serious forms of organized crime.

The realization of this partnership, whose main purpose is European judicial cooperation in a common space of the member states, is facilitated by: common European values, among which finding the truth and carrying out criminal justice occupy a central role; the existence of well-organized judicial institutions, which have well-trained officials; compliance with the territorial competence criteria of the judicial bodies within the member states, so that the principle of state independence is not violated; the adoption and application of a single normative framework at the European level, through which all judicial procedures are regulated.

The last of the functional facilities represents an area of legal construction, to which all the responsible representatives of the member states must contribute, the aim being the adoption of a unique and efficient regulatory framework, with very close standards of clarity and predictability, in order to ensure the bodies judiciary within the partner states, the quality of procedural documents.

Considering the European legislation mechanisms, the Framework Decisions and, later, the European Directives are the normative acts able to ensure the unitary normative framework, all the more so since, at the

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[10] By „procedural act", meaning the manifestation of will with criminal judicial value, expressed by the participants in the criminal process, listed in art. 29 CPP, in order to defend certain procedural rights or interests.

[11] From the perspective of legal effects, the objectification of the procedural interest of the State, although it is not defined in the rules of criminal procedure, is provided by art. 314 para. (1) letter b) CPP, representing a reason for abandoning the criminal prosecution (non-prosecution), when there is no public interest in continuing the criminal prosecution. The state's interest in applying or not applying a penalty (substantial interest) is regulated in substantive law, meaning that, for the first time in Romanian positive law, in art. 80 CP, the conditions for waiving the application of the penalty are described. Although the expression is close (paronymous appearance), however, in order to eliminate confusion, it must be emphasized that the public procedural interest refers to the costs of the procedures and the duration of the procedures, which are far too high in relation to the lack of importance and social damage generated by the crime committed, in time that the state's interest in punishing the perpetrator is a substantial one and refers to the inappropriateness of the punishment given the small legal limits of punishment, the reduced damage to the legal object damaged and the person of the perpetrator and the conduct before and after the commission of the act from which it can be deduced that, in the future, it his conduct can be corrected without the application of a criminal penalty.

level of the EU, the trend is towards the adoption of unique criminal procedures that will it is part of the structure of a future European Criminal Procedure Code.

4. Definition, principles and structure of the EIO. Obstacles and new visions

One of the European judicial instruments that has gained its effectiveness is the European Investigation Order[12] (EIO), initiated and adopted at the European level by the Kingdom of Belgium, the Kingdom of Spain, the Kingdom of Sweden, the Republic of Bulgaria, the Republic of Estonia, the Republic of Austria and the Republic of Slovenia.

Unfortunately, although the EIO represents a judicial instrument that Romania needed so much, our State, through its distinguished representatives in the European Parliament, did not initiate and did not agree at the European level to the draft Directive 2014/41/EU. All with regret, we have to admit that, in the case of Romania, the adoption/implementation of the Directive in the domestic legislation[13] was done late and only after the member states requested this. At the EU level, EIO has experienced an upward evolution, based on the experiences gained from the judicial collaborations carried out on the basis of previous European Directives.

The EIO is a form of judicial cooperation in criminal matters, regarding the manner of issuing and executing a judicial decision, in which the issuing and executing judicial bodies belong to different states within the EU, in order to obtain or transfer of evidence between member states.

In our opinion, the definition of the EIO, provided by art. 268^1 para. (1) letter a) from Law no. 236/2017 for the amendment and completion of Law no. 302/2004 on international judicial cooperation in criminal matters[14], is criticizable, because the phrase „specific investigative measures" that are desired „to be carried out", in addition to the fact that it does not know a concrete definition and delimitation in the legislation and doctrine Romanian criminal procedure, also induces some confusion, given the fact that, in our country, the term „procedural measures" refers to restrictions on the exercise of certain rights (for example, preventive measures or protective measures). We believe that, in order to improve the legislation, but also to clarify the normative content given by the objectivity of the actual activity that wants to be qualified/defined in the law, the phrase „investigative measures" should be replaced with „administration of evidence in order to obtain evidence requested" or „the transfer of existing evidence in the possession of the competent authority to the executing state (requested state)".

The EIO is based on the *principle of mutual recognition of judicial decisions*, Directive 2014/41/EU having its cause in the provisions of art. 82 para. (1) TFEU.

In the European view, the judicial decision from the composition of the EIO has a complex, bivalent *structure*, which involves synalagmatic judicial obligations[15] belonging to the will and reason of the judicial bodies from different states, its content includes both the procedural act - as a manifestation of will expressed by the body judiciary within the issuing state for the purpose of revitalizing the criminal process - as well as the procedural act - as a form of materialization (objectification) and delimitation (regularization) of the expressed judicial will of the same judicial body of the issuing state.

The reciprocal nature of the judicial obligation within the EIO belongs to the judicial bodies of the executing state (requested state), consisting in issuing procedural documents in order to recognize the EIO and then issuing procedural documents in order to administer means of evidence within the judicial investigative activity, necessary and incidental to obtaining and transferring the evidence that is the subject of the EIO.

For the first time at the European level, the goal of mutual recognition of judicial decisions was achieved through the order of non-disposal of goods or evidence, which appears characterized in the Council's Framework Decision 2003/577/JHA[16], consisting in preventing destroying, changing, moving, transferring/ moving or disposing of the evidence.

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[12] At the EU level, the EIO in criminal matters was adopted by Directive no. 2014/41/EU of 04/03/2014 of the European Parliament and of the Council, published in the Official Journal of the EU.

[13] Law no. 236/2017 for the amendment and completion of Law no. 302/2004 on international judicial cooperation in criminal matters, published in the Official Gazette of Romania, Part I, no. 993/14.12.2017.

[14] *Ibidem*.

[15] By „synalagmatic judicial obligations" we mean those judicial duties that can be found in the content of procedural and procedural documents drawn up by judicial bodies, both in the case of those of the issuing state and of the judicial bodies of the executing state.

[16] Council Framework Decision 2003/577/JHA/22.07.2003 on the execution in the European Union of orders to freeze assets or evidence (OJ L 196, 02.08.2003, p. 45).

Of course, the European legislator had in mind the prevention of the alteration of evidence, constituting the factual elements that provide, through the use of the deductive method, data and information necessary to establish the existence or non-existence of the objective (factual) elements that are part of the legal content of the investigated crime.

The deficiency of the Framework Decision 2003/577/JHA consisted precisely in the limited regulatory limits, its object being limited only to the unavailability of evidence (their unalteredness and preservation) located on the territory of another (requested) member state than the one in which the investigation was conducted effective (issuing/requesting state), based on a special request in this regard.

In judicial practice, the criticisms of the procedure regulated by this Framework Decision referred to the cumbersome procedure, which contained two stages (recognition of the request for preservation of evidence and approval of the transfer request), but also to the fact that the working method did not differ in the form of judicial assistance in criminal matters existing before this Decision.

The fragmentation and bureaucratization of the evidence management activity between the cooperating states affected the quality of the justice act, reducing the chances of finding out the truth completely, in a reasonable time.

Consequently, based on the experience gained, the involved states adopted the Council's Framework Decision 2008/978/JHA on the European mandate to obtain evidence[17], through which a significant contribution was made in achieving and ensuring the principle of speed.

Although the new framework decision made the modalities for requesting and transferring evidence between member states more flexible, this new decision also had a number of shortcomings considering that the object of the request and transfer could only be represented by objects, documents and existing data at the time of the request.

Or, the judicial practice felt this limitation as a serious obstacle to finding the truth, so that the European judicial authorities changed the approach, improving and expanding the judicial powers of the requested states in the sense of assigning the functional powers regarding the exploitation, capitalization and transfer of both the means of sample, as well as the samples obtained.

Finding new strategies for judicial cooperation with a view to the preservation, transfer and utilization of evidence were the object of the Stockholm Program adopted by the European Council on December 10-11, 2009, within which the new approach to the problem of preservation and transfer of evidence between the interested states had to be based on: the flexibility of traditional mutual legal assistance systems; the inclusion in the preservation and transfer procedures of all types of evidence; regulating the deadlines for the execution of the requested measures; limiting the reasons for refusing the transfer of evidence by the requested state.

The novelty brought by this vision consisted in the possibility of carrying out one or more specific investigative measures by the requested state at the request of the requesting issuer, which entailed the carrying out of criminal investigation activities, including the issuing of procedural and procedural documents by it, the evidentiary results following be utilized by the requested state.

In the new vision, the judicial investigation could be carried out by referring to the entire set of evidence existing in the legislation of the requested state, by using all evidentiary procedures, the evidence thus obtained being transferred directly to the requesting judicial body (field of application and administration on a horizontal system), without there is still a need for the recognition of documents and investigative activities by the ministries of justice within the cooperating states. This new vision was the basis for the adoption of Directive 2014/41/EU, which currently represents the general normative framework applicable to cross-border judicial investigations, but without involving the cross-border surveillance mentioned in the Convention implementing the Schengen Agreement[18].

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[17] Framework Decision 2008/978/JHA of the Council of 18.12.2008 on the European mandate to obtain evidence for the purpose of obtaining objects, documents and data for their use in criminal proceedings (OJ L 350, 30.12.2008, p. 72).

[18] Convention implementing the Schengen Agreement of 14.06.1985 between the governments of the states of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of controls at their common borders (OJ L 239, 22.09.2000, p. 19).

Within the framework of the EIO, the issuing judicial authority within the requesting state is the one that decides and requests the investigative level and limits to be used considering that they hold the details of the aspects that constitute the subject of the probation[19].

By the investigative measures that can be requested by the issuing judicial authority, we mean all the means of evidence obtained through the legal modalities of the evidentiary procedures.

However, with regard to the defense/compliance with the principle of legality of procedural activities, it must be emphasized that both the evidence and the evidentiary procedures used by the judicial bodies of the requested state must fall within the evidence and evidentiary procedures regulated by the domestic legislation of the requested state.

Also, regarding the conditions of validity and legality of the procedural acts carried out by the judicial bodies of the requested state, they must be carried out in accordance with all the guarantees and conditions imposed by the legislation of the requested state.

In this sense, the European legislator recommends, in point 10 of the rational substantiation of Directive 2014/41/EU, that, in situations where the requesting judicial body requests the performance of a certain type of investigation that is not regulated by the legislation of the state of which it is a part the requested judicial body, the latter to proceed to obtain the evidence/evidence with the help of evidence and by resorting to evidentiary procedures similar to those requested, but provided for in the legislation of the requested state.

As the importance or necessity of the evidence does not justify the violation of the principle of legality, neither the procedural documents issued in order to obtain or administer the evidence can be ordered or executed in violation of the conditions and procedural guarantees regulated by the requested state.

For example, art. 101 CPP, which regulates the substance and limits of the principle of loyalty in the evidence management activity, provides for the prohibition of resorting to violence, threats or other means or methods of coercion and also prohibits promises or exhortations exercised in order to obtain evidence. At the same time, it is forbidden to use listening methods or techniques that affect the person's ability to remember and relate, consciously and voluntarily, the facts that represent the object of the evidence, without producing any kind of legal effect the possible consent of the person questioned in order to appeal to such techniques or methods. Also, art. 102 CPP, provides that „evidence obtained illegally cannot be used in the criminal process", and „nullity of the act by which the taking of evidence was ordered or authorized, as well as nullity of the procedural act by which the taking of the evidence was carried out determines its exclusion". Such legal provisions for the imposition of procedural sanctions in relation to evidence obtained illegally or on the basis of acts issued or applied in violation of special legal provisions exist in most member states' legislation.

Thus, in the *French Criminal Procedure Code* there are textual nullities, particularly concerning searches and telephone interceptions between the accused and his lawyer (art. 59 and art. 100.7 final paragraphs), there are also substantial nullities regarding „disregarding a substantial formality provided for by a provision of the Criminal Procedure Code or any other provision of criminal procedure" (art. 171 Criminal Procedure Code)[20].

In the *German Criminal Procedure Code* (*Straffprozessordnung*), at art. 136 para. 3, it is expressly forbidden to use consecutive statements, obtained during an interrogation conducted according to incorrect methods, such as: subjecting the accused to excessive fatigue and hearing him in a state of physical or mental exhaustion, using promises or exhortations in exchange for obtaining statements or for the suspect to waive certain procedural rights or guarantees. In German Criminal procedural law, the „prohibition of evidence" (*Beweisverbote*) is divided into two categories: obstacles generated by the methods of obtaining evidence, and includes evidence obtained by threat, trickery, manipulation/compromise of the procedural interests of the subject of the trial, and derivative obstacles from the illegal way of administration/presentation of evidence in court (*Beweisverwertungsverbot*), the matter being left to jurisprudence [21], the active role of the judge being decisive.

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[19] By *object of probation* we mean those elements of fact that serve to prove the objective activity (the material element within the objective side of the deed) of which a person is accused and to establish the link between the action or inaction taken and their author.

[20] See S. Guinchard, J. Buisson, *Procédure pénale,* Éditions Litec, Paris, 2000, p. 758.

[21] See H.-H. Kuhne, *Strafprozessrecht, Eine systematische Darstellung des deutschen und europaischen Straf-verfahrensrechts,* C.F. Muller Verlag, Heidelberg, 2003, pp. 396 et seq.

The *Italian Criminal Procedure Code* regulates the unusability of evidence[22], meaning that the invalidity of evidence as a result of non-compliance with the legal framework is a general rule. Italian doctrine[23] created the concept of invalidity, which includes, on the one hand, relative or absolute nullities and, on the other hand, unusability („l'inutilizzabilità della prova"), a notion specific to evidence (art. 191 para. 1) and whose regime it is the same as in the case of absolute nullities. The unusability can be lifted *ex officio* by the judge, even for the first time, in cassation and without the need to cause any damage to any of the parties. According to the art. 191 Italian Criminal Procedure Code, „evidence obtained in violation of the prohibitions established by law cannot be used", and according to art. 526, „the judge cannot use evidence other than those that were obtained, legitimately, following the debates".

In the *Spanish Criminal Procedure Code*, the institution of the exclusion of evidence is regulated in a similar way to the European normative framework (given that the Anglo-Saxon legal system is the primary source of inspiration in both European legislations, the similarities are not surprising in this respect). In advance, we note that fundamental rights enjoy protection at the constitutional level and in the Spanish legal system, as expected. Thus, according to art. 24 para. (2) of the Spanish Constitution[24], all persons have the right, among other things, to the use of evidence appropriate to their defense. Thus, in art. 11 para. (1) from Organic Law no. 6/1985 of the judicial organization[25] in Spain provides that evidence obtained directly or indirectly from the violation of fundamental rights or freedoms has no effect. Therefore, in this definition, the notions of legality and fairness in the administration of evidence seem to merge. The phrase "obtained evidence" has, according to the Spanish Constitutional Court, the meaning of evidence obtained by violating any fundamental right, and the activity of obtaining refers either to the search and investigation of the source of evidence (interception of communications, searches and seizures), or to the task of to obtain results from an evidentiary source inadmissible in the Spanish legal system, as it violates fundamental rights (for example, obtaining statements through hypnosis, torture) [26].

In the *Belgian judicial system*[27], expressed by the jurisprudential order of the Court of Cassation, the absolute prohibition of the use, directly or indirectly, of evidence obtained irregularly has been accredited. Through a ruling of principle issued by this court on October 14, 2003, in the Antigone case, it was established that such evidence cannot be taken into account by the judge, either directly or indirectly, in the following situations: when compliance with certain conditions formal is provided under the penalty of nullity; when the irregularity committed affected the reliability of the evidence; when the use of evidence contravenes the right to a fair trial. As such, to the extent that none of these assumptions is incidental, such an irregularity can serve as a solution to the conviction.

The *Finnish Criminal Procedure Code* prohibits the use of evidence obtained through torture and the evidence obtained in violation of the right to a fair trial. Also, there are certain restrictive rules regarding the administration of verbal statements. It is interesting to note that until 2016 the domestic law did not contain any provisions regarding the administration standards.

According to the *Dutch Criminal Procedure Code*, illegally obtained evidence is subject to the evaluation of the court, which decides on its exclusion, based on a plurality of criteria. These criteria include the interest protected by the violated norm, the seriousness of the violation and the harm caused by that violation. In general, evidence obtained illegally can be excluded when, in the process of collecting it, the principles of criminal procedure were seriously violated. The Dutch system is a complex one, and the admissibility of evidence seems to be decided on a case-by-case basis, taking into account a number of criteria prescribed by the Criminal Procedure Code, but also the method of investigation used. Violation of a rule involves the failure to observe a written or unwritten rule of evidence-gathering, no distinction being made as to the content of those rules.

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[22] See P. Corso, rapport italien, in *La preuve en procédure pénale comparée*, p. 233; D. Siracusano, A. Galati, G. Tranchina și E. Zappala, *Diritto processuale penale,* volume primo, terza edizione, Giuffre editore, Milano, 2001, pp. 333-335.

[23] See P. Tonini, *Lineamenti di diritto processuale penale, Seconda edizione,* Giuffre editore, Milano, 2004, p. 106; D. Siracusano, A. Galati, G. Tranchina și E. Zappala, *op. cit.,* pp. 334-335.

[24] *La Constitucion Espanola de 1978*, available online at *http://boe.es/*.

[25] *Ley Organica 6/1985, de 1 julio, del Poder Judicial,* updated until July 25, 2019, available online *at http://boe.es/*.

[26] Decision 64/86 of May 21, *Materiales docentes en Ingles – The Spanish criminal Process,* available online at *https://rua.ua.es/dspace/bitstream/10045/34555/2Materiales*, p. 79.

[27] See J. Pradel, *Limitation des effets de la nullité d'un acte de procédure la seule personne «concernée», La semaine juridique*. Édition Generale nr. 16. Cour de cassation crim., 14.04.2002, nr. 11-84.694, Juris Data nr. 2012-002124, Juris Classeur périodique (semaine juridique), G 2012, art. 242, obs. J.-Y. Maréchal: JCPG 2012, doctr. 341, nr. 27, obs. A. Maro. pp. 333-334.

According to the jurisprudence of the Dutch Supreme Court[28], a direct link must be established between the infringement and the evidence-gathering activity, which requires the infringement to be the sole result of the illegal evidence-gathering actions[29].

Regarding *the types of procedures in which the EIO can be used*, as well as regarding its content, the appropriateness and proportionality of the use of this judicial instrument, the European legislator has regulated a set of conditions for the judicial bodies in the state applicant, as follows:

- a) the existence of ongoing criminal cases/judicial investigation, especially in the criminal investigation or trial phase;
- b) in the framework of investigations of an administrative nature regarding violations of the legal order, but which can be completed with the notification of some crimes;
- c) in the framework of judicial investigations that can be completed with the application of criminal sanctions.

Regarding *the content and form of the EIO*, it is characterized by certain elements in its composition, as follows:

- the data necessary to determine the issuing judicial authority and the validating one belonging to the executing state.

These data prove the legitimacy component of the EIO, according to which, at least in the case of judicial validation bodies, determine the aspects of material and territorial competence necessary to be respected within the complementary procedure[30], generated at the time of receiving the request for validation of the EIO.

- *the object and reasons of the EIO*, which indicates, in concrete terms, the nature of the case in the course of which it is necessary to carry out the investigations, respectively the administration of the evidence, specifying the object of the probation (the elements of fact that serve to prove the objective elements that make up the objective side - material of the investigated offense or necessary to clarify the factual circumstances on which the execution of criminal justice depends) or the transfer of evidence.

The reasons for the EIO must contain a detail of the reasons for which the investigation order procedure was used. In this sense, the data or indications on the basis of which the conclusion was reached that certain evidence can be obtained or procured or transferred from the territory of the executing state must be exposed, for example, it is desired to hear the injured person or some witnesses about whom knows that they are effectively located or live permanently on the territory of the executing state, or the sending of documents in the custody or possession of public or private institutions from the territory of the requested state is requested, or the transfer/communication of biometric data or the taking of biological samples of two persons (alive or even deceased) located on the territory of the requested state.

- *the necessary information available regarding the person or persons in question*, on which occasion the identification attributes of natural or legal persons who have the capacity of main passive procedural participants, such as the parties (main procedural subjects in the judicial case) must be indicated), the data known by the judicial bodies of the issuing state regarding their domicile, residence or headquarters, the identification data of the secondary procedural subjects involved in the judicial proceedings, such as witness data, as well as the factual aspects that wish to be clarified by him;
- *a description of the criminal act that is the subject of the investigation or the proceedings, as well as the applicable criminal law provisions of the issuing state*, meaning that a chronological exposition of the facts that are the subject of the investigation carried out on the territory of the requesting state, of the persons involved, of their procedural interests, of the legal framework attributed to the fact under investigation in relation to the own legal norms of the issuing state, with the indication of the procedural phase and the procedural stage of the investigation necessary to be carried out in order to find out the truth and bring the person/s found to criminal responsibility guilty, of the procedural and procedural documents issued in the case until that moment and other necessary and useful aspects to determine the validation of the EIO by the competent judicial body within the executing state, but also to edify, after the validation, the positioning and guiding the investigations carried out

[28] For an analysis on this topic, see M.J. Borgers, L. Stevens, *The use of illegally gathered evidence in the Duch criminl trial,* in Electronic Journal of Comparative Law, vol. 14.3, 2010, available online at *https://www.ejcl.org/143/art143-4.pdf*.

[29] HR 24 February 2004, Dutch Law Reports 2004, 226, *apud* M.J. Borgers, L. Stevens, *loc. cit.,* p. 7.

[30] For a pertinent doctrinal analysis of the content and differentiation of the compelent procedures within which we find the complementary competence of the judicial bodies, see V. Rămureanu, *Criminal competence of the judicial bodies*, Scientific and Pedagogical Publishing House, Bucharest, 1980, pp. 180-181.

by the judicial bodies within the executing state, investigative activities that are subject to the EIO.

- *a description of the investigative measure or measures requested and of the evidence to be obtained* meaning that the nature of the evidence will be indicated and the determination of the means of evidence necessary to be administered in order to obtain it, the object of the evidence will be established, by describing the factual aspects what must be clarified/found out/known through the evidence. On this occasion, the procedural guarantees can also be indicated to guarantee the legality and loyalty of the administration of the evidence provided for by the criminal procedural legislation of the issuing state (for example, the hearing of the main procedural subject only in the presence of the lawyer or of the vulnerable witness in the presence of the psychologist, lawyer or of the representative of the guardianship authority etc.).

Regarding the appropriateness and proportionality of resorting to issuing and requesting the administration of evidence or the transfer of evidence through the EIO, *criteria* listed explicitly in art. 6 of the content of Directive 2014/41/EU, reasons must be presented regarding: the scope and sanctions provided by law for the deed that is the subject of the judicial investigation; the damaging consequences of the actions that make up the objective side of the investigated crime; the uniqueness of the way of solving the evidentiary problem by means of the EIO; the need to clarify the case as soon as possible, in order to remove the wrong accusation of a person or to find out the truth in order to bring the author to criminal responsibility; the fact that the investigative measure or measures indicated in the EIO could be ordered under the same conditions in a similar internal case.

All these criteria, as a whole, will be analyzed by the validation authority within the executing state, which, in order to clarify the aspects of grounds, proportionality and timeliness of the expressed request, may ask for clarifications and additional details from the issuing state, following that the validation or rejection of the requests within the EIO or even the EIO in its entirety to be decided after the critical analysis of the communicated data. Of course, in situations where the issuing state finds that the issued EIO is not timely or proportionate compared to the alternative situations of obtaining evidence or does not concern any of the situations in which it can be issued, it can withdraw the request regarding the EIO, notifying the revocation of the executing state, according to art. 6 para. (3) from Directive 2014/41/EU.

- the conditions of formal validity of the EIO represent materializations of the embedded procedural act and of the drawn up procedural act. In this sense, the procedural document must be clear, determined and objective, expressed in writing, in compliance with the conditions of material and functional competence of the judicial body in relation to the criminal procedural legislation in force in the issuing state at the time of issuing the EIO.

The procedural act, represented by the document of the EIO, must contain the elements that certify its authenticity, in order to guarantee the principle of procedural formality. It must be sent to the executing state by any means that allow a written record to ensure the receiving state the possibility of verifying the authenticity of the communicated procedural document[31]. The verification of the fulfillment of the formal conditions of the EIO is carried out by the materially competent judicial bodies on the occasion of its validation or denial.

In this sense, in the case of Romania, when we are the executing state, the verification and validation of the EIO is carried out by the Prosecutor's Office unit, in the case of files in the criminal investigation phase, and by the court, in the case of files in the trial phase.

In the case of both institutions indicated above, given the existence of the differentiation of hierarchical material and functional powers, we believe that, if the judicial investigation carried out by the requesting state is in the criminal prosecution phase, the authorization and validation of the EIO will be carried out by the competent Prosecutor's Office material in carrying out criminal investigations in relation to the exposed crime that is the object of the criminal investigation from the content of the EIO (for example, in the case of the crime of murder, the authorization must be given by the Public Prosecutor's Office attached to the Court), and if the authorization or validation of the EIO refers in a case approved in the trial phase, they can be ordered by the competent court to try the crime that is the subject of the EIO.

The need to respect material, territorial and functional competences is the reason why, in art. 2686 para. 2) from Law no. 236/2017, provides for the obligation to decline jurisdiction in cases where the judicial authority notified by the requesting state is not competent in the execution of judicial activities that are the subject of the

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[31] In this sense, in art. 7 para. (4) of Directive 2014/41/EU it is stipulated that „the issuing authority can transmit the EIO through the telecommunications system of the European Judicial Network established by the Council's Joint Action 98/428/JHA." Reference is made to joint action 98/428/JHA/29.06.1998, adopted by the Council on the basis of art. K.3 TEU, creating a European Judicial Network (OJ L 191, 07.07.1998, p. 4).

received EIO, meaning that it will send the order to the competent authority/judicial body, after which will inform the issuing judicial authority, following that the latter will keep in touch not the judicial authority vested on the basis of the decline of the institutional competence on the territory of the executing state.

It should also be remembered that, in accordance with the provisions of art. 2686 para. (1), sentence II of Law no. 236/2017, if the EIO, „issued during the criminal investigation phase, has as its object the taking of measures which, according to Romanian law, are within the competence of the judge of rights and freedoms, the competent prosecutor will notify the judge of rights and liberties from the appropriate court in the degree in whose territorial constituency the prosecutor's office is based, in order to recognize the EIO". For example, if the evidence sought to be obtained can only be procured by the judicial bodies of the executing state following a search of the home of the legal person or the headquarters of the legal person, the case prosecutor will request the authorization of the activity and the issuance of the search warrant from the competent judge of rights and liberties in relation to the accusation given by the crime investigated by the issuing (requesting) state.

In order to eliminate bureaucratic aspects, as well as to prevent blockages like those that appeared in the execution of the previous Framework Decisions that regulated the preservation and transfer of evidence, in art. 9 point 1 of Directive 2014/41/EU it was provided that „the executing authority recognizes the EIO that meets the conditions of substance and form without the need for any other formality, and ensures its execution in the same way and with the same means as in the situation where the investigation measure in question would has been ordered by an authority of the executing state, unless this authority decides to invoke one of the reasons for non-recognition or non-execution or one of the reasons for postponement provided for in this directive".

5. Conclusions

Summarizing the above, the EIO respects a complex judicial instrument, which bilaterally combines procedural acts of judicial bodies from different countries within the EU, in order to collect, preserve and administer evidence in criminal trials, eliminating any syncope.

The EIO is part of the European system of judicial cooperation and aims to create, develop and strengthen mechanisms for communication and management of the judicial act to ensure its speedy execution.

All the judicial cooperation mechanisms applicable at the level of the EIO will form the basis of the construction of the future unique criminal procedural institutions having a direct applicability throughout the Union space, a fact that would ensure a better and unitary implementation of the act of justice, as well as the implementation of sets of procedural guarantees.

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WIRE TAPPING IN CRIMINAL TRIAL. GUARANTEES FOR A FAIR TRIAL

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Abstract

The purpose of this paper is to carry out an examination of the national legislation and jurisprudence in order to establish whether sufficient guarantees are regulated by law against arbitrariness, for the persons who have been supervised by the state bodies. The study aims to identify possibilities of updating the legislation for its compliance with the CCR decisions and with the ECtHR jurisprudence. The evidentiary process of interception of communications is an important means by which state bodies investigate complex criminal activities, but it involves an interference with the right to privacy, so it is necessary to have substantive and procedural safeguards to prevent arbitrariness from state bodies and to ensure adequate protection of the right to privacy.

In the first part of the study, a presentation is carried out of the evolution of the Romanian legislation and an analysis of the guarantees regulated by it. In the second part, the ECtHR jurisprudence is presented regarding the guarantees that must be regulated by national legislation to respect the right to privacy and to avoid unjustified interference. In the last part of the paper, the substantive and procedural guarantees offered by national legislation and jurisprudence are presented and an analysis of their compliance with the jurisprudence of the ECtHR is carried out. In the conclusions of the paper, two proposals for updating the Romanian Criminal Procedure Code and Law no. 51/1991 on Romania's national security are introduced.

Keywords: *wire tapping, limitation of the right to privacy, history of legislation in the field of wire tapping /telephone tapping, technical surveillance, national security warrant.*

1. Introduction. Interception of conversations and communications – the genesis

The surveillance of people in order to discover and prove criminal activities was initially the prerogative of the secret services. In order to become an evidentiary procedure in a criminal trial, the surveillance methods had a winding evolution.

In the history books[1], among the first mentions of surveillance by spy agencies were the interception of Hitler's communications with his generals during the Second World War and the English decoding team at Bletcheley Park breaking the Enigma code.

In Romania, the surveillance of persons was regulated by law for the first time in 1978 as a tool of the secret services for discovering and proving criminal activities. Despite the fact that the surveillance methods were extrajudicial in nature, the materials obtained as a result of surveillance activity were used to prove criminal activities. Contentwise, the special surveillance measures as an evidentiary procedure ordered in the criminal proceedings/trial, have their source in the surveillance techniques used in espionage. The surveillance of people was initially regulated as an espionage technique that was implemented by the security bodies, and the materials thus obtained could be used in the criminal proceedings.

During the communist regime, the special methods of surveillance in the sense given today to the evidentiary procedure used in the criminal proceedings were not regulated by primary legal provisions. In the Criminal Procedure Code of 1968, adopted by the Great National Assembly on November 12, 1968, the special surveillance methods were not provided for as evidentiary procedures that could be used in criminal proceedings.

The fact that the special methods of surveillance were not regulated by the Criminal Procedure Code did not prevent the bodies of the Department of State Security from conducting mass surveillance of the population.[2]

In that period, multiple investigative methods were used for population surveillance, which in terms of content were similar to the point of overlap with special surveillance methods, but the authorisation procedure

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[1] M. Smith, *Spargerea codului nazist, Enigma*, Orizonturi Publishing House, Colecţia Secretele istoriei, 2011.

[2] The truth about the past: The invisible witness – Security and surveillance, an episode broadcast by TVR on May 9, 2021, available online *https://www.youtube.com/watch?v=m6uuCOqEc6k&ab_channel=TVR*.

was totally different and there was no guarantee against arbitrariness. The persons under surveillance of the security bodies, the only ones capable of authorising and implementing the means of surveillance, could become criminal law subjects as a result of surveillance, and the materials obtained as a result of surveillance were vital evidence on which their conviction was based.

Surveillance was carried out during the communist period by specific means, namely wiretapping, infiltration of an informer (or an officer), secret entering, secret search and informative research, means which were classified as informative-operative activities.[3]

2. Shadowing / Tailing / Stakeout - surveillance measure during the communist period

Shadowing, as a special method of investigation, was regulated by the Order of the Minister of the Interior no. 001401 of 01.07.1978[4] *„Instructions on shadowing/tailing and investigative work".* According to the order, tailing was a special means of security work, through which data, information and evidence were obtained for the purpose of preventing, discovering and neutralizing criminal activities under state security. Competence. The tailing was not an evidentiary process used in the criminal proceedings, but especially outside it, but which led to obtaining of evidence that could have been the basis of a criminal investigation and subsequently the basis of the application of a criminal sanction.

Tailing was an activity closely related to the criminal proceedings, as the main purpose of this measure was to discover and neutralize criminal activities. Tailing authorisation was very different from the procedure regulated by the Criminal Procedure Code for the evidentiary procedure of special surveillance methods, which involves a high interference in the rights of the persons subject to surveillance.

Tailing authorisation, according to art. 5 and 6 of the Order of the Minister of the Interior no. 001401 of 01.07.1978, was carried out at the request of an information subunit and was approved by the commanders of the central information units. This procedure entailed the request, authorisation and enforcement of surveillance by security bodies and offered no guarantee against arbitrariness. In order for the surveillance measure not to produce too much interference with the right to privacy and for there to be a fair balance between the general interest of the state to prove criminal activities and the right to privacy, it is necessary to have several guarantees. A first guarantee is represented by the existence of a clear and predictable legislation framework, which regulates in detail the conditions for the authorisation of the measure, the procedure which must be followed for the authorisation of the measures and the way of execution.

Tailing authorisation did not offer this guarantee. First of all, the regulatory act which regulated the measure was strictly secret, it was not brought to the public's attention through publication in the Official Gazette, it was secondary legislation - subordinate to the primary legislation and did not represent a clear and predictable law. The law did not meet the conditions of clarity and predictability, as the conditions that must be met for the authorisation of the measure were not detailed, so that a person had the possibility to foresee under which conditions they could be supervised by the state bodies.

A second guarantee consists in the existence of a real filter on the part of the state bodies, which should assess concretely, by reference to each individual case, if the conditions stated by the legislator for the authorisation of the measure are met. Tailing did not meet this condition either, and it was entirely the prerogative of the security bodies, which proposed, ordered and implemented the wiretapping measure. Tailing was ordered at the request of an informational subunit and was approved by the commander or deputy of the central informational unit. In the case of complex security actions, the execution of which required the participation of a large number of forces on a specialised line of work, the request proposing the tailing was made by the Special Tailing and Investigations Unit and was approved by the Deputy Minister, chief of the Department of State Security or his substitute on command. It is noted that the person who made the request and the person who approved it were part of the same structure, respectively they were security bodies, and between them there was a relationship of subordination. Consequently, the procedure for authorising the tailing did not comply with a minimum standard of objectivity and did not offer a guarantee against the arbitrariness of state bodies.

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[3] Instructions no. D – 00190/1987 regarding the organisation and performance of the information-operative activity of the security bodies.

[4] Order of the Minister of the Interior no. 001401 of 01.07.1978 was classified as strictly secret and can be consulted at the National Council for the Study of the Securitate Archives (CNSAS) archive or online *http://www.cnsas.ro/documente/materiale_didactice/D%20008712_001_p34.pdf*.

The third guarantee refers to the existence of a maximum period during which the state bodies can monitor/watch a person, the existence of a clear procedure for the implementation of the measure and some levers for contesting the measure. Regarding the duration of the tailing measure[5], it is mentioned that continuous tailing is carried out for a maximum duration of 5 days, intermittent tailing for a duration of up to 7 days with interruptions, tailing at operative moments for a short period of time, and study tailing over a longer period. It should be noted that the regulatory act does not regulate the possibility of extending the tailing measure. With regard to the continuous and intermittent tailing, an enforcement period of 5 days and 7 days is regulated, but for the tailing at operative moments and for the study, there is no time limitation of the measure, the issuer of the act using vague terms such as „short time" or „longer period", which can be interpreted subjectively.

Although a duration for the tailing measure execution is provided for, art. 20 para. (2) of the Order of the Minister of the Interior 001401 of 01.07.1978 provides that in cases of particular importance, the maximum duration of tailing can be extended only with the approval of the commander of the Special Detention Unit and Investigations. The previously mentioned regulatory act does not meet the requirement of clarity, as it does not regulate objective criteria by which the special importance can be assessed, nor does it limit the extent of the tailing in time, as there is no regulation of a maximum duration that cannot be exceeded in case of successive extensions. As for the duration of tailing, there was no maximum period regulated by the regulatory act during which a person could be subject to surveillance and there was no procedure for informing the person under surveillance and no way to challenge such measure.

Consequently, the fact that there was no legal procedure for ordering the tailing measure, for which there were guarantees against arbitrary interference by state bodies, led to a mass surveillance of the population during the communist regime.

Regarding the content, tailing consists in following people or surveilling buildings and places object of security work, secretly, by using specific methods, procedures and means. The information, the data obtained and the findings of the tailing agents during the pursuit or surveillance of the objectives, the result of the identifications and the documentation made materialised in tailing notes or briefings, photographs or films, reports on the performance of some preliminary acts or other means of evidence.

Analyzing the content of video and audio or photography surveillance involving photographing people, observing or recording their conversations, movements or other activities, it can be seen that in terms of content, the measure is identical to tailing. The secret photography and filming are carried out during tailing implementation in order to document the facts and activities of a criminal nature or with operational significance of the objectives, discovered by the surveillance officers or indicated by the interested security information units, to study the environments frequented by some of them or to identify some people who appear in their entourage.

A difference regarding the content of the two measures consists in the fact that video, audio or photographic surveillance as an evidentiary procedure has a person as its object of surveillance, unlike the tailing measure which could have either a person or an objective as its object of surveillance.

In the contents of the Order of the Minister of the Interior 001401 of 01.07.1978 it is stipulated that certain addresses can be monitored, and the establishment of visitors and persons domiciled at the visited addresses would necessarily be preceded by the consultation of the security information unit requesting the surveillance and their verification in tailing and investigation records. Both measures are carried out under conditions of confidentiality. Even if the legislator of the Criminal Procedure Code of 2010 does not expressly regulate that the measure of video, audio or photography surveillance is secret, in order to capture the criminal activity and the natural behaviour of the persons under surveillance, it is necessary that the measure be confidential.

The tailing measure is approved by the security bodies and is also implemented by the security bodies. Following the implementation of the tailing measure, tailing notes or briefings, tailing-identification notes, notes-reports, photographs or films, reports on the execution of some preliminary acts or material means of evidence were drawn up. It is noted that, despite the fact that tailing was not a procedural measure, based on it, evidence was obtained which was later used in the criminal trial, both the reports on the execution of some preliminary acts, as well as the material means of evidence had probative value.

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[5] Art. 20 para. (1) of the Order of the Minister of the Interior no. 001401 of 01.07.1978.

Video, audio or photographic surveillance is especially useful when a proactive investigation is being carried out and criminal activity is ongoing. In these situations, the materials resulting from surveillance have a high probative value, capturing even the criminal activity. The evidentiary procedure is also useful when a reactive investigation is carried out, after the crime has been consumed and exhausted, but as a rule the materials obtained have a lower evidentiary value. With regard to the materials resulting from tailing, there was no possibility of invoking their nullity, since only the violation of the legal provisions regulating the conduct of the criminal proceedings attracted the nullity of the act, according to the Criminal Procedure Code of 1968. Given that tailing was not a measure to be ordered in a procedural framework, but a measure of extrajudicial surveillance, the nullity of the materials resulting from tailing could not be invoked.

With regard to the accessibility of the Order of the Minister of the Interior 001401 of 01.07.1978, considering its classification as a state secret - strictly secret and the consequences deriving from this classification, namely the incurring of criminal liability for disclosing the information contained in the act, the regulatory act was not made public. Not only that the Order of the Ministry of the Interior 001401 of 01.07.1978 was not published in any regulatory act, and its content was not brought to public knowledge, but it was classified as strictly secret, and its content could only be known by the state bodies who had authorisation to access classified information. In the case of disclosure of its content, criminal liability could be incurred for committing the crime of disclosure of a secret which endangered the security of the state.[6]

According to the rich ECtHR jurisprudence, the accessibility and predictability of the law are two particularly important qualities that a law must fulfil, and it established a series of criteria by reference to which it is analyzed whether a law is accessible and predictable. In cases such as *Sunday Times v. United Kingdom of Great Britain and Northern Ireland*, 1979, *Rekvényi v. Hungary*, 1999, *Rotaru v. Romania*, 2000, *Damman v. Switzerland*, 2005, ECtHR emphasised that „it cannot be considered - law- other than a norm stated with sufficient precision, to allow the individual to regulate his/her conduct. The individual must be able to foresee the consequences that may arise from a certain act"; „a norm is predictable only when it is drafted with sufficient precision, in such a way as to allow any person - who, if necessary, can call on specialist advice - to correct his/her conduct"; „in particular, a norm is predictable when it offers a certain guarantee against arbitrary interferences of public power".

The main tasks of tailing were to study and establish the behaviour and preoccupation of the monitored elements in different places or environments, as well as the activity carried out at the buildings or places under surveillance, discovering the methods, procedures and means used by the targets to prepare and commit criminal acts, establishing a personal or impersonal connection, detecting tailing or evading tracking, selecting between directly contacted persons, of the connections or visitors and filtering them for identification, establishing the addresses visited by the targets. Tailing consisted in documenting the activity carried out by the monitored objectives or at the watched ones, through secret photography and filming, the drawing up of reports on performance of preliminary acts, the discovery, preservation and obtaining of evidence related to the preparation or commission of crimes or resulting from their production.

Even if, in terms of content, tailing is similar and overlaps in places with the special surveillance method, in terms of authorisation and use of the obtained evidence, there are substantial differences.

First of all, the authorisation of video surveillance, its audio through photography is ordered either by the judge of rights and liberties, or in special cases, provisionally, by the prosecutor, while tailing was ordered by the commanders of the central security information units at the request of the interested information subunits. In the case of complex security actions, which must be carried out on a certain line of work with the participation of larger security forces, the measure is decided by the head of the State Security Department at the proposal of the Special Security and Investigations Unit. Tailing measure was ordered by the commander of the security units at the request of the staff within the security units and left room for arbitrariness. The procedure itself was deficient, a fact that led to many escalations/sways during the communist period and to mass surveillance of the population. The reason why special surveillance methods must be authorised based on a well-regulated framework, by magistrates who meet the criteria of objectivity, is to respect the right to privacy and prevent arbitrariness on the part of state bodies.

6 According to art. 169 CP 1969, disclosure of documents or data that constitute state secrets or other documents or data, by a person who comes to their knowledge due to his/her duties, if the act is likely to endanger state security, is punishable by imprisonment from 7 to 15 years and the prohibition of certain rights.

In addition, the surveillance measures must be exclusively secret during the period of their implementation, which is the reason why the current Criminal Procedure Code obliges the subjects of a technical surveillance mandate to be informed within no more than 10 days after the termination of the measure, regardless of how the case is resolved.

During the communist regime, the tailing was ordered for a determined period, *i.e.* continuous tailing of the objectives was ordered for a maximum duration of 5 days, the intermittent tailing for a period of up to 7 days and at operative moments for a duration of several hours. Even if the provisions of the Instructions regarding tailing and investigations work stipulated that tailing measure was ordered for a specific period, which varied from a few hours to 7 days; the maximum number of extensions of the measure was not stipulated, nor was the maximum total period.

This precarious regulation of the measure gave way to arbitrariness, the Security bodies were the ones who proposed and authorised the measure, which had a strong secret character, a fact that led to mass surveillance of the population. In addition, the measure could not be censured by a judge and there were no nullity cases that would allow the exclusion of evidence obtained in violation of the law from criminal files. During the communist period, surveillance methods were predominantly secret and were implemented by the Security bodies.

3. The evolution of the legislation since 1978 – the forms of informative-operative activity

The legislation regulating a form of surveillance methods underwent important changes in 1978, brought by means of the Instructions D00190/1987 approved in the meeting of the Management Council of the State Security Department on June 24, 1987.

In the statement of reasons, the legislator mentions that the main purpose of the instructions was to outline a new, perfected framework for the organisation and conduct of security information-operational activity.

In the process of the informative-operative activity, the security bodies had several specific methods to collect and exploit information regarding persons, facts or circumstances of interest for the security of the state. The informative-operational activity represented a continuous and complex process of search, verification and preventive exploitation of information that could be completed by starting the criminal investigation.

These specific methods, among which we mention operative surveillance and operative tailing/shadowing, are the predecessors of special surveillance methods.

3.1. Informative surveillance

One of the main means by which the security bodies could achieve their specific missions was informative tailing, which consisted in the continuous activity of searching for data and information about facts and circumstances that may be the basis for the commission of crimes or other antisocial acts under the competence of the security bodies.

The surveillance activity was carried out in all objectives and areas of interest, both among Romanian citizens and among foreign citizens.

The measure of informative surveillance offered no guarantee against arbitrariness. First of all, it was regulated by secondary legislation, adopted by the Management Council of the State Security Department, having a strictly secret character, and the persons, either Romanian or foreign citizens, did not have the possibility of knowing the content of the instructions and implicitly also under what conditions they could be monitored.

In addition, the provisions of the instructions did not provide certain objective conditions that must be met for a person to be the object of the informative tailing measure, so that the security bodies were the only ones to assess who was necessary to be monitored. Even if the surveillance measure implied a high interference in the right to privacy of the people, the approval and implementation of this measure was the prerogative of the security bodies only, which could survey anyone without the existence of a real filter. The provisions of the Instructions no. D – 0019/1987 which regulated the informative surveillance did not regulate a procedure for authorising the measure, or a way of implementing it.

The materials resulting from the execution of the operative surveillance were preserved in a problem or objective file. Within 30 days, the security bodies, with the approval of the hierarchical superiors, exploited the

resulting materials by taking preventive measures, starting the criminal investigation, continuing to clarify the information, or classifying and destroying the materials.

3.2. Informative tailing

A form of informative-operative activity, an extra-procedural measure from which special surveillance methods originate, is informative tailing. Although it was of extrajudicial in nature, informative tailing was started on the persons about whom information had been obtained that they would prepare, commit or have committed crimes under the jurisdiction of the security bodies, as well as on the facts, criminalised by law as crimes against the security of the state. The infralegal provisions detailed the situations in which informative tailing could be carried out, *i.e.*, when there was information from which there were clear indications that certain persons would prepare or commit crimes within the competence of the security bodies, in situations where there was definite information that certain persons were committing crimes under the jurisdiction of security bodies and when facts criminalized by law were criminalised as crimes against state security.

Informative tailing was a measure authorised and implemented by the security bodies through which the information regarding the preparation or commission of crimes under the jurisdiction of the security bodies was verified. The purpose of informative tailing was to prevent the implementation of plans of hostile actions, and in the process of informative tailing it was forbidden to cause a person to commit or continue to commit a criminal act.

Following the informative tailing activity, a surveillance file was opened containing the plan of measures, and which was approved by the superiors of the central security units, or by their deputies, as well as by the superiors of the military counter-intelligence services. The informative tailing files were periodically analysed, at least quarterly, following the stage of the implementation of the measures and their efficiency. Informative tailing files older than one year were analysed at the hierarchical level higher than the one that approved their opening.

There was no procedure for authorising this measure, but only the body that had the authority to authorise it, that is, the hierarchical superior of the security bodies who proposed and later implemented the measure, so there was no real filter to assess the appropriateness of the approval measure.

The informative tailing file was closed when the preventive measures reached their goal, when the court decision remained final, by recruiting the person who was the object of the measure, or by reporting to other bodies, when the resulting issues did not concern the security of the state.

4. Regulation of special surveillance methods by Law no. 281/2003

During 2003, a criminal procedural reform took place, and the legislator substantially improved the Criminal Procedure Code. On this occasion, the special surveillance method of conversations or communications surveillance was regulated for the first time in section V^{1}.

Law no. 281/2003 introduced a new section „audio or video wire tapping" in the Criminal Procedure Code from 1968 with six new articles that regulated the procedure by which special surveillance methods were authorised and implemented.

From the terminology of the section „wiretapping and audio or video recordings", it can be seen that the legislator regulated only two special methods of surveillance, namely the wire tapping and the audio or video recording of conversations or communications. According to the previously mentioned legal provisions, wiretapping and recordings on magnetic tape or on any other medium would be carried out with the reasoned authorisation of the court, at the request of the prosecutor, if there are data or solid indications regarding the preparation or commission of a crime for which the criminal investigation is carried out *ex officio*, and wiretapping and recording are necessary to find out the truth. From the analysis of the law text, several conditions can be identified for the authorisation of special surveillance methods. First of all, the case had to concern a crime for which the criminal investigation is carried out *ex officio*, which can be found in the enumeration in the second sentence of the article, or be a serious crime that cannot be discovered, or which is committed by means of telephone communication or other means of telecommunications.

The legislator's option to allow the use of special surveillance methods only in the case of crimes for which the criminal prosecution is carried out *ex officio*, is not immune to any criticism, since serious crimes affecting

important social values can be identified in the Criminal Code, for which prosecution is carried out upon prior complaint, for example rape.

Secondly, the legislator leaves open the list of crimes for which special surveillance methods can be authorised, since after listing the crimes for which special surveillance methods can be authorised, respectively *the crimes against national security provided for by the Criminal Code and other special laws, such as and in the case of the crimes of drug trafficking, arms trafficking, human trafficking, acts of terrorism, money laundering, forgery of coins or other values, in the case of crimes provided for by Law no. 78/2000 for the prevention, discovery and sanctioning of acts of corruption*, the legislator provides that special surveillance methods can be authorised in the case of serious crimes, without regulating an objective criterion, by reference to which their seriousness can be established.

Consequently, in the absence of the regulation of a criterion by reference to which the judicial bodies can establish the seriousness of a crime, the legislator left room for the arbitrariness and different interpretation of the seriousness by the judicial bodies.

I consider much more inspired the legislator's option in the new Criminal Procedure Code which conditions the authorisation of special surveillance methods upon carrying out the criminal investigation for a crime with a penalty limit of 5 years or more, without having relevance if the criminal investigation is carried out *ex officio* or at prior complaint.

Another condition provided by the legislator for the authorisation of special surveillance methods was that such measures should be necessary to find out the truth, when establishing the factual situation or identifying the perpetrator cannot be achieved based on other evidence. In order to approve the use of the evidentiary procedure of special surveillance methods in the criminal trial, it was necessary that, on the one hand, it leaded to the discovery of the truth, and on the other hand, the discovery of the truth, which requires the establishment of the factual situation and the identification of the perpetrator, could not be based on other evidence. Practically, in this condition, two characteristics the special surveillance methods for authorisation must fulfil are regulated, respectively the necessary character for finding out the truth and the subsidiary character, in the sense that finding out the truth in the criminal case can only be achieved by using special methods of surveillance, it being not possible to administer other means of proof that would satisfy this desire.

The subsidiarity condition is firmly regulated by Law no. 281/2003, in the sense that it has an absolute character, finding out the truth in question must be possible only by using special surveillance methods and not other evidentiary procedures, unlike the new Criminal Procedure Code which regulates this condition more loosely. In the new Criminal Procedure Code, special surveillance methods can be approved even if finding out the truth can also be achieved through the administration of other non-special means of evidence, if obtaining the evidence would entail special difficulties that would prejudice the investigation or there is a danger to the safety of persons or valuables.

The necessity character is regulated by art. 91^1 of Law no. 281/2003 and stated that wiretapping and audio or video recordings could only be authorised if they are required to find out the truth. Law no. 281/2003 implicitly regulated the special nature of interceptions and audio or video recordings, unlike the current Criminal Code, which explicitly regulates in the title of the chapter the special nature of such measures. The special character lies in the fact that these evidentiary procedures, which involve a more pronounced interference with the right to privacy of individuals, have a subsidiary character compared to the other evidentiary procedures regulated by the Criminal Procedure Code and can only be used in exceptional situations, expressly regulated by the legislator.

From a procedural point of view, wiretapping and audio or video recordings of communications are carried out in the criminal proceedings only with the reasoned authorisation of the court at the request of the prosecutor. The request could only be made by the prosecutor, not by the criminal investigation bodies, within any prosecution unit. On the other hand, within the court, only the president of the court had the authority to authorise the use of such evidentiary procedures.

The magistrate who authorised the measure had to have a double capacity, that is one judicial, of judge, and one administrative, of President of the court. The legislator's option to condition the competence to authorise an evidentiary procedure in the criminal proceedings of an administrative nature, namely to the court president, appears to be bizarre. I believe that the measure should be authorised by a magistrate who has the capacity of a judge and not the position of President of the court, as an administrative position should not be relevant in legal proceedings.

According to the law on the organisation of justice, each court is led by a president who exercises managerial powers for the purpose of efficiently organising court activity, therefore the position of president of the court is an administrative function, so the legislator's option to assign a legal character to an administrative position is unfounded.

In addition, given the secret nature of special surveillance methods, I believe it is inappropriate for all special surveillance measures under the jurisdiction of a court to be authorised by a single judge. In addition, in order to leave no room for arbitrariness, the request for authorisation of special surveillance methods needs to be distributed randomly, and if the competence to resolve such a request belongs only to the President of the court, there cannot be a random distribution.

The evidentiary procedure could be approved for a period of up to 30 days, with the possibility of extending the measure, each extension not exceeding 30 days. The maximum duration of the recordings could not exceed 4 months in the criminal case. The term was a substantial one, as the time limitation of the measure protects the right to privacy, a pre-existing right to the criminal proceedings and independent of it. In contrast, the current Criminal Procedure Code allows the authorisation of special surveillance methods in a criminal case for a maximum duration of 6 months, with the exception of video, audio or photographic surveillance in private spaces, which cannot exceed 120 days.

5. The use of special surveillance methods in the criminal proceedings

In Romania, special surveillance or investigation methods are evidentiary procedures that can be used in cases involving serious crimes. Special methods of surveillance are vital tools in criminal trials, with the help of which investigative bodies fulfil their obligation to ensure the discovery of the truth.

Surveillance by technical means in the criminal proceedings has seen an evolution from both a legislative and an operational point of view. Currently, a large part of criminal activity is carried out or planned through electronic means, communication being carried out through encrypted messages, on the dark net, social media, so it is normal for investigators to have at their disposal adequate tools to discover and prove such crimes. The use of surveillance in the criminal proceedings in order to obtain evidence takes the form of a complex evidentiary procedure, which can only be authorised in a procedural framework, when the conditions stipulated by law are met.

These evidentiary procedures are useful for finding out the truth, but they involve a high interference with the right to privacy, so it is necessary to have a balance between the proper conduct of the criminal investigation and the limitation brought to the right to privacy. The evidentiary procedure of the interception of communications has a special and secret character, which implies a deep intrusion into the right to privacy, so the legislator has regulated several guarantees from which the person under surveillance benefits in order to respect the right to a fair trial and to limit arbitrariness in the interferences to the right to privacy.

5.1. The need for guarantees

In the last decade, international concerns have been expressed about the limitation of the right to privacy, through the surveillance of individuals by state agents or even by private entities. The first concerns about mass surveillance arose in the U.S. after the publication of the Patriot Act[7] in 2001, which allows investigators to use tools in the fight against terrorism that imply a high interference with the right to privacy.

These concerns about mass surveillance were amplified by the disclosure of secret NSA documents in 2013 by Eduard Snow,[8] which attested to the mass surveillance of citizens. The documents show that during the period 2001-2006, President George W. Bush authorised the NSA through a secret decree to collect the metadata provided by all mobile phones, as well as the emails available on nine of the largest servers. Seven years later, the United States Court of Appeals for The Ninth Circuit ruled in *United States v. Moalin*[9] case that the NSA's warrantless bulk metadata collection program was unconstitutional.

In Great Britain, until 1980 the interception of communications was authorised by the Home Secretary, without a legal framework regulating a procedure on the basis of which such measures would be authorised. In

[7] *https://www.forbes.com/sites/forbestechcouncil/2020/09/25/the-state-of-mass-surveillance/?sh=1ccd6285b62d*.

[8] *https://www.crf-usa.org/images/pdf/gates/snowden_nsa.pdf*.

[9] *https://www.aclu.org/sites/all/libraries/pdf.js/web/viewer.html?file=https%3A%2F%2Fwww.aclu.org%2Fsites%2Fdefault%2F files%2Ffield_document%2F85-1._opinion_9.2.20.pdf#page=1&zoom=auto,-12,798*.

Malone v. UK[10] case, ECtHR found that this procedure was not compatible with the right to privacy regulated by art. 8 ECHR.

In that case, Mr. Malone, an antiques dealer, was on trial from June to August 1978, accused of concealing several stolen goods. He complained that his right to privacy was violated, as his telephone conversations were wiretapped based on a warrant issued by the Home Secretary.

In the reasoning of the decision, the Court reiterated the opinion that „the phrase in accordance with the law” does not only refer to domestic law, but refers also to the quality of the law, requiring that it be compatible with the rule of law, which is expressly mentioned in the preamble of the Convention. The phrase thus implies – and this follows from the object and purpose of art. 8 – that there must be a measure of legal protection in domestic law against arbitrary interference with the right to privacy on part of public authorities, especially when a power of the executive is exercised in secret, the risks of arbitrariness are obvious. Undoubtedly, in terms of foreseeability, they cannot be exactly the same in the special context of the interception of communications for the purposes of police investigations as they are when the object of the relevant law is to place restrictions on the conduct of persons. In particular, the requirement of foreseeability cannot mean that a person should be able to foresee when the authorities are likely to intercept his/her communications so that he/she can adapt his/her behaviour accordingly. However, the law must be clear enough in its terms to give citizens adequate indication of the circumstances in which and the conditions under which public authorities are empowered to resort to this secrecy. (...) Since the practical implementation of secret communications surveillance measures is not subject to the control of the individuals concerned or the general public, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise, having regard to the legitimate purpose of the measure in question, to provide the individual with adequate protection against arbitrary interference.

Following the decision of ECtHR in 1885 the Communications Act was passed, which regulates a procedure for interceptions a person's conversations. However, the law proved not to be infallible, and in the case of *Khan vs. UK*[11], ECtHR ruled that the procedure under which the interception of conversations was authorised did not provide sufficient guarantees against the arbitrariness of state bodies.

In the reasoning of the decision, the Court held that it is not disputed that the surveillance carried out by the police in this case constituted an interference with the applicant's rights under art. 8 § 1 ECHR. The main issue is whether this interference was justified under art. 8 § 2, specifically whether it was „in accordance with law” and „necessary in a democratic society” for one of the purposes listed in that paragraph. The Court recalls, together with the Commission in the Govell case (see para. 61 and 62 of the report cited above), that the phrase „in accordance with the law” does not only require compliance with domestic law, but also refers to the quality of that law, requiring that it must be compatible with the rule of law. In the context of covert surveillance by public authorities, in this case the police, domestic law must provide protection against arbitrary interference with an individual's right under art. 8. In addition, the law must be sufficiently clear in its terms to provide individuals with an adequate indication as to the circumstances in which and the conditions under which public authorities are entitled to resort to such covert measures. At the time of the events in this case, there was no legal system governing the use of covert listening devices, although the Police Act 1997 now provides such a legal framework. The Home Office guidance at the relevant time was neither legally binding nor directly accessible to the public.

Based on the decisions of the Strasbourg Court, the UK legislator adopted the Regulation of Investigatory Powers Act (RIPA) in 2000. Prestigious theorists[12] analysed the law, which in the first part provided for a new procedure which applied to public and private communications, in which The Home Secretary could issue a warrant if there were several reasons why the interception of conversations was necessary in a democratic society and if it was proportionate to the aim pursued.

The second part of the law regulated a procedure for three forms of surveillance. Directed surveillance was a form of covert surveillance that did not involve intrusive methods. Intrusive surveillance was a form of surveillance which involved breaking into private spaces or vehicles. The third form of surveillance was done by

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[10] (1985) 7 EHRR 14 *https://data.guardint.org/en/entity/7dczy15vda9*.

[11] (2000) 31 EHRR 1016.

[12] L. Campbell, A. Ashworth, M. Redmayne, *The Criminal Process*, 5th ed., Oxford University Press, 2019, p. 92.

using undercover sources, people who built a close relationship with the target person in order to obtain information.

The authorisation of directed surveillance and the use of undercover sources was ordered by a senior police officer when there were reasonable grounds, before the forces were engaged in surveillance activities, and intrusive surveillance was authorised by the head of a police unit and only in urgent cases by a senior police officer. The Act provided for a Judicial Commissioner to review post-execution surveillance warrants issued by the police and a court to deal with any complaints about the manner in which the warrant had been issued.

The legislation saw an improvement in 2016 when the Investigatory Power Act was adopted, which provides the detailed procedure for issuing a warrant for technical surveillance, obtaining communications data, retaining communications data, interfering with technical equipment. In the first part of the law, the procedure for issuing surveillance warrants by the Home Secretary is provided, when national security is at risk, to prevent or detect a serious crime, or to protect the economic well-being of Great Britain to the extent where these interests are also relevant to national security interests. In the second part of the law, the procedure for issuing a warrant by a Judicial Commissioner was provided when the interception is necessary in a democratic state to find out the truth, and the measure is proportionate to the goal pursued.

In Italy, a country whose criminal procedural law system has the same architecture as that of Romania, the wire tapping was first regulated by the Rocco Code in 1930, being a tool at the disposal of state bodies to discover and prove the conduct of criminal activities.

Law in Italy has seen a continuous evolution, being one of the modern legislations that regulates in detail the procedure on the basis of which the interception of conversations or communications can be authorised, but also that has kept pace with technological evolution and regulates the interception of conversations conducted through applications that I use end to end encryption, through the computer capture.

The interception of communications could only be ordered if there were serious indications that certain serious crimes specifically designated by the legislator had been committed, and the measures were absolutely indispensable for the investigation.

In terms of content, two types of interception of communications are foreseen, the interception of telecommunications and the interception of conversations carried out in the ambient environment, which can also be achieved by remotely installing a computer recorder on a mobile device belonging to the person under surveillance that can activate the device's microphone and intercept communications, including when the subject is not engaged in a telephone call. The measures can be authorised by the investigating judge at the proposal of the public ministry, and in urgent cases by reasoned decree the measure can also be authorised by the prosecutor, under the condition of the subsequent validation of the investigating judge.

In the specialized literature[13], it was noted that in Italy, before this special surveillance method was explicitly regulated, there was a non-uniform judicial practice regarding the exclusion of evidence thus obtained. The first decision of this kind was in 2009, when the Court of Cassation ruled on the legality of the ordinance of the Public Ministry that approved the installation of a „Trojan horse" computer program in the personal computer of a criminal. In order to put an end to the non-unitary judicial practice, the Italian legislator regulated, through Law no. 103/2017, the method of consenting to the interception of „inter prasentes" communications by means of trojan horse-type computer programs installed in mobile electronic devices. The law provides that this special method of surveillance, called „captatore informatico", can be approved by the investigating judge only in the case of crimes of organized crime, terrorism or against the freedom of individuals, when there is evidence previously administered, and the measure is proportionate to the interference with private life. It is foreseen the possibility of the criminal investigation bodies to call on specialists for the implementation of this special surveillance method, considering the specific knowledge in the field of informatics that the specialist who implements this measure must have. All the activities carried out during the implementation of the measure must be recorded in detail in a minute, and the programs used must have the ability to ensure the integrity of the captured data and be authorised. As a result, the computer recorder, regulated in detail by Law no. 103/2017 and the Italian Code of Criminal Procedure, can be used both to intercept conversations conducted via the mobile applications Whatsapp, Telegram, Facebook messenger, and to intercept conversations conducted in directly

[13] R.B. Călin, *Vidul legislativ care generează imposibilitatea interceptării comunicațiilor purtate prin intermediul aplicațiilor mobile tip Whatsapp, Telegram. Facebook messenger*, in Caiete de drept penal no. 1/2022, Universul Juridic Publishing House.

between two or more people present in the same place, by remotely activating the microphone of the smartphone in the possession of a person participating in the discussion.

The Romanian Criminal Procedure Code does not allow the use of a „Trojan horse” computer program to intercept conversations carried out through mobile applications such as Whatsapp, Telegram, Facebook messenger, which is the only method by which communications carried through mobile applications that use encryption can be intercepted end to end. According to art. 138 para. (2) CPP, interception of communications or any type of communication means the interception, access, wiretapping, collection or recording of communications made by telephone, computer system or any other means of communication. Analyzing the legal provisions, it is found that it is allowed to intercept communications carried through mobile applications such as Whatsapp, Telegram, Facebook messenger, but it is not allowed to interfere with a computer system that runs the applications, in order to install a „Trojan horse” type of computer program. thus it is impossible to enforce a technical surveillance mandate regarding the interception of communications carried through mobile applications. In conclusion, even if the interception of communications carried through mobile applications such as Whatsapp, Telegram, Facebook messenger would be approved, this measure cannot be enforced, an impossibility generated by a legislative loophole that does not provide for the possibility of installing „Trojan horse” type computer programs.

5.2. Substantive and procedural guarantees

In the criminal proceedings, the legislator regulates an obligation for the judicial bodies, namely that of finding out the truth about the facts and circumstances of the case, as well as about the person of the suspect or the defendant. The fulfilment of this obligation is possible only by administering the entire palette of evidentiary procedures regulated by the Criminal Procedure Code.

In exceptional cases, judicial bodies can use special surveillance methods, evidentiary procedures that involve a high interference in the right to privacy of individuals. Considering the special character of these evidentiary procedures, as well as the high interference they entail, a series of guarantees have been regulated to ensure the right to a fair trial and to have a high protection against arbitrariness.

Guarantees can be divided into two categories, depending on their nature, substantive (substantial) guarantees and procedural guarantees. Substantial guarantees are those that relate to the substance of the rights protected pre-existing to the criminal proceedings, and procedural ones are those that refer to the acts and forms completed in the criminal proceedings.

5.2.1. The existence of a clear, predictable and accessible legislative framework – a substantial guarantee

The interception of communications is a special evidentiary procedure, and in order to respect the rights of the persons under surveillance and for there to be guarantees against arbitrariness on the part of the state bodies, it is necessary that the procedure on the basis of which the measure is authorised, the content of the measure and the way of execution are regulated in detail by primary legislation. The existence of a clear and predictable legislative framework is a substantial guarantee that must exist in any field that is legislated, but especially in the matter of special surveillance methods, which are implemented secretly by state bodies without public control.

In the rich jurisprudence[14], ECtHR has repeatedly stated that any interference by a public authority with the exercise of a person's right to privacy and correspondence must be „prescribed by law”. This expression not only requires compliance with domestic law, but also refers to the quality of that law, requiring it to be compatible with the rule of law. In the context of secret measures of surveillance or interception of communications by public authorities, due to the lack of public control and the risk of abuse of power, domestic law must provide some protection to the individual against arbitrary interference with the right to privacy. Thus, domestic law must be sufficiently clear in its terms to provide citizens with an adequate indication of the circumstances and conditions under which public authorities are empowered to resort to any such secret measures.

For a regulatory act to be considered law in the sense of ECtHR[15], jurisprudence, the act must be clear, predictable and sufficiently accessible. A rule cannot be regarded as „law” unless it is formulated with sufficient

[14] Case *Halford v. The United Kingdom* (app. no. 20605/92), point 49.
[15] Case *Silver and others v. The United Kingdom*, 25.03.1983, points 87-89.

precision to enable the citizen to regulate his conduct: he must be able, if necessary, with adequate advice from a legal professional, to foresee the consequences on which a certain action can train them. A law conferring a discretion must indicate the scope of that discretion. However, the Court has already recognized the impossibility of achieving absolute certainty in lawmaking and the risk that the pursuit of certainty may involve excessive rigidity.

The quality of the law requires sufficient definition of its content, so that the scope can be determined. The terms and expressions used by the legislator must be sufficiently elaborated, to correspond to the legislative technical requirements specific to the legal norms.

The requirements regarding the quality of the law are higher in the field of surveillance measures, for which the Court specified[16] that in the special context of secret surveillance measures, the quality of the law does not mean that a person should be able to foresee when the authorities are likely to resort to covert surveillance to adjust their behavior accordingly. However, especially when a power conferred on the executive is exercised in secret, the risks of arbitrariness are obvious. It is therefore essential to have clear and detailed rules on the application of covert surveillance measures, especially as the technology available for use becomes increasingly sophisticated. The law must be sufficiently clear in its terms to give citizens an adequate indication of the conditions and circumstances under which the authorities are empowered to resort to any secret surveillance and data collection measures. In addition, due to the lack of public control and the risk of abuse inherent in any system of secret surveillance, the following minimum guarantees should be established in statutory law to avoid abuses: the nature, scope and duration of the possible measures, the necessary grounds for ordering them, the competent authorities to permit, carry out and supervise them, as well as the type of remedy provided for by national law.

In the Romanian procedural law system, these guarantees are regulated by the Procedure Code, which expressly provides that surveillance measures are authorised by a magistrate in the case of serious crimes, only if the evidence could not be obtained using ordinary evidentiary procedures. The legal norm expressly provides for the maximum duration of surveillance measures, as well as the fact that it is ordered only if several conditions are cumulatively met, i.e. there is a reasonable suspicion regarding the preparation or commission of a serious crime, the surveillance measure is proportional to the restriction of the right to privacy, and the evidence could not be obtained in any other way or obtaining it would involve special difficulties that would prejudice the investigation.

Regarding foreseeability, the ECtHR in its jurisprudence[17] gave an autonomous meaning to the phrase „provided by law" which assumes that, first of all, the surveillance measure must have a certain basis in domestic law. Secondly, it refers to the quality of the law in question, requiring that it be accessible to the person in question, who, in addition, must be able to foresee its consequences on him and compatible with the rule of law. The phrase thus implies, inter alia, that domestic law must be sufficiently predictable in its terms to give individuals adequate indication of the circumstances in which and the conditions under which the authorities are entitled to resort to measures affecting their rights under the Convention.

However, predictability is not absolute and is not synonymous with certainty, in the sense that it is not necessary for the person subject of surveillance to know that he/she is being monitored, in order to adapt his/her behaviour, since in this hypothesis the measure would not achieve the goal anymore.

The accessibility of the law means bringing its content to public knowledge, which is achieved through publication in the Official Gazette. In the doctrine[18], it was held that „in order for a *lato sensu* law to be effective, it must be known by its addressees; the effects of the law are produced, therefore, after it is brought to public knowledge and after its entry into force. In domestic law, the rules regarding the entry into force of normative acts are provided by art. 78 of the Constitution, as well as art. 11 of Law no. 24/2000 on legislative technical norms for the elaboration of normative acts. This takes place, depending on the category to which the normative act in question belongs, on the date of publication in the Official Gazette of Romania or on a date subsequent to publication, established either expressly by the constitutional norm or even within the respective normative act. It is against the provisions of art. 15 (2) and art. 78 of the Constitution for a law to provide in its text, for entry into force, a date prior to its publication in the Official Gazette of Romania. In this regard, the Constitutional

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[16] Case *Shimovolos v. Russia*, 21.06.2011, points 68-70.

[17] Case *Fernandez Martinez v. Spain*, 12.06.2014, points 117-118.

[18] I. Predescu, M. Safta, *Principiul securităţii juridice, fundament al statului de drept repere jurisprudenţiale*, available at *https://www.ccr.ro/wp-content/uploads/2021/01/predescu.pdf.*

Court ruled, for example, through Decisions no. 7/200218 and no. 568/2005. Likewise, the Court of Justice of the European Communities has consistently ruled that, in general, the principle of legal certainty prohibits a Community measure from having effects before its publication."

Regarding the predictability and clarity of the legal provisions that regulate the interception of conversations and communications at the initiative of the secret services specialized in gathering information, we appreciate that the legislation in the field needs to be updated. The interception of conversations and communications can be authorised at the proposal of the bodies specialized in the collection of information, in certain cases expressly provided for by Law no. 51/1991 on the national security of Romania by the president of the HCCJ or by the judges designated by the president.

Bodies with powers in the field of national security can make a proposal to the general prosecutor of the Prosecutor's Office attached to the HCCJ, and if the proposal is legal and well-founded, it is forwarded to the president of the HCCJ. The proposal to the Prosecutor's Office attached to the HCCJ can be formulated by the Romanian Intelligence Service, the state body specialized in the matter of information inside the country, the Foreign Intelligence Service, the state body specialized in obtaining from abroad the data relating to national security, and the Protection and Guard Service, the state body specialized in ensuring the protection of Romanian dignitaries and foreign dignitaries during their presence in Romania, as well as in ensuring the security of their workplaces and residences, as well as the Ministry of National Defense, the Ministry Internal Affairs and the Ministry of Justice, institutions that organize their information structures with duties specific to their fields of activity.

Surveillance activities, to prevent and combat threats to national security, are available only if there are no other possibilities or there are limited possibilities for knowing, preventing or countering risks or threats to national security, and the surveillance measures are necessary and proportionate, given being the circumstances of the concrete situation.

It is noted that the legislator provided a procedure that requires the existence of two filters, in order to issue a national security warrant, which authorizes surveillance measures to obtain information to ensure the knowledge, prevention and removal of internal or external threats to national security. Initially, the proposal is analyzed by the general prosecutor of the Public Prosecutor's Office attached to the HCCJ or by the specific prosecutors appointed by him, and if, following the analysis, he considers that the proposal is legal and well-founded, it is submitted to the president of the HCCJ for a new analysis. From this point of view, the procedure for issuing the national surveillance warrant offers sufficient guarantees, given that it is issued by a magistrate of the supreme court, who is independent and autonomous.

As for the way of exploitation in the criminal proceedings of the evidence obtained from the execution of the national surveillance warrants, considering the CCR dec. no. 55/04.02.2020, we appreciate that the legislation needs to be updated.

Through the previously mentioned decision, CCR decided that the recordings obtained on the basis of national surveillance warrants cannot be used in the criminal proceedings and found that the provisions of art. 139 para. (3) final sentence CPP, which stipulates that any recordings can constitute means of evidence if they are not prohibited by law, they are constitutional to the extent that they do not concern the recordings resulting from the performance of activities specific to the collection of information that presuppose the restriction of the exercise of some fundamental human rights or freedoms carried out in compliance with the legal provisions, authorised according to Law no. 51/1991. CCR decided that the materials obtained following the execution of the national surveillance warrants cannot be used in criminal proceedings, as the legal provisions governing the challenge of the legality of the recordings resulting from the execution of the national security warrant are not clear enough and predictable.

In the reasoning of the decision[19], CCR „notes that the regulation of the possibility of conferring the quality of means of evidence on the records resulting from the specific activities of gathering information that presuppose the restriction of the exercise of some fundamental human rights or freedoms is not accompanied by a set of rules that allow the legality to be challenged them in effective conditions. By simply regulating the possibility of conferring the quality of evidence on these records, without creating the appropriate framework that would confer the possibility of contesting their legality, the legislator legislated without respecting the requirements of clarity and predictability. However, the lack of clarity and predictability of the incident normative

[19] CCR dec. no. 55/04.02.2020, p. 55-59.

framework in the matter of contesting the legality of records - means of evidence - which results from the specific activities of gathering information that presuppose the restriction of the exercise of some fundamental human rights or freedoms, used in the criminal proceedings, determines, in fact, the realization of a formal and ineffective control, with the consequence of violating the rights and fundamental freedoms provided by the Constitution. However, conferring the quality of evidence in the criminal proceedings on certain elements is intrinsically linked to the creation of the appropriate framework that gives the possibility of contesting their legality. Thus, conferring the quality of evidence in the criminal proceedings to the records resulting from the performance of the activity specific to the collection of information that presupposes the restriction of the exercise of certain rights or fundamental freedoms of man, pursuant to Law no. 51/1991, can be achieved only to the extent in which this regulation is accompanied by a clear and explicit procedure regarding the verification of the legality of this element. That being the case, the Court finds that the legislator did not regulate a clear, coherent and predictable framework applicable in the case of contesting the legality of evidence obtained according to Law no. 51/1991. Or, the lack of clarity and predictability of the procedure for contesting the legality of the administration of evidence determines its lack of efficiency with consequences in terms of respecting free access to justice and the right to a fair trial. However, the lack of clarity and predictability of the incident normative framework in the matter of contesting the legality of records - means of evidence - which results from the specific activities of gathering information that presuppose the restriction of the exercise of some fundamental human rights or freedoms, used in the criminal proceedings, determines, in fact, the realization of a formal and ineffective control, with the consequence of violating the rights and fundamental freedoms provided by the Constitution. However, conferring the quality of evidence in the criminal proceedings on certain elements is intrinsically linked to the creation of the appropriate framework that gives the possibility of contesting their legality. Thus, conferring the quality of evidence in the criminal proceedings to the records resulting from the performance of the activity specific to the collection of information that presupposes the restriction of the exercise of certain rights or fundamental freedoms of man, pursuant to Law no. 51/1991, can be achieved only to the extent in which this regulation is accompanied by a clear and explicit procedure regarding the verification of the legality of this element."

I appreciate that it is important that the records of intercepted communications obtained following the execution of the national security warrant can be used in the criminal proceedings, considering the principle of finding the truth, a cardinal principle in the criminal proceedings.

During the criminal proceedings, it is necessary to ensure the discovery of the truth regarding the facts and circumstances of the case, as well as regarding the person of the perpetrator, and for this the judicial bodies have the obligation to administer evidence to ensure the discovery of the truth. Recordings intercepted on the basis of the national surveillance warrant can reveal vital aspects for the criminal proceedings, in cases that have as their object crimes against national security or other particularly serious crimes, so it is necessary that they be used in the criminal proceedings to find out the truth, which it is only possible if they are given the status of evidence.

Currently, considering the CCR dec. no. 55/04.02.2020 the recordings intercepted on the basis of the national surveillance warrant can only form the basis of an *ex officio* notification of the criminal investigation bodies, but they cannot be given the status of evidence in the criminal proceedings.

Consequently, we appreciate that the intervention of the legislator is required in order to regulate a predictable legal framework, which would allow a serious and concrete examination in the framework of the criminal proceedings of the legality of the recordings obtained following the execution of the national security warrant.

5.2.2. Use of interceptions only in exceptional cases – substantial guarantee

In the criminal proceedings, the judicial bodies have at their disposal a variety of evidentiary procedures to find out the truth regarding the facts and circumstances of the case, as well as regarding the person of the suspect or the defendant. From the architecture of the Romanian criminal procedure, it appears that the judicial bodies must resort to common evidentiary procedures in the first instance and only in exceptional cases, when the conditions provided by the law are met, to resort to special surveillance methods. The exceptional character of the measures is a procedural guarantee against arbitrariness.

The special methods of surveillance have an exceptional character, which is generated by the high intrusion it entails in the right to privacy of individuals. By virtue of this character, special surveillance methods are subsidiary to common evidentiary procedures, in the sense that they are authorised only when they are the only way or a reasonable way to obtain the evidence necessary to find out the truth.

By virtue of their exceptional nature, special surveillance methods can only be approved in two cases, if the evidence could not be obtained in any other way or if obtaining it would involve special difficulties that would prejudice the investigation or there is a danger to the safety of people or some property value.

Special surveillance methods cannot be authorised when the evidence to be obtained could also be provided in a non-intrusive way. The legislator intended for the judicial bodies to use evidentiary procedures that do not imply an interference with the right to privacy, and only if the evidence cannot be obtained in this way, the special surveillance methods should be used. However, from this rule there are two exceptions, the situation in which the evidence could be obtained in another way, but obtaining it would involve special difficulties that would prejudice the investigation, or when there is a danger to the safety of persons or some property the value. The incidence of the two exceptions is assessed in concert depending on the circumstances of the case, the simple resolution of the case does not imply the existence of special difficulties. The existence of special difficulties requires the obtaining of evidence in difficult conditions, through a sustained effort of the investigation bodies. In addition, there is an additional condition, in the sense that the special difficulties must lead to the prejudice of the investigation, respectively to the impossibility of establishing the truth.

The legislator presumed the condition of subsidiarity as fulfilled when there is a danger to the safety of persons or valuable goods. In the specialised literature[20] it was noted that „in this case, the need for technical supervision is not necessarily related to the impossibility or difficulty of obtaining evidence in another way, but to the fact that resorting to non-invasive methods involves a longer time, which generates risks to the life, bodily integrity or health of a person or in relation to the safety of valuable goods." In the situation where the evidentiary thesis that is sought to be proven is already proven, a request for the approval of special surveillance methods will not be approved.

5.2.3. Authorisation of surveillance measures for a limited period of time – substantial guarantee

In order to guarantee respect for the right to privacy, the surveillance of individuals by state agents must be limited in time. The national legal provisions provide for a time-limited character of the surveillance measures, regulating a maximum duration of their authorisation.

According to the provisions of the Criminal Procedure Code, technical surveillance measures are authorised by the rights and liberties judge for a period of 30 days, and in urgent cases by the prosecutor for a period of 48 hours. The measures can be extended, for well-justified reasons, if the conditions provided by law for taking the measures are met, for a period that cannot exceed 30 days. The total duration of technical surveillance measures regarding the same person and the same deed cannot exceed, in the same case, 6 months, with the exception of video, audio or photography surveillance measures in private spaces, the most intrusive surveillance measure, which cannot exceed 120 days.

However, the total duration of the technical surveillance measures may exceed the previously mentioned terms in a criminal case, if they do not concern the same person or the same act.

The terms provided by the law are substantial, as they limit the duration of some procedural measures and aim to protect a right or an extra-procedural interest.

The terms provided by the legislator for the maximum duration of the technical surveillance measures are reasonable ones, which do not have the ability to bring too much interference in the right to privacy of individuals. We believe that the provision of reasonable terms for limiting the infringements on the right to privacy by the state bodies represents a substantial guarantee in the criminal proceedings.

5.2.4. Authorisation of the measure by a magistrate – procedural guarantee

In Romanian legislation, surveillance measures involving an interference with the rights of individuals are authorised by a magistrate within the meaning of the ECtHR, respectively by the judge of rights and liberties during the criminal investigation phase. Given the high degree of interference, it is a procedural safeguard against

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[20] M. Udroiu (coord.), *Codul de procedură penală, Comentariu pe articole*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2020, p. 946.

arbitrariness that special surveillance methods are not authorised by investigative bodies, but by a judicial body that is independent of the executive branch and that does not participate in the criminal investigation.

According to the procedure provided by art. 140 CPP, special surveillance methods are approved only in the criminal investigation phase by the judge of rights and liberties. The evidentiary procedure of the special surveillance methods can only be administered when there is a procedural framework, after ordering the initiation of the criminal investigation in rem and at the latest until the completion of the investigations. Special surveillance methods cannot be approved during the preliminary chamber phase or during the trial.

In special cases, special surveillance methods can be approved for a period of 48 hours by the prosecutor, when there is an emergency, and obtaining the technical surveillance mandate would lead to a substantial delay in investigations, to the loss, alteration or destruction of evidence or would endanger the safety of the injured person, the witness or their family members. In the situation where the special surveillance methods are approved by the prosecutor, it is necessary that within no later than 24 hours from the expiration of the measure, the prosecutor should notify the judge of rights and liberties in order to confirm the measure.

Regarding the procedure for authorising the surveillance methods provided under Law no. 51/1991 on Romania's national security, it is noted that this is also approved by an independent and impartial magistrate, respectively by one of the judges appointed by the president of the HCCJ.

5.2.5. The existence of an effective appeal to challenge the authorisation or enforcement of the special surveillance measure – procedural guarantee

In the Romanian procedural system, there are several legal ways to challenge the authorisation of special surveillance methods and the manner of their execution.

The fact that the special surveillance measures are authorised by the rights and liberties judge, an independent and impartial magistrate, does not imply an absolute presumption of legality and validity, since such reasoning renders any appeal by the interested parties ineffective. Effective recourse, which would allow for an analysis of criticisms of special surveillance methods, must exist after their approval, starting from the moment when the methods are no longer secret. The establishment of an effective appeal cannot be reported at the time when the special surveillance methods are implemented, when they are characterized by the specific secrecy that these measures entail at that time, but must be reported at the procedural time that is delimited by the others by losing this character.

The Criminal Procedure Code does not expressly provide that the conclusion of the judge of rights and liberties approving the special surveillance methods can be subject to censorship in the preliminary chamber phase, but the doctrine and jurisprudence have established that the judge in the preliminary chamber phase carries out an examination including on the conclusion and materials resulting from the interception of communications. The preliminary chamber phase was regulated by the Romanian legislator as a procedure prior to the start of the trial, the purpose of which is to verify the competence and legality of the court referral, as well as to verify the legality of the administration of evidence and the execution of documents by the criminal investigation bodies.

The Constitutional Court [21]held that in the framework of the preliminary chamber procedure, to the extent that the persons provided for in art. 344 para. (2) CPP formulate requests and exceptions regarding the illegality of the evidence obtained through the technical surveillance procedure, the judge vested with the solution the case will be able to verify the fulfilment of all legal conditions relative to the technical supervision procedure.

Thus, considering that the provisions of art. 342 CPP, which regulate the subject of the preliminary chamber, refer, among other things, to the „legality of the administration of evidence”, the Court held that all documents of prosecution through which the evidence on which the accusation is based was administered, in order to ensure, in this way, the guarantee of legality, independence and impartiality. The Court also held that the verification of legality, including loyalty – an intrinsic component of legality – , of the administration of evidence by the criminal investigation bodies involves the control carried out by the judge of the preliminary chamber regarding the method/conditions of obtaining and using/administering the evidence. The judge of the preliminary chamber is competent to analyze, *ex officio* or upon request, the evidence and documents, through the lens of compliance with the legal provisions, the illegalities found to be sanctioned to the extent and with the sanction allowed by law.

[21] CCR dec. no. 338/22.05.2018, published in the Official Gazette of Romania, Part I, no. 721/21.08.2018.

Regarding the measure of technical supervision, the Court observed that, according to the provisions of the criminal procedure, it is ordered by a judge of rights and liberties, exercising his control in terms of fulfilling the conditions provided for by art. 139 CPP. However, the Court held that the European court has already rejected the reasoning that leads to the conclusion that the magistrate's capacity of the one who orders and supervises the records implies, ipso facto, their legality and compliance with art. 8 ECHR, since such a reasoning renders ineffective any appeal formulated by the interested parties. Therefore, the Court concluded that, in the matter of technical surveillance measures, which constitute an interference in the private life of the persons subject to these measures, there must be a control after the approval and execution of the technical surveillance.

Considering these aspects, the Court notes that in the criminal proceedings, both the legality of the evidence and the evidentiary procedure by which the recordings were obtained can be contested. This presupposes that the judge of the case also decides on the legality of the conclusion admitting the technical supervision measure and the technical supervision mandate. The same conclusion can be drawn from those retained by the HCCJ, the Panel for resolving some legal issues in criminal matters, in dec. no. 2/08.02.2018, published in the Official Gazette of Romania, Part I, no. 307/05.04.2018.

In the HCCJ jurisprudence[22], it was held that the person subject to technical supervision measures must be able to exercise this control in order to verify the fulfillment of the conditions provided by law for taking the measure, as well as the ways of implementing the technical supervision mandate, procedure regulated by the provisions of art. 142-144 CPP. From this perspective, the *a posteriori* control in the matter must refer to the analysis of the legality of the technical surveillance measure, regardless of whether this verification is carried out within the criminal proceedings or independently of it. At the same time, CCR, in its constant jurisprudence, for example, dec. no. 338/22.05.2018, cited above, and dec. no. 802/05.12.2017, published in the Official Gazette of Romania, Part I, no. 116/06.02.2018, considering the object of the preliminary chamber procedure, emphasized that the preliminary chamber judge must carry out a thorough check, exclusively through the lens of legality, of each piece of evidence and the means by which it was administered. Consequently, the Court held that the verification of the legality and loyalty of the judicial approach in the criminal investigation phase regarding the administration of evidence excludes a formal judicial investigation. In other words, the judicial approach carried out by the preliminary chamber judge must be characterized by effectiveness, this being obtained, first of all, by creating an adequate, clear and predictable legislative framework.

As for the possibility of the judge of the preliminary chamber to censor the documents of the judge of rights and liberties and to exclude evidence administered based on his decision, the conclusion of the judge of the preliminary chamber of the HCCJ, crim. s., dec. no. 3147 of 12.12.2014, according to which the documents of the judge of rights and liberties, which ordered measures related to the evidence on which the accusation is based, are subject to control in the preliminary chamber. The same conclusion of the existence of an a posteriori control over the final conclusion by which the judge of rights and liberties pronounces on the technical surveillance measures was highlighted in the doctrine.

In the specialised literature[23], it was considered that «all acts carried out during the criminal investigation on which the accusation is based are subject to verification, regardless of the body that ordered them, authorised them or carried them out, the arguments that substantiated this conclusion doctrinal being the following: (i) according to art. 3 para. (6) CPP, the judge of the preliminary chamber pronounces on the legality of the „evidence on which the referral document is based”, without the text distinguishing between the different categories of criminal investigation documents that are limited to the administration of evidence; (ii) the exercise by the judge of rights and liberties of the function of disposition on some acts and measures during the criminal prosecution is justified by the special protection granted to some particular aspects of the person's rights, regarding either his freedom or the protection of his private life, respectively those „which restrict fundamental rights and freedoms” [art. 3 para. (5) CPP]; instituted only in consideration of these limited purposes, the exercise by the judge, with regard to a specific act, of the disposition function on fundamental rights and freedoms is exclusively intended to ensure, at the time of taking a measure of a certain gravity, the protection of the values regarding freedom and the private life of persons (persons who may be other than the suspect or the defendant) and is not intended to replace any subsequent control of legality over the respective procedural act.».

[22] HCCJ, dec. no. 244/06.04.2017, published in the Official Gazette of Romania, Part I, no. 529/06.07.2017).

[23] Kuglay, in M. Udroiu (coord.), *op. cit.*, p. 909.

Consequently, in the criminal procedural law system in Romania there is a legal way that allows a subsequent control, in the preliminary chamber phase, of the judge's decision approving the special surveillance methods and of the resulting materials.

5.2.6. Informing the person under surveillance

The Criminal Procedure Code regulates the right of the person under surveillance to become aware of the limitations brought to the right to privacy, respectively of the fact that he was the subject of a technical supervision mandate. The regulation of this right is a guarantee that benefits the person who has suffered an interference with the right to privacy and is related to his right to contest the measure.

Initially, the special surveillance methods have a secret character in order to obtain evidence capable of leading to the discovery of the truth, these measures are limited in time, and after the expiration of the term, it is no longer necessary for the measures to keep their secret character.

The legislator regulated the right of persons who were subject to a technical surveillance mandate, as a protection against the arbitrariness of investigative bodies and to be able to effectively exercise the right to an effective appeal against the surveillance measure. The right of the person under surveillance to be aware of the limitations brought to the right to privacy presupposes, on the one hand, his right to be aware of the fact that he has been the subject of a technical surveillance mandate, as well as to be aware, upon request, of the content of the resulting materials following technical supervision. The information must be provided only in writing, within no more than 10 days from the termination of the surveillance measure. The term of 10 days is a substantial one, as it relates to the respect of the right to privacy.

The exercise of the right to learn about the technical surveillance measure and the content of the materials resulting from the implementation of this measure can be postponed. The prosecutor, by means of a reasoned order, may order the postponement of the information or the presentation of the supports on which the technical surveillance activities are stored or of the playback minutes, if this could lead to the disruption or jeopardy of the proper conduct of the criminal prosecution in question; jeopardizing the safety of the victim, witnesses or members of their families or would entail difficulties in the technical supervision of other persons involved in the case. The postponement can be ordered at the latest until the end of the criminal investigation or until the case is closed.

In the doctrine[24] it was noted that „the possibility of postponing the information with reasons is in accordance with the jurisprudence of the ECtHR[25], which showed that the authorities must notify the person as soon as the information can be carried out after the end of the surveillance without prejudicing the purpose for which the measure was willing.” The right to information about the surveillance measure is essentially linked to the right to an effective appeal, which allows a real and serious examination of the criticisms brought about the authorisation of the measure and the way of its implementation, since to contest the surveillance measure it is necessary to know its existence and content beforehand.

CCR[26] admitted the exception of unconstitutionality and found that the legislative solution contained in the provisions of art. 145 CPP, which does not allow the legality of the measure of technical surveillance to be contested by the person concerned by it, who does not have the capacity of defendant, is unconstitutional.

In consideration of the decision, CCR dec. no. 244/06.04.2017, published in the Official Gazette no. 529/07.06.2017, it was held that the fulfilment of the state's positive obligation, in the sense of establishing an effective appeal, cannot be related to those procedural stages in the matter of technical supervision which are characterized by the specific secrecy that these measures entail at the time, but must be related to the procedural moment that is delimited from the others by the loss of this character. In other words, in the context of the procedural stages in the matter of technical supervision which are characterized by the secret specifics of these measures, the provisions of art. 140 para. (7) CPP find their justification precisely by the previously revealed character. Thus, the Court finds that the justification that intervenes in the first procedural stages and that determines the very fairness of the finality of the court decision is removed by the legislator in the procedural stage regulated by the provisions of art. 145 CPP.

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[24] Bulancea, Slăvoiu în M. Udroiu (coord.), *op. cit.*, p. 1003.

[25] Case *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, 28.06.2007.

[26] CCR dec. no. 244/06.04.2017, published in the Official Gazette of Romania no. 529/06.07.2017.

Starting from the premise that, by the very ordering of the technical surveillance measures, the person under surveillance suffers an interference in the scope of his right to privacy, the Court is going to analyze to what extent the lack of *a posteriori* control of the legality of the ordering of the technical surveillance measure complies with the conditions provided by the Constitution and Convention on the Restriction of the Exercise of the Right of Access to a Court for the Purpose of Protecting a Person's Right to privacy.

The Court notes that, according to art. 21 para. (1) of the Constitution, any person can turn to justice for the defense of his rights, freedoms and legitimate interests, and, according to art. 13 ECHR, any person whose rights and freedoms recognized by this Convention have been violated has the right to effectively address a national court, even when the violation is due to persons acting in the exercise of their official duties. Considering this aspect, the Court finds that, in its jurisprudence, it ruled that, since the constitutional text does not distinguish, it follows that the free access to justice enshrined in art. 21 para. (1) of the Basic Law does not refer exclusively to the introductory action to the first court, but also to the referral to any other courts that, according to the law, have the competence to resolve the subsequent phases of the process, therefore, to the exercise of the appeals, because the defence of the rights, freedoms and legitimate interests of the persons implies, logically, and the possibility of taking action against court decisions considered to be illegal or unfounded. The Court also held that, in the exercise of its prerogatives regarding the regulation of appeals or the exemption from their exercise, the legislator must also take into account the respect of the other constitutional reference principles and texts (dec. no. 24/20.01.2016, published in the Official Gazette of Romania, Part I, no. 276/12.04.2016, para. 19, 20). On the same occasion, analyzing the relationship, as well as the way of corroborated interpretation between the constitutional provisions of art. 129 and those of art. 21, CCR ruled that, according to the provisions of art. 129 of the Constitution, „against court decisions, the interested parties and the Public Ministry can exercise appeals, under the conditions of the law".

This constitutional norm includes two articles: the first article enshrines the subjective right of any party to a process, regardless of the subject of the process, as well as the right of the Public Ministry to exercise appeals against court decisions considered illegal or unfounded; the second sentence provides that the exercise of appeals can be carried out under the conditions of the law. The first sentence expresses, in fact, in other terms the fundamental right enshrined in art. 21 of the Constitution, regarding free access to justice; this thesis therefore contains a substantial regulation. The second sentence refers to procedural rules, which cannot affect the substance of the right conferred by the first sentence. That being the case, the Court found that, regarding the conditions for exercising appeals, the legislator can regulate the deadlines for declaring them, the form in which the declaration must be made, its content, the court to which it is submitted, the jurisdiction and the manner of trial, the solutions that can be adopted and others of the same kind, as provided by art. 126 (2) of the Constitution, according to which „the jurisdiction of the courts and the court procedure are provided only by law".

However, although art. 129 of the Constitution ensures the use of appeals „under the conditions of the law", this constitutional provision does not mean that „the law" could remove the exercise of other rights or freedoms expressly enshrined in the Constitution (dec. no. 24/20.01.2016, cited above, para. 22). From the previously stated considerations, the Court finds that, in its jurisprudence, it has ruled as a matter of principle that, whenever a legitimate interest of a person is affected, this person must have the possibility to address the court with an action in which to challenge the violation thus suffered and to obtain, if appropriate, the appropriate redress, even if, in some cases, the action taken takes the form of an appeal against a court decision. The Court considers that the previously established are all the more pertinent in the situation where the safeguarding of the legitimate interest in a certain case is, in fact, confused with the protection of the exercise of a fundamental right or freedom.

The Court also observes that in the doctrine it was held that, from the point of view of its legal nature, the right of „appeal" established by art. 13 is a subjective right of a procedural nature: it guarantees, with regard to the rights and freedoms provided for by the Convention, a right of access before the domestic judge or before any other competent authority that can order the „rectification" of the litigious situation, *i.e.* the removal of the reported violation and its consequences for the owner of the violated right. Next, the Court notes that, with regard to art. 13 ECHR, the European court ruled that these provisions require that in each member state there be a mechanism that allows the person to remedy at national level any violation of a right enshrined in Convention. This provision provides for the existence of a domestic appeal before a „competent national authority" which will examine any claim based on the provisions of the Convention, but which will also provide

the appropriate remedy, even if the contracting states enjoy a certain margin of appreciation as to how to comply with the obligations imposed by this provision. The remedy must be „effective" both in terms of regulation and practical outcome. The „authority" referred to in art. 13 does not necessarily have to be a court of law. However, the attributions and procedural guarantees offered by such an authority are of particular importance to determine the effective character of the appeal offered (Judgment of 4 May 2000, pronounced in the Case *Rotaru v. Romania*, para. 67, 69).

Consequently, based on the previously mentioned decision, the intervention of the legislator would be required to regulate a procedure through which the subjects of the technical supervision can challenge the measure, even if they have no standing in that case.

6. Conclusions

Following the analysis of existing guarantees against arbitrariness and unjustified interference in the right to privacy of individuals in the matter of interception of communications in the criminal proceedings, it can be concluded that the Romanian criminal procedural law is in accordance with the ECtHR jurisprudence.

First of all, the technical surveillance measures are regulated by a legislation which meets the quality conditions, only in exceptional cases, in the situation where ordinary evidentiary procedures do not have the ability to lead to finding out the truth.

Special surveillance measures are ordered for a limited time, by an independent executive and impartial magistrate, respectively by the judge of rights and liberties, which is a guarantee against unjustified interference in the right to privacy.

Upon completion of the implementation of the special surveillance measures, the persons who were subject to them are informed about the existence of the measure and can learn about the content of the materials resulting from the surveillance. People who have been monitored / under surveillance can criticize the interference with the right to privacy and have an effective appeal to challenge them, which is a guarantee for the observance of the right to privacy and for the existence of a fair trial.

However, an update of the legislation would be necessary for its compliance with the CCR decisions. First of all, it would be necessary to legislate a clear, accessible and predictable procedural framework that would regulate a method of contesting in the process the evidence resulting from the execution of the national surveillance warrant.

Also, the criminal proceedings legislation must be improved by regulating an effective appeal for contesting the technical surveillance measure by a person who was not a defendant in the criminal proceedings.

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REFLECTIONS REGARDING THE WITNESS'S RIGHT AGAINST SELF-INCRIMINATION

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Abstract

Considered for a long time as the „eyes and ears of justice", the witness has become a procedural subject around which several controversies have arisen since the entry into effect of Law no. 135/2010 on the Criminal Procedure Code.

The suspected witness, the one against whom further criminal prosecution has not yet been ordered, has acquired a distinct position, shaped by the ECtHR jurisprudence and redefined by CCR dec. no. 236/2020. Although the ECtHR has repeatedly ruled that the guarantees of fairness in proceedings apply once an accusation is formulated, it has also recognized these same guarantees for individuals who are heard as witnesses, but are simultaneously suspected of committing offenses.

Even after the official release of the constitutional court's decision, there are a series of aspects that automatically, are rising debates and controversies, with the most important one being whether there is a genuine right for the witness to remain silent. Has the phrase „cannot be used against them" in art. 118 CPP become predictable and, at the same time, a barrier against potential abuses? Can a „right to silence and non-self-incrimination" be recognized ab initio?

The balance between the general interest of a fair conduct of the criminal proceedings and the rights of the „suspected" witness has required and continues to require practical solutions from the judicial authorities, ensuring that the right to defense and the right to a fair trial are respected.

Keywords: *criminal case, witness, statement, privilege against self-incrimination, right to remain silent, perjury.*

1. Introduction

The roots of this right can be found among the principles of Roman law – the brocard „nemo tenetur se ipsum accusare" (no one is obliged to accuse oneself), having a practical application as early as the 17th century in England, as a reaction to the 16th century royal inquisition, where the accused individuals were required to answer under oath to the questions of the court, without knowing the facts they were being charged of.[1]

In Romanian criminal procedural law, the right to silence and non-self-incrimination does not have a long-standing tradition. It was first regulated in the provisions of criminal procedural law with the amendment of the Criminal Procedure Code 1968 through Law no. 281/2003.[2] Thus, according to art. 70 para. (2) CPP 1968[3], the judicial authorities were required to inform the accused of the right to silence, a right that was recognized not only during the actual questioning, but also during the procedures of detention and pretrial arrest, as stated in art. 143 para. (3) CPP 1968[4]. Later on, the legislator made a corresponding amendment to the Criminal Procedure Code regarding the stage of judicial investigation through Law no. 356/2006[5], within the provisions of art. 322 CPP 1968[6].

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[1] A.S. Ripan, *The Right to Silence. Legal Nature and Who Can Invoke It*, available at *www.avocatripan.ro*.

[2] Published in the Official Gazette of Romania no. 468/01.07.2003.

[3] Art. 70 para. (2) CPP 1968: „The accused or the defendant shall be informed (...) of the right to remain silent, while being duly cautioned that anything they declare may be used against them."

[4] Art. 143 para. (3) CPP 1968: „The prosecutor or the criminal investigation body shall inform the defendant or the accused that (...) they have the right to remain silent, and shall draw their attention to the fact that anything they declare may be used against them."

[5] Published in the Official Gazette of Romania no. 677/07.08.2006.

[6] Art. 322 CPP 1968: „The presiding judge (...) explains to the accused the nature of the charges against them. At the same time, they inform the accused of their right to remain silent, and draw their attention to the fact that anything they declare may be used against them."

The new Code of Criminal Procedure, which came into effect on February 1, 2014, continued to regulate these procedural guarantees for the suspect and for the defendant, providing similar provisions within art. 10 para. (4)[7], art. 83 letter a)[8], art. 209 para. (6)[9], art. 225 para. (8)[10] and art. 374 para. (2)[11] CPP.

As a novelty, this Criminal Procedure Code also regulated the witness's right to avoid self-incrimination within the provisions of art. 118, which state that the testimony given by a person who, within the same case, had or subsequently acquired the status of a suspect or defendant, cannot be used against him or her. Correspondingly, the judicial authorities are obliged to mention the previous procedural status when recording the witness's statement.

In order to assess whether the guarantee established by law in favor of procedural fairness regarding the witness operates with full effectiveness, this work aims to address, on one hand, the perspective of the ECtHR regarding this guarantee, considering that the jurisprudence of the Strasbourg Court played a crucial role in shaping the new regulation, as well as the case law of national courts, especially the constitutional court, on the other hand.

2. The justification for the right to silence and the right not to incriminate oneself in the ECtHR jurisprudence. The situation of the suspected witness

At the level of regulation, this right is provided for in the International Covenant on Civil and Political Rights – art. 14(3)(g), which states that among the guarantees for a person accused of a crime is also the right not to be compelled to testify against oneself or to acknowledge guilt.

At the European level, the right to silence of a person suspected or accused of committing a crime is provided for in Directive (EU) no. 2016/343 of the European Parliament and of the Council of 9 March 2016 regarding the strengthening of certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings. Art. 7(1) of the Directive states that Member States must ensure that suspected and accused persons have the right to remain silent in relation to the offense they are suspected or accused of. Moreover, Member States ensure that suspected and accused persons have the right not to self-incriminate, but while this right is being exercised, competent authorities are not obstructed from lawfully gathering evidence through the use of coercive measures provided by law and which have an existence independent of the will of the suspected or accused persons.

In the preamble of the Directive, it is specifically stated that its measures should apply to individuals who are suspected or accused in criminal proceedings, even before the person is informed by the competent authorities of a Member State, through official notification or by other means, that they are suspected or accused. It is further acknowledged that the right not to self-incriminate is an important feature of the presumption of innocence, and when asked to make a statement or answer questions, suspected and accused persons should not be compelled to provide evidence or documents or communicate information that could lead to self-incrimination. It is also mentioned that the exercise of the right to remain silent or the right not to self-incriminate should not be used against suspected or accused persons and should not be considered, in itself, as evidence that the person has committed the alleged crime. Although the European Convention does not expressly provide for this right, the European Court has developed a plentiful jurisprudence from which the reasons for this guarantee can be derived: (i) protecting the accused from potential abuses by judicial authorities in obtaining self-incriminating evidence, and (ii) ensuring the fair resolution of the case by avoiding judicial errors generated by the coercion of the suspect/accused to admit to an offense.[12]

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[7] Art. 10 para. (4) CPP: „Before being questioned, the suspect and the accused must be advised that they have the right to remain silent."

[8] Art. 83 letter (a) CPP: „During the criminal proceedings, the accused has the following rights: a) the right to remain silent throughout the criminal proceedings, with the warning that if they refuse to make statements, they will not suffer any adverse consequences, but if they do make statements, they may be used as evidence against them."

[9] Art. 209 para. (6) CPP: „Before the questioning, the criminal investigation body or the prosecutor is obliged to inform the suspect or the accused that they have the right to be assisted by a chosen or appointed lawyer and the right to remain silent, except for providing information regarding their identity, and they are warned that anything they declare may be used against them."

[10] Art. 225 para. (8) CPP: „Before proceeding with the interrogation of the accused, the judge of rights and freedoms informs them of the offense they are accused of and their right to remain silent, warning them that anything they declare may be used against them."

[11] Art. 374 para. (2) CPP: „The presiding judge explains to the accused the nature of the charges against them, notifies them of their right to remain silent, warning them that anything they declare may be used against them, as well as their right to question co-defendants, the injured party, other parties, witnesses, experts, and provide explanations throughout the judicial investigation when deemed necessary."

[12] V. Puşcaşu, *Right to Silence and Non-Self-Incrimination. Ratio essendi*, available at *https://drept.uvt.ro*.

Indeed, the Court has held that the privilege against self-incrimination requires prosecutors to prove the accusations risen in criminal proceedings without using the evidence obtained through coercion against the will of the accused. This protected right is closely related to the presumption of innocence. Therefore, the privilege against self-incrimination primarily refers to comply with the accused's choice to remain silent (ECtHR, *Saunders v. United Kingdom*, judgment of 17 December 1996).

As it is well known, the ECtHR has established in its caselaw that the guarantees of the right to a fair trial provided for in art. 6 ECHR become applicable at the moment an accusation is made in a criminal matter, as stated in the judgment rendered in the case of *Engel and Others v. the Netherlands*[13].

In this regard, it has been indicated as the moment of formulation of an accusation, thus the applicability of the guarantees of the right to a fair trial, including the situation where a person suspected of committing an offense is questioned as a witness.[14] It is the so-called **suspected witness**[15], in relation to the fact that the law enforcement authorities have not yet ordered the continuance of the criminal investigation, but there is a suspicion that this individual has committed the offense for which is being heard as a witness. This refers to the witness who, under French law, is referred to as „temoin assisté" (assisted witness), an intermediate status between the one of a witness and a suspect, who can be heard in this capacity when there is a possibility based on available data that the witness may have been involved in some way in the commission of the offense (art. 113-2 of the French Code of Criminal Procedure)[16]. In this capacity, the assisted witness has the right to refuse to provide statements, the right to engage a lawyer, and the right to examine the case files.

The ECtHR has recognized the right of the assisted witness, who is called for questioning regarding their own actions rather than facts they have knowledge of and did not participate in, to not contribute to their own self-incrimination and to remain silent.

In the judgment of October 20, 1997, in the case of *Serves v. France*[17], it was held that assigning the status of a witness to a person and questioning them in that capacity, under circumstances where a refusal to provide statements would result in sanctions, is contrary to art. 6(1) ECHR. Furthermore, a witness who fears that they may be interrogated regarding potential incriminating elements has the right to refuse to answer questions about the facts.

In the judgment of December 18, 2008, in the case of *Loutsenko v. Ukraine*[18] and respectively in the judgment of February 19, 2009, in the case of *Shabelnik v. Ukraine*[19], ECtHR has emphasized the vulnerable position of witnesses compelled to disclose everything they know, even at the risk of self-incrimination. The Court held that a person who has been heard as a witness, based on their request to bring certain facts to the attention of the judicial authorities, thereby self-reported their involvement in a murder offense, is considered an „accused" and is entitled to all the guarantees of a fair trial, including the right to remain silent and not to incriminate oneself. In this regard, the Court did not accept the argument put forward by the state that the status of a suspect would only be acquired after certain verification of the procedures following the self-report.

A tuning point decision in this regard is the case of *Brusco v. France*[20], where the Court found that, erroneously, the individual was only regarded as a witness and, therefore, was compelled to take an oath, whereas in reality, a „criminal charge" was being brought against him and he should have been afforded the right against self-incrimination. The Court also held that the plaintiff was not informed at the beginning of the interrogation of their right to remain silent or the possibility of not answering questions. At the same time, the accused was only able to have contact with their lawyer 20 hours after the charge was formulated, which prevented the lawyer from informing the accused about their procedural rights and providing assistance during the interrogation, as required by art. 6 ECHR.

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[13] *Engel and Others v. the Netherlands* (art. 50) (app. no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72), available in English at *https://hudoc.echr.coe.int/eng?i=001-57478*.

[14] *Kalēja v. Latvia*, Judgment of October 5, 2017.

[15] In this regard, G. Sas, *The Right of the Witness against Self-Incrimination and the Right to Legal Assistance*, JBC no. 1/2020.

[16] In this regard, V. Constantinescu, in M. Udroiu (coord.), *Criminal Procedure Code. Commentary on Articles*, 3rd ed., C.H. Beck Publishing House, 2020, p. 836.

[17] *Serves v. France* (82/1996/671/893), October 20, 1997, available in English at ***https://hudoc.echr.coe.int/eng?i=001-58103***.

[18] *Lutsenko v. Ukraine* (app. no. 30663/04), December 18, 2008, available in English at ***https://hudoc.echr.coe.int/eng?i=001-90364***.

[19] *Shabelnik v. Ukraine* (app. no. 16404/03), February 19, 2009, available in English at ***https://hudoc.echr.coe.int/eng?i=001-91401***.

[20] *Brusco vs. France, available online at http://bit.ly/3aNTar5.*

In the case of *Heany and McGuinness v. Ireland*[21], ECtHR held that the statements obtained through coercion violated the applicants' right to silence, while they were being interrogated under a criminal charge, yet there was no evidence in the file to prove the initiation of criminal proceedings against them. The two applicants were arrested on charges of terrorism. After being informed of their right to remain silent, the police officers, based on art. 52 of the 1939 law on offenses against the state, requested them to provide details about their whereabouts at the time when the offenses in question were committed. The applicants declined to answer these questions, and due to their refusal to provide information about their location at the time of the events, they were sentenced to six months of imprisonment under the same provision of the 1939 law.

The Court held that the applicants were being charged with criminal offenses, as they were detained and interrogated regarding certain crimes, even though there were no formal acts to initiate criminal proceedings against them and no such procedure had been started. The Court considered that the applicants' right to remain silent was completely nullified by the application of that legal disposition since they were left with the choice of either speaking and potentially incriminating themselves or facing criminal sanctions. The Court found that such domestic law led to obtaining statements through extremely harsh coercion, which contradicted the right to silence, and that concerns for security and public order could not justify such a legal provision. Therefore, the presumption of innocence and the right to a fair trial of the applicants were violated.

The Court also held that in the situation where a person is heard as a witness under oath, but especially under the criminal penalty for perjury, regarding facts or circumstances that could incriminate them (the theory of the difficult choice), it is not reasonable to ask that person to choose between being sanctioned for refusing to cooperate, providing authorities with incriminating information, or lying and risking being convicted for it (Judgment of April 8, 2004, in the case of *Weh v. Austria*).

3. Some guidelines regarding the applicability of domestic norms in relation to the witness' right against self-incrimination

3.1. The case law of the Constitutional Court of Romania

The recently introduced national regulations regarding the right of the witness not to incriminate themselves under art. 118 CPP stipulate that a witness statement given by a person who, in the same case, prior the statement, became a suspect or defendant, cannot be used against them. At the same time, judicial authorities are obliged to mention the previous procedural status when recording a statement.

Given the lack of a tradition regarding this procedural guarantee in the domestic legal system, as it has been borrowed from *common law*, the difficulties in interpreting the newly introduced norm have been and remain almost inevitable.

Before examining some of the jurisprudential approaches concerning the interpretation of this witness right not to self-incriminate, we believe that it is important to recall the perspective of the contentious constitutional court regarding the content and limits of this right, within the conducted constitutional review' framework.

In 2017, when presented with a constitutional objection in law regarding the aforementioned provisions, arguing that the phrase „against themselves" contained therein is unconstitutional because a witness statement given by a person who subsequently becomes a defendant in the same case cannot be used against them but can be used against co-defendants, the Constitutional Court dismissed the constitutional challenge[22], concluding that the dispositions of art. 118 CPP are constitutional in relation to the raised criticisms.

Essentially, in the reasoning of its decision, the Court stated, in para. 13-18 of Decision no. 519/2017, that:

(i) The provisions of art. 118 CPP regulate a new legal institution within the existing criminal procedural law, namely the right of the witness not to incriminate themselves.

(ii) The national criminal procedural law, through the denounced norm, does not regulate a right of the witness to refuse to give statements, therefore, it does not establish an actual right of the witness not to self-incriminate on one hand, and it does not fall under the scope of the institution of excluding evidence from criminal proceedings on the other hand.

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[21] ECtHR, Section IV, Case *Heaney and McGuinness v. Ireland*, judgment from 21.12.2000, app. no. 34720/97.

[22] CCR dec. no. 519 of July 6, 2017, published in the Official Gazette of Romania, Part I, no. 879/08.11.2017.

(iii) The purpose of the norm is that a witness statement - given by a person who, in the same case, had previously made a statement or subsequently became a suspect or defendant - is not excluded from the case file and can be used to establish factual circumstances unrelated to the witness themselves. This is expressly regulated in the last paragraph of art. 118 CPP, which imposes an obligation on the judicial authority to mention the witness's previous procedural status when recording the statement.

(iv) The provisions of art. 118 CPP constitute a guarantee of respecting the right to a fair trial of the person testifying, who, before or after making the statement, has become a suspect or defendant, preventing their own statements from being used against them.

(v) The self-incriminating statements of the witness are, at the same time, necessary for resolving the case concerning another accused person since a fundamental principle of criminal proceedings is the discovery of the truth in order to achieve the purpose of criminal proceedings, which is the complete and accurate knowledge of the material facts and the person who committed them, thereby holding the latter criminally responsible.

(vi) Admitting self-incriminating evidence in criminal proceedings against a witness who, before or after making the statement, has become a suspect or defendant, while excluding self-incriminating statements of the witness concerning another accused person, would undermine the fairness of the criminal process and discredit the administration of justice.

By Decision no. 236/2020[23], a new constitutional exception was raised, which found that the legislative provision contained in art. 118 CPP, which does not regulate the right of a witness to remain silent and not to self-incriminate, is unconstitutional.

CCR held that in its current form, subject to examination, art. 118 CPP regulates the „right of the witness not to incriminate oneself" as a negative procedural obligation of the judicial body, which cannot use the statement given as a witness against the person who, after the statement, becomes a suspect or defendant in the same case. Thus, the Court found that the criticized text considers two hypotheses, namely: (i) the hypothesis in which the person is questioned as a witness after the initiation of the criminal investigation regarding the act, and subsequently acquires the status of a suspect, and (ii) the hypothesis in which the person already has the condition of a suspect or defendant and subsequently the judicial body orders the separation of the case, and in the newly formed file, the person acquires the status of a witness.

It was therefore noted that compared to the current wording, art. 118 CPP does not allow the application of the right not to self-incriminate similar to that of a suspect or defendant. At the same time, the witness does not have the possibility to refuse to provide a statement under art. 118 of the current criminal procedural law, being obliged to declare everything they know, under the penalty of committing the offense of perjury, even if through their statement incriminates themselves.

The Court thus found that a person cited as a witness, who tells the truth, can self-incriminate, and if they do not tell the truth, avoiding self-incrimination, they commit the offense of perjury. With regard to the first hypothesis provided for in art. 118 CPP, in the absence of a regulation of the right of a witness to remain silent and not to self-incriminate, the criminal investigation authorities are not obliged to give effect to this right concerning the *de facto* suspect who has not yet acquired the status of a *de jure* suspect. Therefore, this situation leads to the charging of the person questioned as a witness, even in the hypothesis where, prior to the questioning, the criminal investigation authorities had information indicating their involvement in the commission of the offense that was the subject of the questioning as a witness, and the lack of official suspect status may result from the lack of will on the part of the judicial authorities, who do not issue the order under the conditions of art. 305 para. (3) CPP.

As for the second hypothesis regulated in art. 118 CPP, when the person is already pointed as suspect or defendant, and subsequently the judicial body orders the separation of the case, and in the newly formed file, the person acquires the status of a witness, even if the criminal procedural law allows for the questioning of a participant in the commission of the offense, as a witness, in the separated case, they cannot be a genuine witness. The genuine witness is the one who did not participate in any way in the commission of the offense, but only has knowledge of it, specifically knowledge of essential facts or circumstances that determine the fate of the trial.

[23] Published in the Official Gazette of Romania no. 597/08.07.2020.

Moreover, CCR noted that the HCCJ, Panel for the resolution of legal issues in criminal matters, by dec. no. 10/17.04.2019[24], ruled that „a participant in comission of a crime who has been separately tried from the other participants and subsequently questioned as a witness in the separated case cannot have the status of an active subject of the false testimony offense, provided for in art. 273 CP."

The Constitutional Court held that in a separate case, a participant who has been finally convicted can be heard as a witness in the cases of other participants in the same offense. However, their new statement continues to retain the „original" traces of a statement made as a suspect or accused, even though formally, the person has the status of a witness in the new procedural framework.

The Court further noted that, from a procedural standpoint, the witness is vulnerable, as they cannot be subject to secondary prosecution for abusive investigation, as regulated in art. 280 CP. The protection under criminal law only applies to individuals who are under a criminal investigation or in the course of a trial. The same vulnerable situation may persist if a person heard as a witness has limited access to a lawyer. Additionally, art. 118 CPP does not settle the right of a witness to have access to a lawyer, nor does it impose an obligation on the judicial authorities to inform them in this regard or to appoint a lawyer *ex officio* in specific situations.

Therefore, there are insufficient proper guarantees for a person heard as a witness. The witness's protection is limited only to the obligation of the judicial authorities not to use their statement against them. The witness does not have a level of protection similar to that enjoyed by a suspect or accused.

At the same time, the Court observed that the norm does not make any reference to the subsequent effects of such a statement. It can be used to obtain other means of evidence, and the derived evidence, in the absence of a contrary provision, can be used against the witness and influence the subsequent procedural conduct of the judicial authorities. However, such procedural conduct of the judicial authorities cannot be sanctioned under the provisions of art. 102 para. (4) CPP since a witness statement is not included in the scope of illegally obtained evidence.

Therefore, the procedural provisions of art. 118 CPP do not establish an effective protection for the witness concerning potential criminal liability. Also, they do not regulate adequate procedural and substantive guarantees for a person heard as a witness, nor do they prohibit the use of evidence indirectly obtained, based on their statement. The only evidence protected for the witness is their own statement.

It was concluded that the legislative solution contained in art. 118 CPP, which does not regulate the witness's right to silence and against self-incrimination, is unconstitutional. It contradicts the provisions of art. 21 para. (3), art. 23 para. (11), and art. 24 para. (1) of the Romanian Fundamental Law, as well as art. 6 para. (1) and (2) ECHR.

Considering the manner in which the Constitutional Court has defined the content, meaning, and guarantees of the witness's right against self-incrimination, in light of ECtHR extensive jurisprudence, it is necessary to further analyze how the courts have applied this right in practice, following the publication of the aforementioned decision in the Official Gazette.

3.2. The HCCJ and other judicial courts case law

- By the criminal decision of March 14, 2023, rendered by the Galați CA, the Public Ministry's appeal against the criminal judgment of November 8, 2022, pronounced by the Galați CA, acquitting the defendant A.A. for the offense of false testimony under art. 273 para. (1) CP, was dismissed on the grounds that the act is not provided for by criminal law.

The criminal investigation authorities charged the defendant with making false statements on January 4, 2019, when he was questioned as a witness in criminal case no. 9/D/P/2019 of DIICOT, Galați Territorial Office. He falsely declared that he did not know the named individual B.B., who was under investigation for the offense of trafficking in high-risk drugs under art. 2 para. (1) of Law no. 143/2000, and that he had not purchased drugs from him, although in reality, he knew him and had bought drugs from him on multiple occasions.

In the considerations of the acquittal decision, the court found that even without a detailed analysis, it becomes evident that if the defendant A.A. had stated that he had purchased drugs from B.B., there would have been a possibility of his incrimination for the offense under art. 4 para. (1) of Law no. 143/2000, which defines the offense alternately, listing a series of actions including the purchase of high-risk drugs.

[24] Published in the Official Gazette of Romania, Part I, no. 416/28.05.2019.

Thus, the defendant A.A. had to choose between affirming the purchase of drugs, exposing himself to the risk of a new criminal investigation for the offense under art. 4 para. (1) of Law no. 143/2000, for which he had previously been fined, and denying the purchase of drugs, which led to his investigation and prosecution for the offense of false testimony.

The court noted that from the content of the statement recorded during the criminal investigation, it does not appear that the criminal investigation authorities informed the witness A.A. of his right not to incriminate himself. The mention in the standard declaration on page 30, stating that he was informed of his right to refuse to give statements as a witness, is formal and devoid of substance, as it does not indicate the basis on which this aspect was brought to his attention nor the reason why he could refuse to provide such statements.

The court found that although two years have passed since CCR dec. no. 236/2020, the legislature has not adopted an appropriate legislative solution as a consequence of admitting the unconstitutionality exception (neither art. 273 CP nor art. 118 CPP have undergone any changes since the existing form at the time the unconstitutionality exception was pronounced), which puts us, to some extent, in a situation similar to the decisions of unconstitutionality concerning art. 155 CP, regarding the prescription of criminal liability.

Therefore, in light of this constitutional flaw, the caselaw is obliged to analyze and apply the provisions of art. 273 CP and art. 118 CPP in relation to CCR dec. no. 236/2020, as stated, among others, in para. 84 of the mentioned decision.

In conclusion, based on the above exposition, the court stated that the witness benefits the right to remain silent and not contribute to their own incrimination, to the extent that their statement could self-incriminate them, under art. 6 ECHR and the ECtHR case law. CCR dec. no. 236/2020 is considered as more favorable criminal law for individuals who were not informed of their right to remain silent and not contribute to their own incrimination, and later faced charges of false testimony.

The judicial authority cannot use a person's statement as a witness against the accused, but only in favor of the suspect or defendant. The obligation to inform the witness of their right not to self-incriminate lies with the judicial authority that possesses information giving rise to suspicions of the witness's involvement in the commission of a criminal offense. A person summoned as a witness, who tells the truth, may self-incriminate, and if they do not tell the truth to avoid self-incrimination, they may commit the offense of false testimony. In reality, this mechanism leads to the prosecution of the person who was questioned as a witness, which is unfair if the criminal investigation authorities had indications of their involvement in the offense under investigation before their testimony as a witness.

Analyzing the chronology of events in this case, it can be observed that at the time of the defendant A.A.'s questioning as a witness, the criminal investigation authorities had plausible reasons to suspect his involvement in the possible offense of drug trafficking for personal use, especially considering that the defendant had previously been convicted for such an offense. Moreover, even in the hypothesis that they proceeded with his questioning, the criminal investigation authorities had the obligation to inform him of the consequences that arise when the information provided indicates involvement in a crime, including his right not to self-incriminate.

With reference to these considerations, the court concluded that in the specific situation of the defendant A.A., he does not meet the required quality of an active subject under the incriminating norm, which is an essential condition for the offense of false testimony to be imputed to him. Therefore, since the condition of typicity is not fulfilled, the act of false testimony attributed to him is not provided for by law, and the acquittal solution must be adopted.

- According to the criminal judgment issued on February 10, 2022, by the Constanța Court, the defendants A., B., and C. were acquitted of the offense of false testimony, as provided under Article 273(1), (2)(d) of the Criminal Code, because the act is not covered by criminal law.

In order to reach this decision, the court noted that the defendants were indicted by the Constanța Court Prosecutor's Office for the offense of false testimony, as provided under art. 273 para. (1) CP. They were heard as witnesses in a case pending before the Constanța Trib., involving a defendant (a police officer) who was indicted for corruption offenses. During their testimony, the defendants made false statements regarding the essential facts and circumstances about which they were questioned.

Based on the evidence presented, the court found that the defendants in the current case were not genuine witnesses in the case where the police officer was indicted for the offense of bribery. There were reasonable suspicions that they themselves had committed the offense of bribery as regulated under art. 290 CP.

Considering the aspects highlighted by the criminal investigation authorities, the defendants were in a situation where they had to provide false statements or withhold information, which would have led to criminal liability for the offense of false testimony, or disclose everything they knew, which would have resulted in criminal liability for the offense of bribery.

The court appreciated that this situation was analyzed in an abstract manner in the considerations of the aforementioned decision by the Constitutional Court, which concluded that this situation violates the defendants' constitutional right not to contribute to their own incrimination.

Therefore, the court concluded that the conditions required by law for convicting the defendants were not met, and it ordered their acquittal considering that the committed act is not provided for by criminal law, invoking the provisions of art. 16 para. (1) letter (b), first paragraph CPP.

- Through ruling no. 299 issued on October 4, 2021, by the judges of the preliminary chamber of the Suceava Trib., the appeal against the ruling of the judge of the preliminary chamber of the Câmpulung Moldovenesc Court was upheld. The contested ruling was completely annulled, and upon retrial, the exception of nullity regarding multiple pieces of evidence and acts of criminal investigation was accepted, including the witness statements given by A. on November 27, 2017, and November 28, 2017, ordering their exclusion from the case.

Based on the documents in the case file, the defendant was charged with the offense of driving a motor vehicle under the influence of alcohol or other substances. On November 27, 2017, around 04:00, while driving a car on public roads, the defendant was involved in a traffic accident resulting only in material damages. When tested with a breathalyzer, a concentration of 0.68 mg/l of pure alcohol in the breath and an alcohol concentration in the blood above the legal limit were recorded.

By the order of the criminal investigation authorities dated November 27, 2017, the criminal investigation *in rem* for the offense of driving a vehicle under the influence of alcohol or other substances, as provided under art. 336 para. (1) CP, was initiated.

Furthermore, the defendant was heard as a witness on November 27, 2017, and November 28, 2017. Subsequently, through the order dated March 22, 2018, confirmed on the same date, the further prosecution of the defendant was ordered regarding the offense of driving a vehicle under the influence of alcohol or other substances, as provided under art. 336 para. (1) CP. After the initiation of the criminal action, the defendant was indicted for the commission of the mentioned offense.

Referring to CCR dec. no. 236/02.06.2020, the judges of the preliminary chamber noted that the prosecutor cannot attribute the status of a witness to a person whom they know to be involved in the commission of a criminal offense, solely for the purpose of using the mechanism described in the considerations of the constitutional court's decision[25], in order to formulate a criminal accusation.

Based on these theoretical considerations, the judges have found that indeed, on the dates of 27.11.2017 and 28.11.2017, when the defendant A. was heard as a witness, the prosecutor had sufficient information that he was the presumptive author of the offense, as he was questioned regarding the materiality of the act. However, the defendant was heard as a witness, despite the fact that a witness is obliged, under penalty of criminal liability for the offense of false testimony, to declare the truth in the matter.

In this situation, the defendant, in his capacity as a witness, could not invoke the right not to self-incriminate, which cannot be remedied during the judicial proceedings. His statements were used as evidence in the indictment order no. 1405/P/2017 dated 20.05.2021, the confirmation order for the further conduct of the criminal investigation no. 1405/P/2017 dated 22.03.2018, and the order for the further conduct of the criminal investigation no. 1405/P/2017 dated 22.03.2021, as well as in the reasoning of the indictment, mentioned in Chapter II „Means of evidence".

3.3. A judgment contrary to the aforementioned (Cluj CA, crim. dec. no. 413/A/22.03.2021)[26]

In fact, the defendant P.G.D. was heard as a witness regarding the offenses of disturbing public order and possession or use of dangerous objects without authorization, committed by the defendant B.I.P. At the time of his testimony, P.G.D. cooperated with the criminal investigation authority, disclosing everything he knew, with

[25] A person subpoenaed to be heard as a witness, with the obligation to tell the truth, may be charged if they self-incriminate. On the other hand, if they do not tell the truth to avoid self-incrimination, they would commit the offense of false testimony.

[26] R. Anghel, *Critical Note on Criminal Decision no. 413/A/22.03.2021 of the Cluj CA*, in Caiete de Drept Penal no. 2/30.06.2021.

one notable exception. When asked whether the defendant B.I.P. had a knife on him (a knife that the defendant B.I.P. indeed had on him and that P.G.D. picked up from the ground), P.G.D. falsely declared that such knife did not exist. Both before the first instance and the appellate court, the defendant P.G.D. stated that he lied to protect himself from potential criminal liability for aiding the defendant B.I.P., with the assistance consisting of attempting to conceal the knife.

By criminal decision no. 413/A/2021 dated 22.03.2021, the Cluj CA rejected the appeal of the defendant P.G.D., stating that his request for acquittal cannot be granted. In support of this ruling, the Court indicated that the defendant was heard in accordance with the legal norms in force at the time of the hearing and that the defendant did not invoke the right to remain silent at that time, choosing instead to make false statements. Additionally, the Court, referring to the ECtHR case law, the supreme court, and the Constitutional Court, held that the witness's right against self-incrimination is not absolute, essentially stating that being heard in connection with offenses committed by another person does not entitle the witness to make false claims.

The defendant B.I.P. was indicted for the offenses of possession or use of dangerous objects without authorization and disturbing the public order, while the defendant P.G.D. was charged with perjury. According to the indictment, the defendant B.I.P. was inside Club N., located in Cluj-Napoca, and got into a conflict with the witness B.F.A. The security guard asked the defendant to leave the premises and accompanied him until he left the club. However, at the exit, the defendant became unruly, taking out a knife from his pants pocket and gesturing towards the security guards. They subsequently immobilized the defendant, during which process the defendant P.G.D. dropped the knife on the ground, which was then picked up by the defendant P.G.D.

As a witness, the defendant P.G.D. partially confirmed the statements of other witnesses regarding the existence of an incident. As for the existence of the knife, he claimed not to have seen any such object on the defendant and not to have picked up any knife from the ground. It was determined that the witness' statement was false, as surveillance camera footage showed him picking up the knife that the defendant B.I.P. had.

The trial court noted that the defendant referred to the CCR dec. no. 236/02.06.2020, which declared unconstitutional the legislative resolution contained in art. 118 CPP, which did not regulate the witness' right against self-incrimination. However, the Court considered that the witness' testimony was given in compliance with the law, as he was made aware of the provisions of art. 118 CPP (which were unaffected at that time by the aforementioned decision, which was rendered later). CCR dec. no. 236/02.06.2020 was published in the Official Gazette of Romania no. 597/08.07.2020, and its effects produced, according to art. 26 of Law no. 47/1992, from the moment of publication and only for the future.

Secondly, the court found that the accused P.G.D. was informed about the subject of the investigation („the incident at club N.") and the person under investigation (the accused B.I.P.). P.G.D. was not involved in that incident (did not cause the incident or commit any acts of violence) and did not use the knife (he only picked up the knife after it was dropped by the accused B.I.P., without using it in any way).

It cannot be accepted that the defendant felt compelled to lie in order to avoid criminal responsibility for acts he did not commit (acts that do not exist) and for which he was not under investigation or accused.

Furthermore, the court found that the accused did not commit the offense of false testimony by refusing to give statements or by concealing details, but rather presented a deliberately false and obviously favorable state of affairs for the defendant B.I.P.

The Cluj CA dismissed the accused's appeal as unfounded, stating that the witness statement was taken in accordance with the law, and the provisions of art. 120 para. (2) letter d) CPP were brought to his attention. P.G.D. was not involved in the incident (did not cause the incident or commit any acts of violence) and did not use the knife (he only picked up the knife after it was dropped by the accused B.I.P., without using it in any way). The judicial authorities, at the time of his testimony as a witness, had no indication/information/data regarding his involvement in the incident under investigation. P.G.D. did not have the status of a suspect/accused in the case being investigated for the offenses of unauthorized use of dangerous objects and disturbance of public order prior to or after giving his witness statement. Finally, the accused did not invoke the right to remain silent at the time of the hearing and did not refuse to give statements.

Additionally, it was noted that the witness' right to remain silent and not incriminate oneself must be analyzed in each specific case and cannot be recognized *ab initio*, without any distinction, as a general and absolute right. It should be assessed based on the particularities of each case, especially in relation to whether the judicial authority has plausible reasons to believe that the statements of the witness could incriminate him,

i.e., whether the judicial authority has minimal indications that the witness may be involved in the facts about which he is being questioned.

In this decision, a separate opinion was also formulated, advocating for the acquittal of the accused P.G.D. based on the grounds of art. 16 letter b) CPP. The difference of opinion in this litigation essentially revolves around the interpretation of CCR dec. no. 236/2020. Contrary to the views held by the majority opinion, the separate opinion considers that the correct interpretation of this decision is to grant any witness who is questioned, regardless of the nature or object of the case, an absolute right to remain silent and not self-incriminate.

It was noted that according to the ECtHR jurisprudence, it is not natural to ask the alleged perpetrator to choose between being penalized for refusing to cooperate, providing incriminating information to the authorities, or lying and risking conviction for perjury (*Weh v. Austria*, 2004). When combined with CCR dec. no. 236/2020, three conclusions can be drawn: no one can be penalized for exercising the right to remain silent, regardless of their formal role in the process; no one can be compelled to provide incriminating information to the authorities; no one can be penalized for lying to avoid self-incrimination. The decisions of the Constitutional Court, like legal norms, are imperative and must be respected, and direct censorship of these decisions by the courts can only occur in exceptional circumstances. The accused P.G.D. faced these three difficult decisions at the time of the commission of the offense. This is certain, just as it is certain that he chose to lie about those details which he believed could incriminate him, details that were known to the judicial authorities from the rest of the evidence presented in the case.

It was noted that it needs to be determined whether the fact that the accused lied to conceal the possible commission of a separate offense, rather than the offense for which he was being questioned, is relevant. In this context, it was stated that although it is extremely important to be able to rely on the testimony of witnesses, it is essential to recognize their right not to self-incriminate or self-denounce. It is undeniable that the witness's right to remain silent cannot be exercised arbitrarily and absolutely, just as the „right to lie" cannot be used in this way. However, the only limitation should be the proof that, in the abstract, the witness could not self-incriminate by telling the truth.

The second issue that arises is whether the statement given by the accused P.G.D., assuming he was not lying, could have incriminated him. The analysis of this issue should remain concise and abstract, as the court is not called upon to judge the potential offense of aiding the perpetrator. In this regard, it was argued that it is sufficient to determine that, in the abstract, concealing a weapon used in the commission of a crime immediately after the offense could meet the elements of the accusation of aiding the perpetrator.

In conclusion, at the time of his testimony during the criminal investigation, the accused P.G.D., without knowledge of his right not to make statements that could incriminate him (CCR dec. no. 236/2020 being subsequent to this moment), was put in a situation where he had to choose between self-incrimination, refusal to testify (which at that time could lead to a reasonable presumption that he would be held criminally liable for perjury), and lying (which at that time could also lead to a reasonable presumption that he would be held criminally liable for perjury, with the mention that he believed there was a possibility that his action would not be discovered). In a spur of the moment decision, the accused chose to lie. However, beyond the more or less moral character of this choice, in light of CCR dec. no. 236/2020 and the ECtHR jurisprudence, this choice was made under duress, in a context where there was no correct choice from the accused's perspective, and it cannot be criminally sanctioned.

In a critical note to this decision, it was pointed out that through dec. no. 651/2018, the Romanian Constitutional Court had stated that decisions pronounced by CCR must have the vocation of retroactive application, as a form of criminal law decriminalization. However, by transforming the right to remain silent and not self-incriminate into an absolute right, a series of behaviors that previously met the elements of the offense of perjury were decriminalized. The fact that the accused was not heard as a witness in a case where an offense committed by him was being investigated cannot be considered a reason to disregard the right to remain silent or not self-incriminate. The interpretation given by the court, which did not take into account the possibility of multiple separate offenses being committed in a closely related context by different individuals (some of which could easily come to light through self-incrimination or even self-denunciation), is unacceptable. Regarding this issue, it was considered that the separate opinion clearly demonstrates why such an approach is incorrect. Essentially, it would ignore the entire jurisprudence of the ECtHR, which has shaped the concept of a (true) witness. Moreover, such an interpretation would encourage a return to abusive practices of interrogating the

perpetrator as a witness, only with the mention that this interrogation would be related to another person or a different legal framework.

It was appreciated that the judicial authorities acted unlawfully when they heard P.G.D. as a witness. The judicial authorities, even in the absence of the CCR's decision, in light of the ECtHR jurisprudence, could and should have informed the witness that if he believed that by disclosing certain facts he could self-incriminate, he had the right to remain silent. It is indisputable that concealing a weapon used in the commission of a crime immediately after the offense can meet the elements of the offense of aiding the perpetrator. The judicial authorities not only failed to inform P.G.D. that he could exercise his right to remain silent, even though at that stage of the criminal investigation they were aware of his behavior of raising the knife and attempting to hide it, but they even asked him questions explicitly related to this aspect. The accused's choice to provide false information was considered by the court as a reason for conviction, arguing that the accused should have chosen not to declare anything. Apart from the fact that such a statement contradicts the real possibilities that a person questioned as a witness has, most of the time it also contradicts the objective reality of the case, given that the accused was not informed of his right to remain silent. Furthermore, it is essential to the theory of the three difficult choices that the witness faced with this choice has the possibility to exercise any option without suffering consequences.

b.5) A nuanced solution regarding the analyzed aspect was given by the supreme court, which upheld the decision pronounced by the judge of the preliminary chamber of the Bucharest CA, 1st crim. s. (HCCJ, crim. s., dec. no. 508/20.05.2021, by the panel of 2 judges of the preliminary chamber).

Thus, by the ruling dated November 23, 2020, the Bucharest CA, 1st crim. s., based on art. 346 para. (2) in conjunction with art. 345 para. (1) and (2) CPP, dismissed as unfounded the requests and exceptions formulated, among others, by the defendants A. and B. regarding the legality of the court's referral, the performance of procedural acts, and the administration of evidence in the criminal investigation phase. It found the legality of the court's referral, as well as the legality of the performance of procedural acts and the administration of evidence in the criminal investigation phase, and ordered the commencement of the trial.

The judge of the preliminary chamber at the trial court noted that the DNA indictment dated July 20, 2020, referred to the following defendants: defendant A., charged with the offenses of abuse of office if the public official obtained an undue benefit for himself or another person, in the form of instigation, as provided by art. 297 para. (1) CP, related to art. 132 of Law no. 78/2000, with the application of art. 47 CP, and continuous intellectual forgery in the form of instigation, provided by art. 321 para. (1) CP, in conjunction with art. 35 para. (1) CP, with the application of art. 47 CP, both with the application of art. 38 para. (2) CP; defendant B., for complicity in the use, in any way, directly or indirectly, of non-public information or allowing unauthorized persons access to such information, as provided by art. 48 para. (1) CP, related to art. 12 letter b) of Law no. 78/2000.

In the preliminary chamber procedure, defendant A., through his chosen defense counsel, invoked, among other things, requests and exceptions concerning the fact that the statements of the named Z. and the statement given as a witness by the defendant W. were unfairly obtained since, although those statements concerned their own actions, they were not informed of their right not to self-incriminate before the questioning, as required by CCR dec. no. 236/02.06.2020[27].

Regarding the reason invoked by defendant A. through his defense counsel, the judge of the preliminary chamber found it unfounded, and the defense counsel's request to establish the unfair manner of obtaining the statements and to exclude them from the overall evidence of the case is unfounded.

Regarding the witness statements of Z. and the statement given as a witness by the defendant W., which were obtained without informing the persons questioned of their right not to self-incriminate, as established by CCR dec. no. 236/02.06.2020, the judge of the preliminary chamber found that the conditions for applying the relative nullity sanction, provided for in art. 282 para. (1) CPP, are not met for the following reasons:

As for witness Z., it was essentially noted that a decision to close the case was taken against her in the indictment. Therefore, in relation to what was established by the constitutional administrative court in dec. no. 236/2020, her questioning without being informed by the prosecutor of the right to remain silent and the right not to contribute to her own incrimination, as procedural rights recognized in favor of the „accused", did not cause her any concrete harm, given that those statements were never used against her.

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[27] Published in the Official Gazette of Romania no. 597/08.07.2020.

Regarding the statement given as a witness by the defendant W, in the absence of her being informed about the right to remain silent and not self-incriminate, it is not affected by any grounds for relative nullity under art. 282 CPP. On the one hand, at the time of this questioning by the prosecutor himself, based on the evidence in the case, the prosecutor did not have sufficient conclusive information to suspect the possible involvement of defendant W. in the investigated offenses, so it could not be considered that W. had already acquired the status of an „accused" in the autonomous sense of this notion, as configured in the ECtHR jurisprudence. On the other hand, from the examination of the content of this statement, it does not appear that the holder of the statement made incriminating statements against herself or other defendants in the case, and the aspects recorded in that statement were not used by the prosecutor to prove the factual situation described in the indictment.

Against this ruling, within the legal deadline, various parties, including defendant A, filed appeals, reiterating the criticisms raised before the judge of the preliminary chamber at the trial court, arguing that the ruling pronounced by the judge was unfounded, illegal, and inadequately motivated.

Examining the legality and validity of the appealed ruling, based on the grounds of appeal invoked and *ex officio* within the limits conferred by art. 347 para. (4) and art. 281 CPP, the High Court, with a panel of two judges, considered the appeals to be unfounded for the following reasons:

Defendant A.'s criticism regarding the legality of obtaining evidence from the perspective that the statements of witness Z. and defendant W., given as witnesses, were obtained unfairly by violating their right not to self-incriminate was deemed unfounded.

The High Court noted that the witness statements of the two individuals were given on March 12, 2020, prior to the publication of CCR dec. no. 236/02.06.2020 (in the Official Gazette of Romania, Part I, no. 597/08.07.2020), which recognized the unconstitutionality of the legislative solution provided in art. 118 CPP, which does not regulate the witness's right to remain silent and not self-incriminate. In this context, it was noted that the decision of the constitutional administrative court cannot, unconditionally, invalidate these means of evidence without the risk of producing retroactive effects. According to art. 147 para. (4) of the Romanian Constitution, republished, „Decisions of the Constitutional Court shall be published in the Official Journal of Romania. From the date of publication, the decisions shall be generally binding and shall only have future effect".

On the other hand, the right of a witness to remain silent and not self-incriminate is intended, in principle, to protect the freedom of any person questioned to choose whether to speak or remain silent when interrogated by the police regarding illicit activities in which they may have been involved. This freedom of choice is compromised when, suspecting the possible contribution of the person questioned to the illicit activities under investigation, the authorities' resort to the subterfuge of questioning them as a witness (obliged to provide complete statements) and fail to inform them not only of the suspicions against them but, more importantly, of their procedural right not to contribute to their own incrimination.

From the analysis of the provisions of art. 282 CPP regarding the relative nullity, in relation to the considerations of CCR dec. no. 236/02.06.2020, it is apparent that the right to remain silent and not self-incriminate belongs to the person who provided the statement as a witness, as they are the holder of the procedural interest in giving statements only when fully aware of their value and purpose in the proceedings, in order to effectively benefit from all the guarantees of a fair trial.

Given the circumstances, the alleged violation of the right not to self-incriminate was not invoked by the witnesses themselves, namely Z. and W., but rather by the defendant A., who does not justify a specific procedural interest in relation to the analyzed provisions of criminal procedure. Furthermore, in line with the preliminary judge at the trial court, upon examining the content of the witness statements in question, the appellate court determined, at a formal analysis level inherent to the preliminary stage, that these statements do not appear to provide incriminating information regarding the appellant A. Therefore, the preliminary judge at the trial court correctly concluded that the conditions for applying the sanction of relative nullity, as provided by art. 282 para. (1) CPP, are not met in this case with regard to the witness statements of Z. and W.

4. Conclusions

Based on the aforementioned, it can be concluded that CCR dec. no. 236/2020 has significantly changed judicial practice regarding the witness's right to remain silent and not to self-incriminate. Although there was already a rich jurisprudence from the European Court on this matter, its application has been somewhat timid,

perhaps indicating the need for a stronger impetus, which was provided by the resurgence of jurisprudence from the Constitutional Court.

However, the debate still remains open regarding the temporal application of the aforementioned decision and the practical method of recognizing the witness' right to remain silent. The identified jurisprudence allows us to draw the conclusion that, although the witness' right to remain silent has been created, more or less explicitly, it is not recognized *ab initio*, even when viewed from the perspective of the *de facto* defendant.

At least for now, it seems to be the responsibility of the preliminary judge to determine whether, with respect to the witness, the investigating authorities had sufficient evidence at the time of the hearing to conclude that the witness could potentially self-incriminate through their statements, thus facing a difficult choice.

The current state of the law, as interpreted by the Constitutional Court, requires a careful examination of the specific circumstances of each case to assess the potential violation of the witness's rights. The role of the preliminary judge is crucial in evaluating whether there were enough proofs for the witness to be put in a position where their statements could potentially lead to self-incrimination.

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IS IT MANDATORY FOR THE CRIMINAL PROSECUTION BODY TO ISSUE A CRIMINAL INDICTMENT ORDER?

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Abstract

Pursuant to the legal provisions, in view of facilitating the criminal prosecution of persons who commit criminal offences, the filing of a Crime Information Report as a result of which the perpetrator is indicted triggers the remission by half of the sentence limits applicable to the criminal offence (or criminal offences) the Informant is charged with. The crucial element is that the Crime Information Report may only trigger the remission of the sentence if the person concerned by the Crime Information Report is indicted, time-wise, before the closing of the criminal proceedings in which the accused person who filed the Crime Information Report is tried. In this context, it is paramount for the Informant who has the status of an accused person that the filed Crime Information Report be materialised at least in the indictment of the person concerned by the Crime Information Report by the time the judgement in the trial of the accused has become final. This study was based on a practical situation which, in the summary, presented the following characteristics: a) the accused person, who was prosecuted for having committed drug offences, filed a Crime Information Report concerned with the commission of drug trafficking offences; b) after having been notified by means of a Crime Information Report, the criminal prosecution bodies collected clear evidence from which it followed that the person concerned by the Crime Information Report was indeed committing drug trafficking offences. Against this background and having analysed the framework of the criminal procedural law, we concluded that the indictment of the person concerned by the Crime Information Report (who, after further prosecution, was conferred the status of a suspect) was mandatory. Furthermore, as to when the criminal charges were brought against the person concerned by the Crime Information Report (so as to materialise the Crime Information Report into concrete action), the case-law pointed out to the existence of relatively short periods - a few days to maximum 1 year - from the time inculpatory evidence was collected and until criminal charges were brought.

Keywords: *criminal charge, further prosecution, criminal indictment, notification of the criminal prosecution bodies by means of a Crime Information Report, remission of sentence limits.*

1. Introduction

In the Romanian criminal proceedings, a person's criminal indictment takes place during the criminal prosecution phase, by means of a procedure that can be conducted both by the investigating bodies of the judiciary police, as well as by the prosecutor, mainly depending on the nature of the offence which is subject of the criminal case, but also on the status of the person in question, under certain assumptions. Slightly redundant, the criminal charge is brought on 2 occasions, both through the conduct of the further prosecution procedure (at which point the accused person acquires the status of a suspect), as well as through criminal indictment (as a result of which the person against whom charges are brought acquires the status of an accused person). Beyond the importance of informing the person of the criminal charge brought against him/her, the further prosecution causes significant criminal consequences also against third parties who are not involved in the case file in which the perpetrator acquired the status of a suspect.

We are working under the assumption that, pursuant to the provisions of art. 19 of Law no. 682/2002 on witness protection[1], the person who committed an offence may be granted a remission by half of the sentence limits provided for by the law if, before or during the criminal prosecution or proceedings, the person in question

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[1] Law no. 682 of 19 December 2002 on witness protection was republished in the Official Gazette of Romania no. 288/18.04.2014.

files a Crime Information Report and facilitates the identification and prosecution of other persons who committed offences[2].

2. Requirements for granting the remission by half of the sentence limits

As a consistent method of exercising the right of defence through a significant remission of the sentence prescribed by law, the filing of Crime Information Report triggering the prosecution of another person has been given various interpretations in the practice of the criminal judicial bodies. The most important issues in respect of which varying opinions may be encountered in the criminal judicial practice include, inter alia: a) whether the effects of granting the remission by half of the sentence, in the circumstances where the accused person facilitated the identification and prosecution of the person concerned by the filed Crime Information Report in a different case, apply to all criminal cases pending before the courts, without limitation; b) who are the beneficiaries of the remission by half of a sentence limits prescribed by law; c) whether the provisions of art. 19 of Law no. 682/2002 may be construed as grounds for sentence remission within the meaning of art. 598 para. (1) letter (d) CPP; d) whether the granting of remission by half of the sentence limits to the accused person who is an informant in a criminal case is conditional upon further prosecution *in personam* or upon criminal indictment or whether it is sufficient to initiate criminal prosecution *in rem* in the case in which the accused person is a witness who filed a Crime Information Report.

To sum up, as to limiting the effect of remitting the sentence limits prescribed by the law, in its ruling on a question of law, HCCJ held that the effects of the legal grounds for sentence remission shall exclusively occur in the specific criminal case having as subject one or several offences committed by the person who, before or during the criminal prosecution or proceedings in respect of the case in question, filed a Crime Information Report and facilitated the prosecution of participants to the commission of serious offences; the author of the Crime Information Report may not be granted a remission by half of the special sentence limits in different criminal cases, even if those cases are concerned with concurrent offences committed by the said author[3].

As to the potential beneficiaries of the provisions of art. 19 of Law no. 682/2002, CCR found that limiting such beneficiaries strictly to persons having the status of a witness who filed a Crime Information Report and who have committed a serious offence was unconstitutional; consequently, the persons who have not committed serious offences were also included in this category[4].

It was also held that the provisions of art. 19 of Law no. 682/2002 may not be construed as grounds for sentence remission within the meaning of art. 598 para. (1) letter (d) CPP, therefore leading to the conclusion that the materialisation of a Crime Information Report may no longer trigger the remission by half of the sentence once the decision has become final in the case in which the witness who filed a Crime Information Report has the status of an accused person[5].

Last, but not least, also ruling on a question of law, the supreme court determined that granting the remission by half of a sentence limits to the accused person who is an Informant in a criminal case is conditional upon further prosecution *in personam* in the case in which the accused is a witness who filed a Crime Information Report[6].

The two aspects of importance for this study are as follows: the Crime Information Report may trigger the remission by half of the sentence limits only if it is materialised before the decision concerning the accused having the status of a witness who filed a Crime Information Report has become final; the expression „facilitates the identification and prosecution of other persons who committed offences” means the criminal indictment of the person concerned by the Crime Information Report subsequent to issuing a further prosecution order.

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[2] The provisions of art. 19 of Law no. 682/2002 can also be partly found in art. 15 of Law no. 143/2000 on prevention and control of illicit drug trafficking and use, according to which „the person who committed one of the criminal offences provided for in art. 2-9 and, during his/her criminal prosecution, files a Crime Information Report and facilitates the identification and prosecution of other persons who committed drug-related offences, shall be granted a remission by half of the sentence limits prescribed by law”.

[3] HCCJ, the Panel in charge for ruling on questions of law in criminal matters, dec. no. 3/28.02.2018, published in the Official Gazette of Romania no. 327/13.04.2018.

[4] CCR dec. no. 67/26.02.2015, published in the Official Gazette of Romania no. 185/18.03.2015.

[5] HCCJ, the Panel in charge for ruling on questions of law in criminal matters, dec. no. 4/13.02.2020, published in the Official Gazette of Romania no. 278/02.04.2020.

[6] HCCJ, the Panel in charge for ruling on questions of law in criminal matters, dec. no. 79/18.11.2021, published in the Official Gazette of Romania no. 96/31.01.2022.

Against this background, the following question arises: what happens under the assumption that the accused person files a Crime Information Report against another person and the prosecutor, despite having conducted important evidentiary activities capable of determining the identification of the perpetrator and of ascertaining the commission of the reported offence, fails to confer the status of a suspect to the person concerned by the Crime Information Report? In other words, is it mandatory to bring a charge in criminal matters against the person concerned by the Crime Information Report or, on the contrary, is this a procedural act that is exclusively left at the discretion of the criminal prosecution body?

In order to try and answer this question, which is the central focus of this study, we shall proceed by examining the existing legal framework on a person's criminal indictment (considering the two distinct procedures for bringing criminal charges, namely the further prosecution and the criminal indictment respectively). We will also present the findings of a case-law examination focused on the attempt to approximate the average period of time between the time the Crime Information Report is filed and the time the person concerned by the Crime Information Report is indicted (and, implicitly, the time when the Crime Information Report is materialised into concrete action by the criminal prosecution bodies).

The particular case underpinning this study can be summarised as follows: a) the accused person, who was sent to trial in September 2021 for committing drug trafficking offences, filed a Crime Information Report in November 2022, whereby the criminal prosecution bodies were informed about the commission of drug trafficking offences by certain specified persons; b) in February 2022, as a result the filed Crime Information Report, the criminal prosecution bodies conducted important evidentiary activities (authorised purchases of drugs, through collaborators, from the persons concerned by the Crime Information Report and, respectively physical and chemical findings of a technical and scientific nature); in December 2022, the prosecutor informed the court called to rule on the merits in the case of the accused person who is an informant of the fact that no criminal indictment was ordered in respect of any person in the case file formed as a result of the filed Crime Information Report.

3. Bringing the charge in criminal matters

Pursuant to art. 131 para. (1) of the Constitution of Romania, „within the judicial activity, the Public Ministry shall represent the general interests of the society and shall defend legal order, as well as the citizens' rights and freedoms". Applied to the criminal indictment of a person in respect of whom there is evidence of having committed criminal offences, the constitutional requirement enshrines the role of the Public Ministry (translator's note: the Public Prosecution Service) as representative of the interests of society and as guardian of the rule of law. Thus, under the assumption that conclusive inculpatory evidence is produced, out of which it follows (in our case) that serious drug offences were committed, the prosecutor's intervention in view of ascertaining the criminal offence and of indicting the perpetrator is a genuine method of guarding the rule of law and of defending citizens' rights and freedoms.

As to the moment, during the criminal prosecution phase, when criminal charges are brought for the first time against a person, art. 305 para. (3) CPP stipulates: „when there is evidence from which reasonable suspicion arises that a person has committed the offence that warranted the start of criminal prosecution and the case does not fall under any of the situations provided for in art. 16 para. (1), the criminal prosecution body shall order the further prosecution against the said person who shall acquire the status of a suspect". Consequently, the only requirements that need to be fulfilled in order for the perpetrator to acquire the status of a suspect entail the existence of inculpatory evidence and, respectively, the absence of legal obstacles to the prosecution proceedings. As to whether it is mandatory for the criminal prosecution body to issue an order for further prosecution in personam, the legal text under analysis does not clearly specify at what point in time the charge in criminal matters must be brought, while the appropriateness and time of the criminal indictment are determined by the criminal prosecution body.

However, in terms of bringing the charge by means of criminal indictment, art. 7 CPP stipulates: „the prosecutor is required to start and carry-out the indictment ex officio when evidence exists that shows the commission of an offence and there is no legal ground to prevent such prosecution (...)". This legal text - deemed as having a value of a principle when it comes to enforcing the procedural law in criminal matters - enshrines the mandatory nature of the criminal indictment (and, hence, the mandatory nature of bringing charges in criminal matters against the person in question), while the legislator sets out 2 conditions: a positive condition, requiring

the existence of inculpatory evidence; and one negative condition, requiring the absence of legal grounds preventing such prosecution. This ground rule is resumed, somehow differently, in art. 15 CPP („criminal prosecution shall be started and conducted when evidence exists giving rise to the reasonable assumption that a person committed an offence and there are no situations preventing the start or conduct of such prosecution"), as well as in art. 309 CPP. Given the chronology of the two orders (the further prosecution being at all times prior to indictment), the mandatory act of indicting the perpetrator necessarily determines the mandatory nature of issuing an order for further prosecution.

In our opinion, of relevance for the topic of this study are also the provisions of art. 306 para. (1) CPP, stating that: „in order to achieve the goal of criminal prosecution, the criminal investigation bodies are required, once notified, to seek and collect data or information concerning the existence of the criminal offences and the identity of perpetrators, to take steps for limiting the consequences thereof (...)". Clearly, these legal provisions apply not only to the criminal investigation body, but also to the prosecutor, requiring a broad interpretation of the legal text (in accordance with the marginal name of the mentioned article, „the obligations of criminal prosecution bodies"). The fact that the obligation to take steps for limiting the consequences of the reported criminal offences is to be borne by the criminal prosecution bodies determines, in our case, the recognition of the need for an active involvement of the criminal prosecution bodies. Thus, once notified of the commission of drug offences and having collected clear inculpatory evidence confirming the content of the Crime Information Report, the judicial bodies are required to intervene by stopping the criminal activity, especially since such criminal offences pose a health treat for the users of the trafficked psychoactive substances.

To be also noted that the specificity of criminal investigations conducted in respect of drug trafficking criminal offences implies, in specific cases, that the time of criminal indictment subsequent to ascertaining the criminal activity be deferred in view of completing the standard of evidence, so as to enable the identification of all persons who, under different forms of criminal participation, contributed to the commission of the criminal offences in question. In this case, it is vital that criminal prosecution (which is not conducted in personam) be carried-out in a sustained and credible pace and, in all cases, should not exceed a reasonable period for bringing criminal proceedings against the persons concerned by the Crime Information Report.

4. Bringing the charge in criminal matters

The criminal case files subject to analysis present the following commonalities: a) the subject-matter of the selected criminal cases concerned criminal proceedings brought against persons who committed drug offences; b) the accused persons filed Crime Information Reports against other persons; c) subsequent to the filing of the Crime Information Report, acts of prosecution were carried-out (for the most part, evidentiary activities consisting of authorised purchases of drugs, via collaborators under true or protected identity, respectively via undercover investigators); d) the inculpatory evidence collected in this manner led to the criminal indictment of the persons concerned by the Crime Information Report (by issuing the orders for further prosecution and, respectively, for criminal indictment) [7].

Judgement no. 827/20.07.2022 rendered by Bucharest Trib.[8]. The notification by means of a Crime Information Report took place on 16.04.2021. On 05.05.2021, the accused person sold 1.27 grammes of heroin to a protected identity collaborator; on 06.05.2021, the accused person sold 0.73 grammes of heroin to a protected identity collaborator; on 04.08.2021, the accused person smuggled approximately 4 kg of heroin into the country. The accused person was indicted on 12.10.2021 (further prosecution, criminal indictment, detention). *It is noted that approximately 6 months have passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time the accused person was indicted.*

Judgement no. 1209/07.11.2022 rendered by Bucharest Trib.[9]. The offence was notified by means of a Crime Information Report on 25.02.2022. Purchases under surveillance were organised between 04.03.2022 and 05.04.2022, with the help of a true identity collaborator (0.85 grammes of heroin, 0.35 grammes of heroin, 0.83 grammes of heroin). The criminal indictment took place on 23.05.2022 (further prosecution, criminal indictment,

[7] The examined case-law was consulted using the ReJust application, which was accessed between December 2022 and February 2023.

[8] According to *https://www.rejust.ro/juris/eeeed5d65*.

[9] According to *https://www.rejust.ro/juris/4ee78eg38*.

detention). *It is noted that approximately 3 months have passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time the accused person was indicted.*

Judgement no. 1198/04.11.2022 rendered by Bucharest Trib.[10]. The offence was notified by means of a Crime Information Report on 14.06.2021. 2 purchases under surveillance were organised on 01.07.2021 and on 14.07.2021, with the help of a true identity collaborator (approximately 10 grammes of cocaine). The bill of indictment was issued on 15.10.2021. *It is noted that approximately 4 months have passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time the accused person was brought before the court. The analysed judgement does not indicate the time when the accused person was indicted, but it is certain that the indictment occurred prior to commitment for trial.*

Judgement no. 1139/26.10.2022 rendered by Bucharest Trib.[11]. The offence was notified by means of a Crime Information Report. 3 authorised purchases were organised on 12.11.2021, on 13.11.2021 and, respectively, on 02.12.2021 with the help of a collaborator who filed a Crime Information Report (risk and high-rick drugs). From the content of the judgement under analysis it follows that the accused person was placed under judicial supervision on 22.02.2022. *It is noted that 2 months and 20 days have passed between the date of the last authorised purchase and the time the accused person was indicted; the judgement under analysis does not specify the registration date of the Crime Information Report with the criminal prosecution body.*

Judgement no. 856/27.07.2022 rendered by Bucharest Trib.[12]. The criminal prosecution bodies were notified by means of a Crime Information Report on 31.01.2022. On 23.02.2021 and on 03.03.2022, the accused person sold 50 grammes of cannabis and, respectively, 30 grammes of cannabis to a true identity collaborator. The criminal indictment took place on 31.05.2022 (further prosecution, criminal indictment). *It is noted that 4 months have passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time the accused person was indicted.*

Judgement no. 826/20.07.2022 rendered by Bucharest Trib.[13]. The criminal prosecution bodies were notified by means of a Crime Information Report on 02.12.2020. Between 22.01.2021 and 13.05.2021, the accused person sold ecstasy to a protected identity collaborator (4 material facts). The criminal indictment took place on 02.06.2021 (further prosecution, criminal indictment), when the commission of the crime was also ascertained further to a deceptive operation designed to catch the person attempting to commit the offence. *It is noted that approximately 6 months have passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time the accused person was indicted.*

Judgement no. 805/13.07.2022 rendered by Bucharest Trib.[14]. The criminal prosecution bodies were notified by means of a Crime Information Report on 06.09.2021. On 02.10.2021, the accused person sold 1.17 grammes of cocaine to a witness collaborating with the prosecution; on 13.10.2021, the accused person sold 2.33 grammes of cocaine to a witness collaborating with the prosecution. The case was sent to court on 18.11.2021 (the judgement under analysis contains no data on when the accused person was indicted). *It is noted that 2 months and 12 days have passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time the accused person's case was brought before a court; definitely, the criminal indictment of the accused person took place in a shorter period.*

Judgement no. 826/20.07.2022 rendered by Bucharest Trib.[15]. The criminal prosecution bodies were notified by means of a Crime Information Report on 24.03.2021. On 28.04.2021, the accused person sold 0.53 grammes of cocaine to a witness collaborating with the prosecution; on 06.05.2021, the accused person sold 0.56 grammes of cocaine to a witness collaborating with the prosecution; on 24.08.2021, the accused held 2.07 grammes of cocaine in his home. The criminal indictment took place on 24.08.2021 (further prosecution, criminal indictment, detention, arrest pending trial). *It is noted that 5 months have passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time the accused person was indicted.*

[10] According to *https://www.rejust.ro/juris/dee8d5975*.
[11] According to *https://www.rejust.ro/juris/eee637336*.
[12] According to *https://www.rejust.ro/juris/722293442*.
[13] According to *https://www.rejust.ro/juris/59992326d*.
[14] According to *https://www.rejust.ro/juris/2335g92g7*.
[15] According to *https://www.rejust.ro/juris/59992326d*.

Judgement no. 761/07.07.2022 rendered by Bucharest Trib.[16]. The criminal prosecution bodies were notified by means of a Crime Information Report on 10.01.2022. On 27.01.2022, the accused person sold 0.44 grammes of heroin to an authorised collaborator; on 31.01.2022, the accused person sold 0.42 grammes of heroin to an authorised collaborator; on 14.02.2022, the accused person sold 0.32 grammes of heroin to an authorised collaborator; on 16.02.2022, the accused person sold 0.35 grammes of heroin to an authorised collaborator; on 14.03.2022, the accused person held 6.42 grammes of heroin and other risk and high-rick drugs with the intent to sell. The criminal indictment took place on 14.03.2022 (further prosecution, criminal indictment, detention, arrest pending trial). *It is noted that approximately 2 months have passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time the accused person was indicted.*

Judgement no. 639/15.06.2022 rendered by Bucharest Trib.[17]. The criminal prosecution bodies were notified by means of a Crime Information Report on 16.09.2021. On 28.09.2021 and, respectively, on 06.10.2021, the accused persona sold 2.33 grammes of cannabis and 46 LSD doses to an authorised collaborator; on 03.11.2021, the accused person was in possession of 15.74 grammes of cannabis and 3.84 grammes of MDMA. The criminal indictment took place on 03.11.2021 (further prosecution, criminal indictment). *It is noted that 1 month and 17 days have passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time the accused person was indicted.*

Judgement no. 641/15.06.2022 rendered by Bucharest Trib.[18]. The criminal prosecution bodies were notified by means of a Crime Information Report on 07.10.2021. On 11.11.2021, the accused person sold 6 MDMA tablets to an authorised collaborator; on 09.12.2021, the accused person sold 4 MDMA tablets to an authorised collaborator. The criminal indictment took place on 03.02.2022 (further prosecution, criminal indictment, detention). *It is noted that approximately 4 months have passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time the accused person was indicted.*

Judgement no. 559/26.05.2022 rendered by Bucharest Trib.[19]. The criminal prosecution bodies were notified by means of a Crime Information Report on 06.07.2021. On 15.07.2021, the accused person sold 5 grammes of cocaine to an authorised collaborator; on 21.07.2021, the accused person sold 5.01 grammes of cocaine to an authorised collaborator; on 25.08.2021, the accused person held 789.23 grammes of cocaine with the intent to sell. The criminal indictment took place on 25.02.2022 (further prosecution, criminal indictment, detention). *It is noted that 7 months and 19 days have passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time the accused person was indicted.*

Judgement no. 543/20.05.2022 rendered by Bucharest Trib.[20]. The criminal prosecution bodies were notified by means of a Crime Information Report on 04.10.2021. On 14.10.2021, the accused person sold 4 MDMA tablets and 3.37 grammes of cannabis to an authorised collaborator; on 25.10.2021, the accused person sold 6.95 grammes of cannabis to an authorised collaborator; on 24.11.2021, the accused person was in possession of 12.42 grammes of cannabis. The criminal indictment took place on 24.11.2021 (further prosecution, criminal indictment, detention). *It is noted that 1 month and 20 days have passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time the accused person was indicted.*

Judgement no. 442/14.11.2022 rendered by Constanța Trib.[21]. The *ex officio* notice concerned with committing the offence of risk drug trafficking on an ongoing basis took place on 14.01.2022. Between 01.02.2022 and 12.04.2022, the accused person sold different quantities of cannabis (1.53 grammes, 1.52 grammes, 2.47 grammes, 1.64 grammes etc.) to the authorised protected identity collaborator. The criminal indictment took place on 12.04.2022 (further prosecution, criminal indictment, detention). *It is noted that approximately 3 months have passed between the time the criminal prosecution bodies took note of the offence and the time the accused person was indicted.*

[16] According to *https://www.rejust.ro/juris/59929949d*.
[17] According to *https://www.rejust.ro/juris/722d53439*.
[18] According to *https://www.rejust.ro/juris/4eeg23875*.
[19] According to *https://www.rejust.ro/juris/5994e7d7e*.
[20] According to *https://www.rejust.ro/juris/eee47ge57*.
[21] According to *https://www.rejust.ro/juris/dee653549*.

Judgement no. 426/25.10.2022 rendered by Constanța Trib.[22]. The *ex officio* notice concerned with committing the offence of high-risk drug trafficking took place on 16.11.2021. Between 10.12.2021 and 28.03.2022, the first accused person sold different quantities of risk and high-risk drugs to the relevant authorised collaborator; between 26.11.2021 and 28.03.2022, the first accused person, as well, sold different quantities of risk and high-risk drugs to the protected identity collaborator; between 01.02.2022 and 28.03.2022, the second accused person sold different quantities of risk and high-risk drugs to the relevant authorised collaborator. The criminal indictment took place on 29.03.2022. *It is noted that approximately 4 months have passed between the time the criminal prosecution bodies took note of the offence and the time the accused person was indicted.*

Judgement no. 421/20.10.2022 rendered by Constanța Trib.[23]. The offence of risk and high-risk drug trafficking was notified by means of a Crime Information Report on 07.01.2022. Between 11.02.2022 and 06.05.2022, the accused person repeatedly sold amphetamine, respectively cannabis (2.5 grammes) to the undercover collaborator. The criminal indictment took place on 17.05.2022. *It is noted that approximately 4 months have passed between the time the criminal prosecution bodies took note of the offence and the time the accused person was indicted.*

Judgement no. 228/10.06.2022 rendered by Constanța Trib.[24]. The offence was notified by means of a Crime Information Report on 21.10.2021. On 20.10.2021, the accused person put drugs into circulation, respectively offered 60.15 grammes of cannabis to the witness; on 21.10.2021, the accused person held the quantity of 69.52 grammes of cannabis with the intent to sell and was caught in the act further to a deceptive operation organised on the same date by the police authorities; on 21.10.2021, the accused person held with the intent to circulate a total quantity of 249.44 grammes of cannabis and 3 cigarette remains on which Tetrahydrocannabinol (THC) was identified, which were discovered while conducting a home search. The criminal indictment took place on 22.10.2021. *It is noted that 1 day has passed between the notification of the criminal prosecution bodies and the time the accused person was indicted.*

Judgement no. 150/29.04.2022 rendered by Constanța Trib.[25]. The offence was notified by means of a Crime Information Report on 16.03.2021. On 22.04.2021, the accused person sold a quantity of 3.4 grammes of MDMA to the undercover investigator. The criminal indictment took place on 05.07.2021. *It is noted that approximately 4 months have passed between the time the criminal prosecution bodies took note of the offence and the time the accused person was indicted.*

Judgement no. 546/09.11.2022 rendered by Timiș Trib.[26]. The offence was notified by means of a Crime Information Report on 27.07.2021. On 25.10.2021, via a WhatsApp videocall, the accused person showed the collaborator that he held at his home 4 jars containing approximately 800 grammes of vegetal mass alleged to be cannabis and a bag containing light-green tablets claimed to be ecstasy tablets (MDMA). The criminal indictment took place on 10.11.2021 when the accused was caught in the act during a home search. *It is noted that approximately 4 months have passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time of indictment.*

Judgement no. 679/17.11.2021 rendered by Timiș Trib.[27]. The offence was notified by means of a Crime Information Report on 06.03.2021. On 06.03.2021, the accused person sold 3 aluminium foil packages containing 2.3 grammes of cocaine to the undercover investigator. The criminal indictment took place on 28.09.2021. *It is noted that approximately 6 months have passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time of indictment.*

Judgement no. 246/20.10.2022 rendered by Cluj Trib.[28]. The offence was notified by means of a Crime Information Report on 01.02.2022. The criminal indictment took place on 03.02.2022 when the accused was caught in the act intending to sell the quantity of 1,464.6 grammes of cannabis and the quantity of 1.2 grammes of white crystallin substance to the undercover investigator. *It is noted that approximately 2 days have passed*

[22] According to *https://www.rejust.ro/juris/6228ee87e*.
[23] According to *https://www.rejust.ro/juris/g88234948*.
[24] According to *https://www.rejust.ro/juris/72e8e8d73*.
[25] According to *https://www.rejust.ro/juris/235d47d72*.
[26] According to *https://www.rejust.ro/juris/866gg8d75*.
[27] According to *https://www.rejust.ro/juris/525d22494*.
[28] According to *https://www.rejust.ro/juris/eee6dd875*.

between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time of indictment.

Judgement no. 176/01.08.2022 rendered by Cluj Trib.[29]. The offence was notified by means of a Crime Information Report on 05.03.2021. On 28.04.2021, the accused person sold 1.9 grammes of cannabis and 1.4 grammes of substance containing 3-CMC to the undercover investigator; on 29.09.2021, the accused person sold 9.7 grammes of cannabis to the undercover investigator; on 13.11.2021, the accused person sold 1.5 grammes of substance containing 3-MMC to the undercover investigator. The criminal indictment took place on 15.12.2021. *It is noted that approximately 9 months have passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time of indictment.*

Judgement no. 96/21.04.2022 rendered by Cluj Trib.[30]. The offence was notified by means of a Crime Information Report on 29.10.2020. On 28.04.2021, the accused person sold 2 grammes of cannabis to the undercover investigator; on 27.09.2021, the accused person sold 0.8 grammes of substance containing 3-MMC to the undercover investigator. The criminal indictment took place on 22.10.2021. *It is noted that approximately 1 year has passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time of indictment.*

The case-law analysis reveals that the longest period of time between the notification by means of a Crime Information Report and the time the person concerned by the Crime Information Report was indicted was of approximately 1 year. Of course, the list referred to above has merely of an illustrative nature and we have no claim as to the certain, universally valid character of our conclusions. In the particular case that constituted the starting point of this study, it is noted that approximately 1 year and 1 month has passed between the notification of the prosecutor by means of a Crime Information Report and the time the court was informed that no criminal charges were brought.

5. Conclusions

The practice of criminal case files reveals the fact that the remission by half of the sentence limits prescribed by law, as a result of a Crime Information Report having been filed that led to criminal proceedings brought against the perpetrator constitutes the most important defence, specifically under the assumptions where the commission of the criminal offence is proven beyond any reasonable doubt.

However, the granting of a sentence remission is conditional upon the criminal indictment a person concerned by the Crime Information Report by latest the closing of the criminal proceedings in which the accused - a witness who filed a Crime Information Report - is tried. In such circumstances, one can witness a genuine race against the clock to materialise the Crime Information Report into concrete action, as the bringing of criminal charges, if any, against the person concerned by the Crime Information Report once the decision has become final in the trial of the informant is no longer beneficial to the latter.

Of course, many crime information reports are not materialised by the criminal prosecution bodies, as they are unsuitable for bringing criminal proceedings against the person concerned by the Crime Information Report. Through this study, we sought to analyse the assumption in which, subsequent to the filing of the Crime Information Report, the criminal prosecution bodies carry-out evidentiary activities capable of leading, unquestionably, to ascertaining the commission of the reported offence. For such situations, where there is evidence showing that the person concerned by the Crime Information Report committed an offence, the criminal indictment (by order for further prosecution) is mandatory.

As to when the criminal prosecution body decides to issue the order for criminal indictment, it must be outlined that at times, for reasons concerned with unveiling the complete truth, the bringing of criminal charges (implicitly meaning the materialisation of the filed Crime Information Report) is deferred until the determination of all circumstances in which the reported offences are committed (participants in the commission of criminal offences, form of guilt, etc.). For such assumptions, in the particular case under analysis which is concerned with the commission of drug offences, the case-law analysis demonstrated that once the clear inculpatory evidence was produced, the indictment took place after a period of maximum 1 year (while a large number of cases was identified in which this period was much shorter).

[29] According to *https://www.rejust.ro/juris/23336g8d9*.
[30] According to *https://www.rejust.ro/juris/2357g4e73*.

It therefore follows that the right to defence may be exercised by the accused person by notifying the criminal prosecution bodies by means of a Crime Information Report (a notification method which, at the same time, is an important tool made available to the criminal authorities in their activity concerned with ascertaining the commission of criminal offences and with the criminal proceedings brought against the persons who have committed such offences), while the collection of concrete inculpatory evidence leads to the mandatory issuing of the order for criminal indictment of the person concerned by the Crime Information Report, within a time interval that observes the reasonable period requirement.

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DOMESTIC VIOLENCE AND FAMILY RELATIONSHIPS. A FEW LEGAL, SOCIAL AND PSYCHOLOGICAL CONSIDERATIONS

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Abstract

Domestic violence is a serious problem (even a criminal offense under Romanian law) that affects a lot of people around the world, has implications in criminal matters, but also in the field of family law, and transcends national law, with implications at the European level as well. We recall here the convictions for the payment of moral damages before ECtHR.

In Romania, domestic violence is regulated primarily by Law no. 217/2003 on preventing and combating domestic violence, but there are also some other provisions related to domestic violence in the Civil Code (Law no. 287/2009) and in the Criminal Code (Law no. 286/2009), as well as in other special laws, such as Law no. 272/2004 on protection and promotion of the rights of the child and Law no. 273/2004 regarding the procedure of adoption. At the European level, we can mention Directive 2011/99/EU on the European Protection Order (EPO), a mechanism for the mutual recognition of protection measures of victims of crime, and we will note that, despite the laudable intentions of the EPO Directive, the aim of which is to provide continuous and similar protection of victims when they are moving across Member States, there are many reasons why the EPO remains under-used in practice.

Therefore, the chosen topic aims to find an answer to the question of whether the measures to combat domestic violence are sufficient and effective, both those regulated by national legislation and those provided for in international treaties.

Keywords: *domestic violence, family relationships, European Protection Order (EPO), Temporary Protection Order (TPO), national jurisprudence, ECtHR jurisprudence.*

„In civilized life, domestic hatred usually expresses itself by saying things that would appear quite harmless on paper (…) but in such a voice or at such a moment that they are not far short of a blow in the face.”[1]

1. An introduction inspired by Francine Hughes and the „burning bed syndrome”

One of the most famous movies that dealt with domestic violence was „The burning bed” (1984)[2]. In fact, it is both a non-fictional book by Faith McNulty and a 1984 TV movie adaptation that follows Francine Hughes trial for the murder of her husband, following her setting fire to the bed he was sleeping in at their home on March 9, 1977, and thirteen years of physical and sexual domestic abuse. This true story has raised awareness about the important issue of domestic violence and the legal system’s response to it. In this case, the jury returned from deliberation and found Francine not guilty by reason of *temporary insanity*. Francine Hughes stood outside her Michigan home, watching her abusive husband burn. Earlier that night, he had beaten and raped her for the last time, and then she drove herself to the authorities and turned herself in. Those were the facts. But let’s see a little bit more about the story behind this story. As a child, Francine watched her alcoholic father abuse her mother, and, when she dropped out of high school to marry, she quickly became a spousal abuse victim, too[3], with four children and a husband who spent much of their money on alcohol. A nightmarish marriage,

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[1] C.S. Lewis, *The Screwtape letters (The Devil’s letters to his nephew)*, 1942, available at *https://judithwolfe.wp.st-andrews.ac.uk/files/2017/08/Screwtape.pdf*, last consulted on 04.05.2023.

[2] For more details, see *https://en.wikipedia.org/wiki/The_Burning_Bed*, last consulted on 03.05.2023.

[3] Francine confessed: «I was thinking about all the things that had happened to me (…) all the times he had hurt me (…) how he had hurt the kids (...) I stood still for a moment, hesitating, and a voice urged me on. It whispered, „Do it! Do it! Do it!”». For details, see E.

marked by physical, verbal and emotional abuse, lead Francine to a divorce, but, even after that, the abuse continued, and, worst of all, even in front of their children.

Francine did not know it, but she was about to become a central voice in the women's movement which worked to draw attention to the cases of women who were brutalized by their husbands but were rarely taken seriously by America's justice system. The movement created a system of life-saving shelters, laying the foundation for a modern awareness of domestic violence. The story of Francine Hughes didn't mean that domestic abuse stopped, though. By 1977, the same year that Francine Hughes killed her husband, the FBI had reported that spousal abuse was the United States' most underreported crime[4]. Cases like Francine Hughes' helped draw awareness to this issue, and inspire changes in U.S. laws and policies on domestic violence for the better protection of the victims. After she was acquitted due to *temporary insanity*, „burning bed syndrome" became something studied by academics and used as a defense in other cases of women killing their abusers. A decade later, the U.S. Congress passed the *Violence Against Women Act*[5], which established a national domestic violence hotline, forced all the states and jurisdictions to recognize and enforce victim protection orders, and provided funding for domestic violence training for law enforcement officers, among other provisions. So, domestic violence had been recognized as a major national problem, but, even in 2019, in the U.S., „20 people per minute are physically abused by an intimate partner, and one in four women and one in nine men will be victims of severe physical abuse by an intimate partner during their lifetime".[6]

However, it is important to note that movies or books can also perpetuate harmful stereotypes and myths about domestic violence, such as the idea that victims are to blame for the abuse or that the abuser is always a man. In recent years, the issue of domestic violence against men has gained increased attention and recognition within the field of jurisprudence and in popular media. In Romania, the legal system recognizes domestic violence against both men and women and provides legal protection for the victims regardless of gender. But, like in many countries, the societal stigma surrounding male victims of domestic violence remains a significant barrier for many men seeking help. This is often due to the prevalent stereotype that men are supposed to be physically strong and emotionally resilient, and therefore less likely to be victims of domestic violence. On the international level, there is growing recognition of the importance of acknowledging and addressing domestic violence against men. For example, the UN[7] has highlighted the issue of male victims of domestic violence in its publications, as have several international organizations, such as the World Health Organization (WHO)[8] and EU[9].

2. Romanian law on domestic violence

2.1. General considerations and definition

The fight against conjugal (domestic) violence has intensified at the national and international level amid the enrichment of the legal framework and the media coverage of this challenge in the context of the expansion of jurisprudence in civil and criminal cases with this object. From the perspective of civil law, there is an attempt to delegalize disputes with this object, a sign that the preventive measures of conjugal violence work in practice

Blackmore, *Francine Hughes Killed Her Abusive Husband and Changed U.S. Views on Domestic Violence*, 21.03.2019, available at *https://www.history.com/news/burning-bed-syndrome-francine-hughes-domestic-abuse*, last consulted on 03.05.2023.

[4] *Ibidem*.

[5] The *Violence Against Women Act* of 1994 is a U.S. federal law signed by President Bill Clinton on September 13. See Office on Violence Against Women, Legislation and Regulations, at *https://www.justice.gov/ovw/legislation*, last consulted on 03.05.2023.

[6] See E. Blackmore, *op. cit., loc. cit.*

[7] For example: report from January 21, 2022, *Exploring conflict related sexual violence against men, boys and LGBTI+ people*, available at *https://www.un.org/sexualviolenceinconflict/report/exploring-conflict-related-sexual-violence-against-men-boys-and-lgbti-people/*, last consulted on 03.05.2023; report from December 9, 2019, *Checklist on preventing and addressing conflict-related sexual violence against men and boys*, available at *https://www.un.org/sexualviolenceinconflict/report/checklist-on-preventing-and-addressing-conflict-related-sexual-violence-against-men-and-boys/*, last consulted on 03.05.2023.

[8] WHO stated that most aggressors are men (*a contrario*, men can also be victims). Both women who experience intimate partner violence and children who are affected, either directly or indirectly, are at a higher risk of developing mental health conditions (the same risk also exists for the men who perpetrate intimate partner violence). WHO contributed to the first Psychiatry Commission on intimate partner violence and mental health, which brought together international experts from a variety of backgrounds (academics, clinicians, and those with lived experience), in order to find some key steps against violence and its consequences (and also to prevent future violence) by „understanding the connections between intimate partner violence and mental health and by „training health care providers in how to look for signs and ask the right questions in the right way". See *https://www.who.int/news/item/06-10-2022-preventing-intimate-partner-violence-improves-mental-health*, 6 October 2022, last consulted on 03.05.2023.

[9] See, for example, point (9) from Directive 2011/99/EU of the European Parliament and of the Council, of December 13, 2011, on the European Protection Order (EPO), OJ L 338/2/21.12.2011.

with regard to the victims or co-victims of these illicit interferences. Of course, the effectiveness of prevention depends essentially on knowing the causes of the aggression and, at the same time, on the role of the victim's behavior in generating it. On the other hand, from the perspective of criminal law, there is a worrying increase in the continuing causes of violence within the family, and between family members within the meaning of art. 177 CP, including high-violence crimes such as murder and qualified murder.[10]

The basic regulation of domestic violence is found in Law no. 217/2003 on preventing and combating domestic violence[11], but also in other special regulations[12] related to the institution.

Preventing and combating domestic violence is part of the integrated family protection and support policy and is an important public health issue, according to Law no. 217/2003 [art. 1 para. (2)]. The same law defines *domestic abuse* as „any intentional inaction or action of physical, sexual, psychological, economic, social, spiritual, or cyber violence that occurs in the family or domestic environment or between spouses or former spouses, as well as between current or former partners, whether the abuser lives or has lived with the victim" (art. 3).

Important aspects need to be highlighted. *First of all*, the law recognizes that domestic violence may occur in various types of relationships, including marriage, cohabitation, or familial (domestic) relationships. Moreover, the law also refers to former spouses or former partners, as well as situations in which the abuser lives or does not live with the victim. Therefore, the criterion proposed by the legislator is not strictly related to the fact that the victim and her abuser live in the same place[13], nor to a person's marital status deriving from or outside marriage (including relationships after divorce), free unions, or partnerships. The only condition that emerges from the law is that acts of domestic violence committed are based on a family relationship or on an assimilated into the family relationship. *Secondly*, the legislator's reference to „any intentional inaction or action of (…) violence that occurs in the family or domestic environment *or between* spouses or former spouses, as well as between current or former partners (…)", justifies the conclusion that the law also protects when the victims are family members other than spouses or former spouses, partners or former partners, such as ascendants and descendants, brothers and sisters, their children, as well as the persons who became such relatives by adoption, within the meaning of the concept of *family member*, retained by art. 5 para. (1)[14] from Law no. 217/2003 and, with almost the same content, by art. 177 CP[15].

Romanian family law also addresses domestic violence, particularly in the context of adoption or divorce proceedings, but also regarding the exercise of parental authority. Thus, according to art. 508 CC[16], the court may decide that the parent may be deprived of parental rights if he or she endangers the life, health, or development of the child through ill-treatment, abuse of alcohol or narcotics, abusive behavior, gross negligence in the exercise of his parental obligations or rights, or by serious harm to the principle of the best interests of the

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[10] The same crescendo of serious cases regarding domestic violence was observed in other European countries, such as France, where, for example, between 2020 and 2021, cases of homicide between family members increased by 14%. See *Bilan de plusieurs années d'action contre les violences au sein de la famille*, in Revue Actualité Juridique Famille, no. 1/2023 (January), ed. Dalloz, p. 15.

[11] Republished in the Official Gazette of Romania, Part I, no. 948/15.10.2020.

[12] Violence, in all the mentioned forms (see *infra*, point **2.2. Forms of domestic violence**), is criminalized in various forms in the Romanian Criminal Code, the legislator even allocating special provisions of criminalization such as domestic violence (art. 199) and the killing or injury of the newborn by the mother (art. 200).

[13] See also A.-Gh. Gherasim, *Violența domestică – noțiune și reglementare la nivel internațional și* național, at *https://lex-avocatura.ro/violenta-domestica-notiune-si-reglementare-la-nivel-international-si-national,* last consulted on 15.03.2023. In addition, see CCR dec. no. 264/2017 (Official Gazette of Romania no. 468/22.06.2017) regarding the exception of unconstitutionality of the phrase „in case that they cohabit" from art. 5 letter c) of the Law no. 217/2003 on preventing and combating domestic violence (the version published in Official Gazette of Romania no. 365/13.05.2012). CCR admitted this exception of unconstitutionality and decided that it violated the Romanian constitutional provisions of art. 1, regarding the rule of law, of art. 22, regarding the right to life and to physical and mental integrity, and of art. 26, regarding intimate and private life. Moreover, CCR retained that the Convention of May 11, 2011, of the Council of Europe on preventing and combating violence against women and domestic violence, ratified by Romania through Law no. 30/2016, represents a genuine treaty on human rights, and art. 3 letter b) of it provides that „domestic violence" means all acts of physical, sexual, psychological, or economic violence that occur in the family or domestic environment or between former or current spouses or partners, „regardless of whether the aggressor shares or shared the same domicile with the victim". Therefore, the Court observed that the cohabitation requirement — imposed by the provisions of art. 5 letter c) of the Law no. 217/2003 to people who have established relationships similar to those between spouses or parents and children, in order to be able to issue a PO —, contains an inconsistency, in the meaning of art. 20 para. (2) of the Romanian Constitution, between the internal law and a treaty regarding fundamental human rights. Since the domestic law does not contain more favorable provisions, the provisions of art. 20 para. (2) of the Romanian Constitution enshrine the priority of the international regulation, in this case, the Convention of May 11, above mentioned.

[14] See *infra*, point **2.3. Subjects of domestic violence**.

[15] See Law no. 286/2009, published in the Official Gazette of Romania, Part I, no. 510/24.07.2009.

[16] This does not exempt the parent from his obligation to provide financial support to the child (art. 510 CC). See Law no. 287/2009, republished in the Official Gazette of Romania, Part I, no. 505/15.07.2011.

child. In the domain of adoption, the law[17] provides that it cannot adopt a person who has been convicted of an intentional crime against human beings or against the family, as well as a person who has been deprived of parental rights. The impediment also relates to the situation in which a person wishes to adopt himself or herself and his or her spouse is in one of the aforementioned situations. According to art. 37 para. (7) of the Law no. 272/2004 on the protection and promotion of child rights[18], among the serious reasons that can be taken into account by the judge in order to decide the exercise of parental authority only by one of the parents, there can be retained also the violence against the child or against the other parent, the convictions for violent crimes, and any other reason related to the risks for the child that would derive from the exercise by that parent of parental authority. Moreover, art. 21 of the same law provides some criteria that could be taken into account when the judge determines the child’s place to live after divorce, based on his or her best interests, and these criteria include the history of parental violence against the child or against other persons.

The family, in the broader meaning of the concept, is protected at the criminal level and by other provisions of the Criminal Code, such as the offenses contained in Chapter II (offenses against the family) of Title VIII (art. 376-380 on bigamy, incest, abandonment of the family, non-compliance with the measures regarding the custody of the minor, preventing access to compulsory general education).

2.2. Forms of domestic violence

The forms of domestic violence are regulated by art. 4 para. (1) of Law no. 217/2003, and these refer to:

- *verbal violence* (brutal language, such as the use of insults, threats, and degrading or humiliating words and expressions);
- *psychological abuse*[19] (imposing the will or personal control, provoking states of tension and mental suffering in any way and/or by any means, by verbal threats, blackmail, demonstrative violence on objects and animals, ostentatious display of weapons, neglect, control of personal life, acts of jealousy, coercion of any kind, unlawful stalking, monitoring of the home, workplace, or other places frequented by the victim, making telephone calls or other types of communications by means of distance transmission, which by frequency, content, or the moment they are made create fear, as well as other actions with similar effects);
- *physical abuse* (personal injury by beating, pushing, knocking down, hair pulling, pricking, cutting, burning, choking, biting, in any form and intensity, including those disguised as the result of accidents, through poisoning, intoxication, and other actions with similar effect, submission to exhausting physical effort or activities with high degree of risk to life or health and physical integrity, other than those established for economic abuse);
- *sexual violence* (sexual aggression, imposing degrading acts, harassment, intimidation, manipulation, brutality in order to have forced sexual relations, rape, including marital rape);
- *economic abuse* (prohibition of professional activity, deprivation of economic means, including deprivation of means of primary existence, such as food, medicines, and first-aid items; intentional theft of the person's goods; prohibition of the right to own, use and dispose of the common goods; inequitable control over the common goods and resources; the refusal to support the family; the imposition of heavy and harmful work to the detriment of health, including to a minor family member; as well as other actions with similar effects);
- *social abuse* (imposing the isolation of the individual from the family, community, and friends; the prohibition of attending the educational institution or the workplace; the prohibition or limitation of professional achievement; the imposition of isolation, including in the common house; the deprivation of access to the living space; the deprivation of identity documents; the intentional deprivation of access to information; as well as other actions with similar effects);
- *spiritual abuse* (underestimating or diminishing the importance of satisfying moral-spiritual needs by banning, limiting, ridiculing, or penalizing the aspirations of family members, the access to cultural, ethnic,

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[17] See Law no. 273/2004 regarding the procedure of adoption, republished in the Official Gazette of Romania, Part I, no. 739/23.09.2016 [art. 7 para. (1)-(3)].

[18] See Law no. 272/2004, republished in the Official Gazette of Romania, Part I, no. 159/05.03.2014.

[19] In a recent case, it was admitted the notification regarding the issuance of a PO and disposed that, for a period of 3 months, the aggressor keeps a minimum distance of 50 m from the victim, and any contact with the victim was forbidden. In opposition to the opinion of the court of first instance, the tribunal found, on the basis of the same evidence, that the aggressor exercised forms of psychological violence against the victim. The aggressor’s temperament and the threatening and offensive language used in the messages sent to the victim were likely to cause real fear, tension, and mental distress. Thus, the placement of the victim in an inferior position by the aggressor, the disclosure in public space of the conflict between the two on a social page, and his attempt to crush his dignity are among the reasons for issuing the PO (Bucharest Trib., 3rd civ. s., crim. dec. no. 446/A/21.02.2022, *www.rejust.ro*).

linguistic or religious values, prohibiting the right to speak in one's native language and to teach children to speak in their native language, imposing adherence to unacceptable spiritual and religious beliefs and practices, as well as other actions with similar effects or similar repercussions);

- *cyber violence* [online harassment[20], online gender-related hate speech, online stalking, online threats, non-consensual publication of information and intimate graphic content, illegal access (interception) of communications and private data, and any other form of misuse of information technology and communications via computers, smartphones, or other similar devices that use telecommunications or can connect to the Internet and transmit and use social or e-mail platforms for the purpose of embarrassing, humiliating, intimidating, threatening, or silencing the victim].

Para. (2) of art. 4 specifies also that under no circumstances may custom, culture, religion, tradition, or honor be considered as justification for any type of violence defined in this law.

2.3. Subjects of domestic violence. Sanction. Prior complaint

As we have mentioned[21], the applicable law regarding domestic violence also provides a definition of the concept of family member. Thus, the response to the question *Who are the subjects of domestic violence?* is given by art. 5 of Law no. 217/2003. According to the law, *family member* means:

a) ascendants and descendants, siblings, their spouses, and children, as well as persons who become relatives by adoption, according to the law;

b) the spouse and/or former spouse; siblings, parents, and children from other relationships of the spouse or former spouse;

c) persons who have established relationships similar to those between spouses or between parents and children, current or former partners, regardless of whether or not they have lived with the abuser, ascendants and descendants of the partner, as well as their siblings;

d) the guardian or another person who exercises in fact or in law rights related to the child;

e) the legal representative or another person who takes care of a person with mental illness, intellectual disability, or physical disability, except for those who fulfill these attributions in the exercise of professional duties.

The law also underlines, in para. (2) of the same art. 5, that *victim* means a natural person who is subjected to one or more of the forms of violence provided in art. 4, including children witnessing such forms of violence.

Art. 199 CP establishes that the criminal offenses of murder, aggravated murder, battery, and other acts of violence or battery leading to death, committed against a family member, are punished more severely, with the maximum limit of these punishments increasing by a quarter.

In the case of family conflicts, the police can act[22] after a written referral is filed at the police station competent over the territorial area of the victim's home (if it is made by the victim it is called a *complaint*, if it is made by a witness, it is called a *denunciation*), following a telephone call to the service officer of the police station or unit in the respective area or a call to the Single Emergency Call Service 112 (which can be made by anyone aware of such events), a verbal referral made by anyone directly to the police officer patrolling, or the police may find out from the media or during an intervention in a different case. An *ex officio* referral is the way in which the police find out about an offense in any other way than through the victim's complaint. Referrals about acts of domestic violence may also be filed by persons with management positions within a public administration authority or within other public authorities, public institutions, or other legal persons under public law, as well as by any person with control powers who, in the exercise of their powers, has become aware of the commission of an offense for which criminal proceedings are instituted *ex officio*. They are obliged to immediately notify the criminal investigation body and to take measures so that the traces of the offense, the *corpora delicti*, and any other means of evidence do not disappear (art. 291 CPP).

[20] There is an extension of the general incrimination in art. 208 CP on harassment: (1) The act of a person who repeatedly pursues, without right or without legitimate interest, a person or supervises his or her home, job or other places frequented by him, thus causing him a state of fear, shall be punished by imprisonment from 3 to 6 months or by a fine. (2) Making telephone calls or communications by means of remote transmission that, by frequency or content, cause a person fear shall be punished by imprisonment from one month to 3 months or by a fine, if the act does not constitute a more serious crime. (3) The criminal action is set in motion upon the prior complaint of the injured person."

[21] See *supra*, point **2.1. General considerations and definition**.

[22] See also *https://www.politiaromana.ro/ro/prevenire/violenta-domestica/temporary-protection-order*, last consulted on 04.05.2023.

The victims must know that they can refer *a prior complaint* to the criminal investigation body or the prosecutor. This right is personal and belongs to the injured party, but we must retain that the prior complaint may also be lodged by an agent, in which case the power of attorney must be drawn specifically for this purpose and must remain attached to the complaint during the proceedings. The criminal action in cases of offenses punishable upon prior complaint of the injured person, such as battery or other acts of violence (art. 193 CP); threats (art. 206 CP); rape in non-aggravating forms [art. 218 paras. (1) and (2) CP]; sexual assault in non-aggravating forms [art. 219 para. (1) CP]; theft between family members [art. 231 para. (1) CP]; and destruction [art. 253 paras. (1) and (2) CP], is governed by the *principle of availability*: the victim may decide to withdraw the complaint, a situation which extinguishes the criminal action previously initiated. In the case of the offense of battery or other acts of violence committed against a family member, the criminal action may be initiated *ex officio*, and in this case, the victim's will to stop the punishment of the aggressor can no longer be manifested. For the other categories of offenses (for which the law does not require the lodging of a prior criminal complaint), the criminal investigation bodies do not need the express manifestation of will of the injured person to prosecute the perpetrator, regardless of how they found out about it (complaint, *ex officio*).

We must retain, from art. 289, 295 CPP, that *a prior complaint* shall have a certain form[23] and has to be submitted within a certain deadline (within 3 months from the day when the injured person found out about the perpetration of the deed[24]).

2.4. Temporary protection order (TPO)

According to art. 28 of Law no. 217/2003, republished, the *TPO*[25] *is issued by the police agents* who, in exercising their professional duties, find that there is an imminent risk that the life, physical integrity, or freedom of a person is endangered by an act of domestic violence.

The police agents establish *the existence of an imminent risk* based on their assessment of the factual situation resulting from the evidence held and the risk assessment form. If, further to the assessment of the factual situation, it is found that the requirements for the issuance of a TPO are not fulfilled, the police agents have the obligation to inform the persons stating that they are victims of domestic violence that they have the possibility to file with the court an application for the issuance of a protection order (PO).

A TPO issued by a police agent shall order, for a period of 5 days, one or several *protection measures* (art. 31[26] of the above-mentioned law):

- temporary eviction of the aggressor from the common dwelling, irrespective of whether such is the holder of the ownership right thereon;
- reintegration of the victim and, as the case may be, of the children, in the common dwelling;
- ordering the aggressor to keep a determined minimum distance from the victim, from the members of the victim's family, or from the residence, workplace or educational unit of the protected person;
- ordering the aggressor to deliver the weapons held to the police.

A TPO shall also include an indication that the breach of any of the ordered measures constitutes an offense and is punished by imprisonment from one month to one year. If the TPO takes the measure of temporary eviction of the aggressor and their accommodation is not ensured from another source, they shall be informed and guided to the residential centers offering accommodation for homeless people, night shelters managed by the local public administration authorities, or any other adequate place. If the aggressor requests

[23] A prior complaint is addressed to the criminal investigation body or to the prosecutor only by the injured person or by an attorney-in-fact (there should be a limited power of attorney, which shall remain attached to the complaint). If it is made in writing, the complaint has to be signed by the injured person or by the attorney-in-fact. A complaint may also be submitted verbally, and its content shall be recorded in a report written by the person receiving it. A complaint may also be sent electronically, namely by e-mail, but only if it is certified by an electronic signature. Information which shall be included in the complaint: name, first name, personal identification number, quality and domicile of the claimant, description of the fact forming the object of the complaint, indicating the perpetrator, and the means of evidence.

[24] When the injured person is a minor or a major who benefits of judicial counseling or special guardianship, the term of 3 months shall start running from the date when their legal representative found out about the perpetration of the deed. If the perpetrator is the legal representative of the minor or of the incapacitated person, the term of 3 months runs from the date of the appointment of a new legal representative.

[25] See also *https://www.politiaromana.ro/ro/prevenire/violenta-domestica/temporary-protection-order*, last consulted on 04.05.2023.

[26] The violation, by the person against whom a TPO has been issued, of any measures provided for in art. 31 para. (1) and ordered by the TPO constitutes an offense and shall be punished by imprisonment from 6 months to 5 years [art. 47 para. (2) from Law no. 217/2003, republished].

accommodation in a residential center such as those mentioned above, they shall be led by the mobile team (mobile team: representatives of the social assistance public service).[27]

The obligations and interdictions ordered against aggressors by the TPOs become mandatory immediately after their issuance, without any summons or lapse of time. The period of 5 days shall be calculated per hours, *i.e.*, 120 hours from the moment when the TPO was issued.[28] The TPO shall be communicated to the aggressor and to the victim[29] and shall be submitted by the police unit to which the police agent who issued it belongs, for confirmation, to the prosecutor's office attached to the competent local court within whose territorial area it was issued, within 24 hours from its issuance date[30]. The prosecutor or the competent prosecutor's office decides the need to maintain the protection measures ordered by the police body within 48 hours from the issuance of the TPO. If it finds that it is no longer necessary to maintain the ordered protection measures, the prosecutor may order the termination of the protection measures, supporting such orders with reasons and indicating the time from which they cease. The prosecutor shall communicate this immediately to the police unit that submitted the TPO, which shall take measures to immediately inform the persons who formed the object of such an order.[31] If the prosecutor confirms that it is necessary to maintain the protection measures ordered by the police body by the TPO, it shall apply an administrative resolution to its original counterpart. The prosecutor shall then submit the TPO with a term of 5 days, accompanied by the documents underlying the issuance and confirmation thereof, to the competent local court within whose territorial area it was issued, accompanied by an application for the issuance of the protection order with a maximum term of 6 months. The initial term (of 5 days) for which the TPO was issued shall be extended as of right with the time necessary for the fulfillment of the judicial procedure of issuing the protection order, informing the aggressor of this fact.[32] The TPO may be appealed to the competent court of law within 48 hours of its communication.[33]

2.5. Protection order (PO)

According to the provisions of art. 38 of Law no. 217/2003, republished, *a PO is a judgment issued by a court of law* by which it orders, at the request of a person whose life, physical or mental integrity, or freedom is endangered by an act of violence perpetrated by a family member, one or several of the following measures, obligations, or interdictions, having an interim nature:

- temporary eviction of the aggressor from the family home, irrespective of whether such is the holder of the ownership right thereon;
- reintegration of the victim and, as the case may be, of the children, in the family home;
- limitation of the aggressor's right of use only over a part of the common dwelling when such may be partitioned in such a way that the aggressor does not come in contact with the victim;
- accommodation or placement of the victim, with her consent and, as the case may be, of the children, in a support center;
- ordering the aggressor to keep a determined minimum distance from the victim, from the members of the victim's family or from the residence, workplace or educational unit of the protected person;
- interdiction for the aggressor to go to certain localities or determined areas that the protected person attends or visits periodically;
- ordering the aggressor to permanently wear an electronic device of surveillance;
- prohibition of any contact, including by telephone, by correspondence, or in any other manner, with the victim;
- ordering the aggressor to deliver the weapons held to the police;
- entrusting minor children or establishing their residence.

By the same judgment, the court may order that the aggressor bear the rent and/or maintenance costs for the temporary dwelling where the victim, the minor children, or other members of the family live or shall live because of the impossibility to stay in the family home. Besides any of the measures listed above, the court may

[27] See art. 31 paras. (4), (5) of Law no. 217/2003, republished.
[28] See art. 32 paras. (1), (2) of Law no. 217/2003, republished.
[29] See art. 33 para. (1) of Law no. 217/2003, republished.
[30] See art. 34 para. (1) of Law no. 217/2003, republished.
[31] See art. 34 paras. (3), (5) of Law no. 217/2003, republished.
[32] See art. 34 paras. (4), (6), (7) of Law no. 217/2003, republished.
[33] See art. 35 para. (1) of Law no. 217/2003, republished.

order that the aggressor undergo psychological counseling, psychotherapy and may recommend voluntary or non-voluntary hospitalization. If the aggressor is a consumer of psychoactive substances, the court may order, with their consent, their integration into a support program for drug consumers.

According to art. 44 of Law no. 217/2003, republished, PO is *enforceable*. It is immediately communicated (the term is of a maximum 5 hours) to the structures of the Romanian Police within whose territorial area the victim's and the aggressor's dwelling is located. The PO that orders any of the measures provided under art. 38 shall enforce them immediately, by the police or, as the case may be, under their supervision. Another legal obligation incumbent upon the police consists of the duty to supervise the manner in which the protection order is complied with and to notify the criminal prosecution body in case of avoidance of its enforcement.[34]

3. EU law[35]

Romania is a member state of the European Union and, as such, is subject to the EU's legal framework on domestic violence. The EU has adopted several directives and regulations that aim to prevent and combat domestic violence effectively, including:

The Victims' Rights Directive (Directive 2012/29/EU of the European Parliament and of the Council of October 25, 2012, establishing minimum standards on the rights, support, and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA[36]) establishes a mechanism for the mutual recognition of protection measures in criminal matters between Member States and sets out minimum standards for victims' rights in all EU member states, including the right to access to justice, protection, and support. Member states are required to ensure that victims of domestic violence receive appropriate protection and support, including access to legal aid, medical care, counseling, and emergency services. According to paras. (11) and (13), the Directive lays down minimum rules (Member States may extend the rights set out in order to provide a higher level of protection) and applies in relation to criminal offenses committed in the Union and to criminal proceedings that take place in the EU. It confers rights on victims of extra-territorial offenses only in relation to criminal proceedings that take place in the EU. A primary consideration in applying this Directive must be the principle of the children's best interests, in accordance with the Charter of Fundamental Rights of the European Union and the United Nations Convention on the Rights of the Child, adopted on 20.11.1989. Child victims should be considered and treated as the full bearers of the rights set out in this Directive and should be entitled to exercise those rights in a manner that takes into account their capacity to form their own views [para. (14)].

The European Protection Order Regulation allows for the recognition and enforcement of protection orders issued in one member state to be recognized and enforced in another member state. This facilitates the protection of victims who move or travel within the EU. To effectively protect victims of violence and harassment, national authorities often grant them specific measures (restraining, barring, or a similar PO) that help prevent further aggression or re-assault by the offender. If someone has been granted a PO in a Member State and he wishes to continue to benefit from this protection when moving or traveling to another Member State, the EU has put in place a mechanism for the mutual recognition of protection measures. National protection measures can be of a civil, criminal, or administrative nature, and their duration, scope and procedures of adoption vary among the Member States. POs orders covered by the Directive and the Regulation concern situations where someone is a victim, or a potential victim, of crime and benefits from a prohibition or regulation of entering certain places or being contacted by or approached by a person causing risk. *Directive 2011/99/EU on the European Protection Order (EPO)*[37] sets up a mechanism allowing for the recognition of protection orders issued as a criminal law measure between Member States. If someone benefits from a PO in criminal matters issued in one Member State, he may request an EPO. Protection should be awarded through a new protection measure

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[34] The violation, by the person against whom has been issued a PO, of any measures provided for in art. 38 paras. (1), (4) and (5) letters a) and b) and ordered by PO constitutes an offense and shall be punished by imprisonment from 6 months to 5 years [art. 47 para. (1) from Law no. 217/2003, republished].

[35] Information taken over from the *„Study on domestic abuse*", conducted in 2016 by the Crime Research and Prevention Institute, cited by *https://www.politiaromana.ro/ro/prevenire/violenta-domestica/causes-of-domestic-abuse*, last consulted on 08.05.2023, and Camelia Deaconescu, *Cercetare practică violența domestică*, from 06.04.2018, on *https://vdocuments.net/cercetare-practica-violenta-domestica.html*, last consulted on 08.05.2023.

[36] OJ L 315/57 from 14.11.2012, at *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0029*, last consulted on 09.05.2023.

[37] OJ L 338/2 from 21.12.2011, on *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011L0099*, last consulted on 02.05.2023.

adopted by the Member State to which he will travel or move, following a simplified and accelerated procedure. However, if someone benefits from a civil law PO issued in the Member State of his residence, he may use *Regulation (EU) no. 606/2013 on mutual recognition of protection measures in civil matters*[38], which sets up a mechanism allowing for the direct recognition of POs issued as a civil law measure between Member States. Therefore, if someone benefits from a civil law PO issued in the Member State of his residence, he may invoke it directly in other Member States by obtaining a certificate[39] and presenting it to the relevant authorities certifying his rights.

4. Domestic violence, a complex phenomenon

4.1. Causes of domestic abuse[40]

- *Cultural Factors:* the attitudes and social stereotypes that legitimate the dominant role of men[41] and the subordinated role of women, which have been perpetuated throughout the history of humankind; the perception of the divorce[42]; society's acceptance of violence within a couple[43]; the fact that violence is seen as a form of resolving tensed or conflictual situations[44].
- *Mass media* contributes to keeping violence alive and, without any doubt, it has a role in the rise of aggressiveness. Violence is a form of aggressiveness that is learned, and the easiest form of learning is by imitation, which is why the media plays an essential role (news, television programs, cartoons), and violence is abundant.
- *Social and economic factors:* poverty is one of the most frequently incriminated factors in the appearance and proliferation of domestic violence and determines frustration in a person, which generates, in turn, a negative energy that affects family life; financial dependency of a woman, which exists in many of the cases of domestic abuse, favors the victim's lack of reaction and, thus, she chooses to endure; however, a conclusion that domestic abuse is a characteristic of poor families is wrong without affecting the economic middle or upper classes because this type of behavior is manifest in all environments.
- *Legal Factors:* the cumbersome legal procedures applicable in the case of requesting custody of children, the lack of training of some of the experts from the public institutions – social workers, prosecutors, and psychologists; moreover, the crisis of trust in the legal system may be an aggravating factor of this phenomenon.
- *Political Factors:* the lack of political interest in women's problems in general and domestic abuse in particular; the excessive valorization of the family as private space, by limiting the intervention of the State in the life of a couple; the lack of involvement of women in political life.

Besides these causes, there are several circumstances which determine or favour the occurrence of domestic abuse, such as: *excessive alcohol consumption*; *partners' jealousy*; *partners' infidelity*; *sexual problems of the couple*; *arguments regarding children*, existence of unwanted children or divergences regarding the manner of upbringing and educating children; *the woman's desire to become financially independent* - consolidation of woman's status in the family, uncooperating negotiation of her position in the family; *difficulties which make the couple vulnerable* (poverty/depreciation of living standard associated with feelings of failure and

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[38] OJ L 181/4 from 29.06.2013, on *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0606*, last consulted on 02.05.2023.

[39] OJ L 263/10 from 03.09.2014, on *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0939*, last consulted on 02.05.2023.

[40] Information taken over from the *Study on domestic abuse*, conducted in 2016 by the Crime Research and Prevention Institute, cited by *https://www.politiaromana.ro/ro/prevenire/violenta-domestica/causes-of-domestic-abuse*, last consulted on 08.05.2023, and C. Deaconescu, *Cercetare practică violența domestică*, from 06.04.2018, at *https://vdocuments.net/cercetare-practica-violenta-domestica.html*, last consulted on 08.05.2023.

[41] Thus, the main factor responsible for the manifestation of the phenomenon of domestic abuse is represented by the mentality of the men superiority. It should not be forgotten that in Romania, in particular in the rural environment, the family is still under the control of men, being based on the patriarchal pattern of relationships, in which the man decides and the woman listens to, conforms to, and follows.

[42] A perspective according to which a divorce is the recognition of a failure, mostly a woman's failure, who is responsible for the unity of the family, is still passed on by education.

[43] Violent family conflicts, in which the woman is a victim, become to a certain extent known within the entourage and within the community where they live, and the lack of reaction of the people around shows indifference or even tacit approval.

[44] This may be seen not only at the level of the family or couple, but also at the community level. Violence is used in order to impose one's own vision on divergent aspects. That is why the family of origin, the entourage, the group of friends, and the group of colleagues are as many factors determining an individual's behavior as the modalities of action and resolution of conflicts.

frustration; absence of jobs/unemployment associated with feelings of insecurity; stress associated with various unpleasant events, such as loss of job, accident etc.; health condition of one or both partners).

There is a *vicious circle of violence*. Although it all starts with the acceptance of a first act of aggression (*„first slap*"), unfortunately, in time, the violent episodes may become more frequent, intense, and more severe. Moreover, the abusive process may start even before the creation of the couple. May be a predisposition, a role learned from childhood, the role of passive victim. Remember the case of Francine Hughes? Persons who unconsciously try to seek in their life partner a model seen in their family of origin, which may be abusive. Other people project an ideal partner in a person they have just met, refusing to see his true personality, living in their own fantasy, and interpreting some of his traits in an idealized manner. Often, the abusing person is forgiven, but, in time, as the frustration rises, the level of tension rises, and the acts of violence become more frequent and severe. The victim's emotional and financial dependency on the aggressor determines, however, that the victim must repress her preservation instincts, find excuses for the aggressor, and remain in this abusive relationship. There are even situations in which the victims may change or adapt her personality in order to no longer incite her life partner to aggressive behaviors and hesitate for a long time before they decide to ask for support or before they effectively take the decision to exit the dysfunctional relationship. If this happens, it is quite late; there is a tendency to postpone this moment as much as possible. There are also extreme situations, which are less frequent, of *high-risk abusers* who are not characterized by a gradual or phased process of violent behavior within the couple; these cases are very severe from the beginning and often end with hospitalization or even the death of the victim.

4.2. How about a safety plan?

It is not easy to leave a violent relationship. The aggressor[45] either does not admit how severe his behavior is, or promises to change if he is forgiven and supported by the family. Most of the time, he uses emotional blackmail and blames other people for the current situation in the family. Regardless of the control strategy that the abuser applies, the victim[46] should know that she has the right to a dignified life and that there are institutions and NGOs that may help her solve the crisis. There are available resources for abused and beaten women, including shelters, training centers for specialization in a profession, legal services, and child care. By staying and continuing to accept repeated abuses, hoping that he would eventually realize that he was wrong and change, the victim consolidates his conviction that he may do more. The victim's patience contributes, in fact, to the perpetuation of the problem. Even if the abuser attends psychological counseling, there is no guarantee that he will change. After hours of therapy imposed by the victim or by a judge, many abusers continue to be violent. Regardless of whether the victim decides to stay or leave the abusive partner, there are several measures that may confer on her a higher level of personal safety. Here are some *recommendations[47] made by the Romanian Police and the representatives of the „Necuvinte" Association[48]*: be prepared for emergency situations[49], make

[45] Abusers are often described as having low self-esteem, excessive jealousy, aggressive and hostile personalities, low communication skills, low social skills, an intense need for power or feelings of incapacity, anxiety or a strong fear of abandonment, narcissistic personalities, egoism, etc. Most of the time, people who are violent at home seem not to be aware or responsible for their actions or have unbalanced personalities; they cannot manage their anger or nervous breakdowns. However, except for pathological cases, aggressors are normal people from a mental standpoint who are to be found in all social categories without essential distinctions in terms of education or social status. The aggressor's attitude is characterized by: *minimizing responsibility for their own behavior*; *transfer of responsibility for the act of violence to the partner*; *transfer of responsibility to other persons or situations that negatively influenced the cohabitation with the partner*: her parents, her siblings or other relatives, her friends; the poverty, unemployment, etc. See *Study of domestic abuse, op. cit., loc. cit.*

[46] Victims (most of them women) learn that violence is outside their control or that it is normal, and, thus, they become depressed and incapable of helping themselves. Which is specific to a victim of domestic violence is the material or emotional dependency on the aggressor, internalizing traditional mentalities regarding the woman's role within a couple, as well as the presence of personality traits predisposing her to such victimization (mental fragility, self-blaming tendency, docility, obedience, anxiety, conformism, irascibility; they may be persons without initiative or they may lack objective perception of reality). See *Study of domestic abuse, op. cit., loc. cit.*

[47] See *https://www.politiaromana.ro/ro/prevenire/violenta-domestica/temporary-protection-order*, and, for the Romanian version, *https://www.necuvinte.ro/cere-ajutor/planul-de-siguranta/*, last consulted on 08.05.2023.

[48] „Necuvinte" Association is a Romanian non-governmental organization (NGO), created in 2013 in order to combat discrimination, abuse, and gender-based violence. See, for details, *https://www.necuvinte.ro/mission-vision/?lang=en*, last consulted on 08.05.2023.

[49] The victim must be aware of the signs triggering the abuse and use any reason to get away from the abuser and get out of the house. Moreover, the victim must identify the safe areas of the house where she takes refuge (it's better to avoid small spaces, spaces without escape, or rooms with potential weapons – like the kitchen, and, if possible, choose a room with a telephone and an exit room or a window) and set a code (word, phrase, or signal) by which the victim's friends or neighbors know about the danger, so that they call the police for help.

an escape plan[50], get another mobile telephone[51], communicate safely on the internet[52], protect yourself against GPS supervision and recording devices[53], keep your location secret[54], ask for help by calling 112!

4.3. Consequences of domestic abuse in general and their effects on children in particular

Domestic abuse impacts the *physical and mental health conditions* of the victims, their *professional life,* their *economic status*, and their *social relationships*. The victim may suffer injuries that require medical care, as well as temporary or permanent emotional disorders (acute or chronic depression, phobias, post-traumatic stress, panic attacks, anxiety, insomnia), personality disorders, and, sometimes, behavior disorders, food disorders, and even suicide attempts. Regarding the professional and economic status, the aggressor may prohibit the victims from taking a job, or if they already have a job, they may find it difficult to maintain it because of repeated medical leaves after the aggressions suffered. From a social point of view, the victims are radically or gradually isolated from their family, group of friends, colleagues, and social support services. The aggressor prohibits the victim from keeping in touch with the world outside the home, threatens her, has crises of jealousy, and beats the victim if she does not submit to the interdictions invented by the aggressor. The social isolation of the victim is one of the most serious drivers of failure in the woman's attempt to exit such dependency.

Family violence is the main cause of pre-delinquent behaviors in minor children (running away from home, leaving school, vagabondage), which is a first step towards delinquency in the form of theft, robbery, drug consumption and trafficking etc. Most of the children who were sexually abused within their families became abusers, continuing the cycle of violence. Children are always affected by abuse against their mother and may become, in turn, victims of the aggressor, who, in most cases, is their biological father or stepfather. So, there is for sure a link between acts of abuse suffered in childhood and the risk of becoming victims/aggressors when growing up (boys face a higher likelihood of becoming aggressors, and girls face a higher likelihood of becoming victims). It is essential that they benefit from support in order to deal with the experience of violence and to understand that a life of terror and abuse is not normal. *Symptoms of children exposed to violence*: sleep disorders and food disorders; bedwetting; speech disorders; behavioral disorders: aggressive behavior towards colleagues, friends, and teachers or passivity to other people's aggressive behavior; depression, anxiety, introversion, fear of abandonment, fear of injuries, and fear of death; learning and socializing difficulties in school; suicidal thoughts or attempts.[55]

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[50] The victim must be prepared to leave the house in case of need, keep a spare key of the car for herself, a minimum amount of money for emergencies, clothes, important telephone numbers, and her identity documents and the children's identity documents hidden in a safe place (*e.g.*, in a friend's house), and try to memorize a list of emergency contacts and ask several persons that she trust if she may contact them in case of need.

[51] When the victim looks for help against the abuser, it is important that she: covers the traces, especially when using the telephone or the computer; uses a prepaid telephone sim card; verifies the settings of her mobile telephone – there are mobile telephone technologies that the aggressor may use in order to listen to her calls or in order to track where she is, so it's better that the victim close the telephone when she is not using it or no longer take it with her when she is running away from the aggressor.

[52] Many times, the aggressors monitor the activities of their partners, including the use of the computer. While there are means to delete the internet browsing history, it is nearly impossible to delete all evidence from the computer, the history of visited sites, etc., if the victim doesn't know a lot about computers. It is most safe to use a computer outside the house (*e.g.*, at work place, at the house of a friend, or at the library). Also, the victim must consider creating a new e-mail account not known to the aggressor, using new user names and passwords, changing the passwords of the online banking services, and choosing passwords that the aggressor may not guess (not birthdays, nicknames, or other personal information).

[53] The aggressor may use hidden cameras, such as „Nanny Cam", or even a baby monitor in order to monitor the victim. The GPS devices may be hidden in the car, bag or other items that the victim carries. The aggressor may also use the GPS system of the car in order to see where the victim has been.

[54] It is better that the victim not list the telephone number and, for invoices and correspondence, use a post office box rather than her home address. Also, it is safer to cancel the former bank accounts and credit cards, especially if they were joint accounts with the aggressor, and to use another bank for opening new accounts; to change the daily routine, to use another route to get to work, to avoid places where they used to go together with the aggressor and to always keep a charged mobile phone all the time in case of emergencies.

[55] Children raised in families where verbal or physical violence is present learn that, by using violence, you may obtain what you want, impose your standpoint, and make the others listen to you. Men who punish women are shown as real men, who know how to be confident, who do not express their feelings, and who are always listened to and respected. In a family affected by aggressive behaviors, children live in an environment in which their needs for safety and emotional security are deeply altered. Instead of parental authority, such a home hosts terror, which does not educate, does not form a balanced adult, and may stop the normal mental and emotional development of the child. See WAVE study, *Away from Violence: Guidelines for Setting up and Running a Refuge* (2004), pp. 10-14, available at *http://fileserver.wave-network.org/trainingmanuals/Away_from_Violence_2004_English.*pdf, last consulted on 31.04.2023.

5. Romanian and ECtHR jurisprudence

As we have mentioned above in Sections 2.4. and 2.5., the PO is one of the most commonly used legal measures to protect victims of domestic violence, designed to provide a swift and effective response to incidents of domestic violence by granting immediate protection to the victim. However, it is important to note that POs are not always effective in stopping domestic violence. In some cases, perpetrators may continue to harass or harm their victims even after a PO has been issued. This can occur if the perpetrator ignores the order, if the order is not enforced effectively, or if the victim is not able to report any violation of the order to the authorities. Moreover, POs are not a single solution to domestic violence. Other measures may include counseling and support services for victims, education and training for perpetrators, and more effective prosecution and punishment of domestic violence crimes. It is important that POs are enforced effectively and that victims receive the support and resources they need to stay safe and recover from the trauma of domestic violence.

5.1. Romanian jurisprudence

From the unpublished case-law of the national courts on *high-violence crimes (murder, qualified murder, etc.) against family members* [especially regarding art. 188 para. (1) CP, art. 199 para. (1) CP], we have noted the following relevant decisions:

- constitutes murder the act of the recidivist defendant who, due to jealousy, being in his home, applied to his concubine repeated and high-intensity blows all over his body with fists, legs, and a stick, causing traumatic injuries that led to the slow death of the victim (with whom he also had a minor child, at the time of the act being pregnant, even if the defendant did not know this aspect). It has been shown that living together, assimilated into a marriage, obliges the defendant, at least morally, to care for and show affection for the woman with whom he lived, and in no case should the defendant apply such brutal treatment to the victim, invoking the excuse of jealousy. These circumstances led the first court to focus on the special maximum of the main penalty provided by the law (16 years and 8 months in prison);[56]
- the act of the defendant who, being drunk, applied repeated blows with a hard body to his wife (the leg with heavy boots with a hard bomb, the noise of strong blows applied to the victim being heard to the house of his neighbors), producing traumatic injuries that led to her death, meets the constituent elements of the crime of murder on a family member, for which the defendant was sentenced to 10 years imprisonment as a result of the benefit of the simplified procedure;[57]
- in another case, it was noted that, being under the influence of alcoholic beverages and against the background of violent behavior with his family, the defendant applied several blows to his wife in various areas of the body, including the head, using the tail of a hard object with which he repaired through the yard, causing them multiple traumatic injuries that eventually led to death three days later, despite emergency surgery;[58]
- in the relevant case-law relating to the crime of simple murder of a family member – parent (mother or father), another judgment held that the act of the defendant who exercised acts of physical aggression on his mother, aged 69, as a result of which she died, it constitutes the crime of murder committed on a family member, for which he was sentenced to 25 years in prison; it was established that the defendant was known to be an excess consumer of alcoholic beverages, he usually went to his parents' home to ask them for money to buy alcohol and cigarettes and, if they did not have money, the defendant resorted to acts of violence toward his parents, the father - 73 years old and the mother - 69 years old, who were often in a position to leave home, to take refuge at neighbors or to sleep in the field;[59]
- it meets the constituent elements of the crime of attempted murder on a family member, and not the crime of family abandonment, the act of the defendant who abandoned his newly born daughter (aged 4 days) behind a building in Bucharest, next to some garbage bins, in a plastic bag, with the intention of suppressing her life; in this case, the defendant abandoned her 4-day-old minor daughter near some garbage bins, in a bag that made her little visible, on an isolated alley that was clogging and had no access to the boulevard, in the evening, in adverse weather conditions, aspects that could unquestionably prove that the defendant acted with the indirect intention of suppressing the victim's life; it is not relevant that the victim was found, by chance, shortly

[56] Bucharest CA, 1st crim. s., dec. no. 576/A/21.04.2015, unpublished.
[57] Bucharest CA, 1st crim. s., dec. no. 1027/A/28.08.2015, unpublished.
[58] Ploiești CA, crim. s. and for cases with minors, dec. no. 550/A/08.05.2017, unpublished.
[59] Bucharest CA, 1st crim. s., dec. no. 988/A/27.07.2015, unpublished.

after being abandoned by a witness, nor that she was subjected to physical violence, the manner in which the defendant acted being sufficient to lead to the child's death;[60]

- on May 1, 2016, while at his common home, the defendant struck his 82-year-old grandmother repeatedly with his fists and legs („he jumped" on his grandmother's head), which suffered injuries that led to death; following that, the defendant was sentenced to 10 years in prison; the intention to kill cannot be judged in the light of the relationship between the author and the victim of the feelings nourished by the defendant for the victim, these being subjective and do not remove his willful character and thus do not constitute a component of the offense examined; however, it indicates the seriousness of the act and can be used for the individualization of the punishment.[61]

5.2. ECtHR jurisprudence

ECtHR has been active in addressing domestic violence cases and has issued several landmark decisions that have influenced the legal frameworks of member states, including Romania. During the past thirteen years, the Court has firmly established that domestic violence can constitute a violation of ECHR; however, the way in which this issue has been contextualized by ECtHR has varied and evolved, namely in terms of which articles of the ECHR have been held to have been violated in such cases.

Case *Jurišić v. Croatia*[62] *(no. 2)*, a recent decision that relates to domestic violence, concerned a woman who had been subjected to domestic violence by her husband and who had sought protection from the Croatian authorities. In this case, the applicant had reported several incidents of domestic violence to the police and obtained a PO against her husband. However, the PO was not enforced effectively, and the applicant continued to experience abuse from her husband. She subsequently filed a complaint with the Croatian authorities, alleging that they had failed to protect her from domestic violence. ECtHR found that Croatia had violated the applicant's rights under art. 3 ECHR (prohibition of torture and inhuman or degrading treatment) and art. 14 ECHR (prohibition of discrimination). The Court held that Croatia had failed to provide effective protection to the applicant from domestic violence and that the authorities had not taken the necessary measures to prevent further abuse. The Court also found that the applicant had been subjected to discrimination on the grounds of her gender, as the authorities had failed to take her complaints of domestic violence seriously and had not provided her with effective protection. The Court emphasized that the state has a positive obligation to protect victims of domestic violence, regardless of their gender, and that failure to do so can constitute discrimination. This decision is significant in several ways. It reaffirms the positive obligation of states to protect victims of domestic violence and emphasizes the need for effective measures to prevent and punish domestic violence, including criminal sanctions, POs, and support for victims. It also highlights the importance of a coordinated and effective response to domestic violence, involving different agencies and actors, and the need to address the issue of gender discrimination in the context of domestic violence.

Case *M.S. v. Italy*[63], another recent decision, concerned a woman who had been subjected to domestic violence by her partner and who had sought protection from the Italian authorities. The applicant had reported several incidents of domestic violence to the police and obtained a PO against her partner. However, the PO was not enforced effectively, and the applicant continued to experience abuse from her partner. She subsequently filed a complaint with the Italian authorities, alleging that they had failed to protect her from domestic violence. The ECtHR found that Italy had violated the applicant's rights under art. 3 ECHR (prohibition of torture and inhuman or degrading treatment) and art. 14 ECHR (prohibition of discrimination). The Court held that Italy had failed to provide effective protection to the applicant from domestic violence and that the authorities had not taken the necessary measures to prevent further abuse. The Court also found that the applicant had been subjected to discrimination on the grounds of her gender, as the authorities had failed to take her complaints of domestic violence seriously and had not provided her with effective protection.

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[60] Bucharest Trib., 1st crim. s., sent. no. 1788/22.07.2016, unpublished.

[61] Prahova Trib., crim. s., dec. no. 174/22.04.2016, unpublished. On the crime of murder (consumed or attempted) on a family member within the meaning of art. 177 CP, see also: Alba Trib., crim. s., dec. no. 52/17.06.2020, unpublished (the victim was a descendant); Bucharest CA, 1st crim. s., dec. no. 955/A/09.07.2015, unpublished (victims were the concubine of the defendant and her father); Brașov CA, crim. s., dec. no. 311/Ap/11.04.2019, unpublished (victims were the wife and two children).

[62] App. no. 8000/21, final judgment from 07.10.2022, available at *https://hudoc.echr.coe.int/eng?i=001-218132*, last consulted on 09.05.2023.

[63] App. no. 32715/19, final judgment from 07.10.2022, available at *https://hudoc.echr.coe.int/eng?i=001-218130*, last consulted on 09.05.2023.

Case *Volodina v. Russia*[64], another valuable addition to the ECtHR case law on domestic violence, reinforces the positive obligations placed upon states to protect victims. The applicant argued before ECtHR that the Russian authorities had violated art. 3 ECHR (due to their failure to protect her from repeated acts of domestic violence and to hold the perpetrator accountable) and also had failed to establish a legislative framework to address domestic violence and to investigate and prosecute her ill-treatment under the existing criminal law provisions. In addition, the applicant argued that the failure of the authorities to put in place specific measures to combat gender-based discrimination against women constituted a violation of art. 14 ECHR, in conjunction with art. 3. ECtHR also held that, due to the repeated complaints that the applicant had made to the police, the authorities ought to have been aware of the violence to which the applicant had been subjected and of the real and immediate risk that such violence could recur. ECtHR pointed out that measures such as restraining orders or POs are not available in Russian law. The Court stated that the response of the authorities had been „manifestly inadequate" and that the state had failed in its duty to investigate the ill-treatment that the applicant had suffered; therefore, there had been a violation of art. 3 ECHR. In respect of the alleged violation of art. 14, the Court commented that „substantive gender equality can only be achieved with a gender-sensitive interpretation and application of the Convention provisions that takes into account the factual inequalities between women and men and the way they impact women's lives." ECtHR held that the evidence submitted by the applicant, along with information from international and domestic sources, was sufficient to establish *prima facie* indications that in Russia, domestic violence affects women disproportionately. However, the authorities had not adopted any legislation that was sufficient to provide protection to women who have been disproportionately affected by domestic violence. ECtHR thus held that there had also been a violation of art. 14, in conjunction with art. 3.

In the Case *Buturugă v. Romania*[65], Romania was sentenced by ECtHR to pay moral damages to a woman because the authorities did not respond appropriately to her reports of conjugal violence, a case that highlighted the inefficient management by the Romanian authorities of a domestic violence case in our country. In this case, although the victim of domestic violence has made many efforts to demonstrate the abusive behavior to which she was subjected by her former life partner, her actions have met the indifference of the Romanian authorities. Although the victim asked the Prosecutor's Office attached to the Tulcea Court for an electronic search of the family's computer in order to prove that her partner had abusively consulted her electronic accounts and that he had made copies of his private conversations, the prosecutor's office rejected the victim's request, motivated by the fact that the evidence that could have been thus obtained by search would not be related to the threatening and violent crimes committed by the partner. Thus, ECtHR concluded that the Romanian authorities did not address the criminal investigation into the Commission of a crime of conjugal violence and that, in doing so, no measures were taken appropriate to the seriousness of the facts denounced by the applicant. There has also been no substantive examination of the complaint concerning the violation of electronic mail, which, according to the Court, is closely linked to complaints of striking and other violence. Therefore, there has been an omission in compliance with the positive obligations under art. 3 and 8 ECHR and a violation of these provisions.

Another significant case was *Talpis v. Italy*[66]. E. Talpis suffered years of domestic violence from her alcoholic husband. He attacked her on numerous occasions, causing her injuries, and he also tried to make her have sex with his friends by threatening her with a knife. After E. was hospitalized, she moved into a shelter for three months, but she had to leave due to a lack of space and resources. She tried to tell the authorities about her situation several times, lodged a formal complaint, asking for prompt action to protect her and her children. However, the police did nothing for months and this situation of impunity only caused further acts of violence. One evening in November 2013, E. contacted again the authorities. The police stopped her husband and found that he was in a drunken state, but they allowed him to go home. He went to the house in a rage, attacking E. with a knife. Her 19-year-old son tried to stop him. The husband stabbed the boy, who died of his injuries. E. was

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[64] App. no. 40419/19, final judgment from 14.12.2021, available at *https://hudoc.echr.coe.int/eng?i=001-211794*, last consulted on 09.05.2023. See also an interesting analysis of this decision by R.J.A. McQuigg, *The European Court of Human Rights and Domestic Violence: Volodina v. Russia*, in International Human Rights Law Review, 07.05.2021, available at *https://brill.com/view/journals/hrlr/10/1/article-p155_155.xml?ebody=full%20html-copy1*, last consulted on 09.05.2023.

[65] App. no. 56567/15, final judgment from 11.06.2020, available at *https://hudoc.echr.coe.int/eng?i=001-201342*, last consulted on 09.05.2023.

[66] App. no. 41237/14, final judgment from 18.09.2017, available at *https://hudoc.echr.coe.int/eng?i=001-171994*, last consulted on 09.05.2023.

also stabbed several times in the chest as she tried to escape, but she survived the attack. ECtHR ruled that the authorities had failed to take steps to protect E. and her son given their knowledge of her husband's violent behavior and the immediate threat he caused. The authorities had also failed to take any steps to investigate her complaints for an excessively long time. By underestimating the seriousness of the domestic violence, the authorities had allowed a situation to develop where it was being carried out with impunity. These failings had been discriminatory, as they were linked to the fact that the violence was being carried out against a woman in the home. Evidence showed that many women in Italy were being murdered by their partners or former partners and that society at large continued to tolerate acts of domestic violence. The Court reiterates that in domestic violence cases perpetrators' rights cannot supersede victims' human rights, and the State has a positive obligation to take preventive operational measures to protect an individual whose life is at risk.[67]

In *Eremia v. Republic of Moldova*[68], ECtHR found that Moldova had violated the applicant's right to an effective remedy by failing to investigate and prosecute her husband for domestic violence. E's husband, a police officer, had been abusive towards her, often in the presence of their teenage daughters (whose psychological well-being were affected as a result). A PO had been issued against E's husband upon E's first request but was not respected by the husband and was partly revoked on appeal. E filed a criminal complaint and claimed to have been pressured by other police officers to withdraw the complaint. Although a criminal investigation was finally launched and substantive evidence of the husband's guilt was found, the prosecutor suspended the investigation for one year, subject to the condition that the investigation would be reopened if the husband committed another offense during that time on the basis that the husband had committed „a less serious offense" and „did not represent a danger to society." ECtHR found a violation of art. 3 ECHR in respect of E as the suspension of E's husband's criminal investigation in effect shielded him from criminal liability rather than deterring him from committing further violence against E. The Court concluded that the refusal to speed up the urgent examination of their request for a divorce, the failure to enforce the PO, and the insult of E by suggesting reconciliation since she was „not the first nor the last woman to be beaten up by her husband", and by suspending the criminal proceedings amounted to „repeatedly condoning such violence and reflected a discriminatory attitude towards the first applicant as a woman", thus violating art. 14 ECHR. There was also a violation of art. 8 ECHR in respect of E's daughters regarding their right to respect of private life, including a person's physical and psychological integrity. The Court ordered the State to pay the applicants non-pecuniary damages, cost and expenses.

In Case *Opuz v. Turkey*[69], ECtHR held that the failure of Turkish authorities to protect the applicant and her mother from repeated acts of domestic violence by the applicant's husband (H.O.) violated their right to be protected from torture and inhuman or degrading treatment under art. 3 ECHR. The Court emphasized the importance of effective protection measures, including POs, in preventing and addressing domestic violence. The victim and her mother were repeatedly abused and threatened by the victim's husband, abuse that was medically documented. The victim's husband and his father were at one point indicted for attempted murder against the two women, but both were acquitted. The abuse continued after the acquittal and eventually resulted in the husband's father killing the victim's mother. The husband's father was tried and convicted for intentional murder, but because he argued provocation and exhibited good behavior during the trial, his sentence was mitigated, and he was released pending an appeal[70]. Taking into consideration regional and international treaties as well as the domestic situation in Turkey, ECtHR held that Turkey violated art. 2 ECHR (the right to life), art. 3 ECHR (the prohibition of torture and inhuman or degrading treatment), and art. 14 ECHR (the prohibition of discrimination), and Turkey was obliged to pay the victim non-pecuniary damages and costs. It held that the Government was

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[67] As a result of this decision in Italy, between 2015 and 2018, a series of additional reforms were carried out, including: legal changes to strengthen the rights of victims of domestic violence; life imprisonment for the murder of a spouse or partner; training of police and judges about how to combat domestic and gender-based violence; a wide range of public events and national campaigns to raise awareness of the issue; a 24-hour phone line and specialist support units for victims; and an action plan to combat domestic violence from 2017-2020 with substantial financial resources. Following these reforms, the number of convictions has increased, and the length of criminal proceedings is decreasing. However, the Council of Europe continues to monitor the issue of domestic violence in Italy while further evidence is gathered about the effectiveness of the reforms. See also *https://www.coe.int/en/web/impact-convention-human-rights/-/deadly-attack-on-woman-and-her-son-leads-to-ongoing-reforms-to-combat-domestic-violence*, last consulted on 08.05.2023.

[68] App. no. 3564/11, final judgment from 28.08.2013, available at *https://hudoc.echr.coe.int/eng?i=001-119968*, last consulted on 09.05.2023. See also *https://www.law.cornell.edu/women-and-justice/resource/case_of_eremia_v_the_republic_of_moldova*, last consulted on 08.05.2023.

[69] App. no. 33401/02, final judgment from 09.09.2009, available at *https://hudoc.echr.coe.int/fre?i=001-92945*, last consulted on 09.05.2023.

[70] See *https://www.law.cornell.edu/women-and-justice/resource/opuz_v_turkey*, last consulted on 08.05.2023.

liable for not taking action to protect victims of domestic violence. As a result, this was the first time a Court recognized that the failure of states to act against domestic violence was a violation under the Convention. The case concerned alleged incidents of violence, including attempted murder, death threats, harassment, and ongoing physical assault, and occasioning grievous bodily harm towards the applicant and her mother (whom he later shot and killed). This was brought to the attention of the relevant state authorities on numerous occasions; however, prosecutions against H.O. were discontinued because the two women withdrew their complaints. On release, after appealing his conviction, H.O. again harassed the applicant, leading her to the ECtHR, claiming violations under the convention. Such a judgment was considered ground-breaking in regards to international law on violence against women and the state's responsibility. It recognized that States must take a proactive approach in cases where the violence is serious and must bring criminal proceedings against perpetrators of such violence. More significantly, the Court also acknowledged the extent to which violence against women is an issue of inequality and how this impedes the enjoyment of other rights. This was done through non-European sources, such as General Recommendation no. 19 of the CEDAW Committee which highlighted gender-based violence. Thus, it is hoped that the decision could „make a difference for hundreds of thousands of women victims of domestic violence in Europe."[71]

6. NGOs and their roles

There are many *NGOs*, both in Romania and in the world, that are actively involved in addressing the issue of domestic violence. These organizations provide a range of services to victims of domestic violence, including counseling, legal advice, and support groups. These NGOs play a critical role in addressing the issue of domestic violence, and their work is essential in supporting victims, raising public awareness, and advocating for policy changes. Their efforts have helped to raise the profile of this issue and have contributed to the growing recognition of domestic violence as a serious problem that requires a comprehensive and coordinated response.

Here are a few examples:

- *„Necuvinte" Association*[72] is a Romanian NGO from 2013, created in order to combat discrimination, abuse, and gender-based violence. It is a member in four specialized national and European networks (Women Against Violence Europe – WAVE, the VOLUM Federation, the Federation of Non-Governmental Organizations for Social Services – FONSS and „We break the silence about sexual violence"). This organization has taken important steps to pave the way for other organizations. From solid partnerships with public institutions with responsibilities in preventing and combating gender-based violence to the first national campaign and caravan „Broken Wings", implemented in partnership with the Romanian Police, to the amendment of Law no. 217/2003 and the proposal to amend the Criminal Code, this association maintains its path to profound change in Romanian society.
- *FILIA Center - Women's Association*[73] was created in 2000 with the aim of developing gender studies at an academic level so that they contribute, through expertise and epistemic authority, to emancipation strategies in Romanian society. This is a feminist NGO that focuses on promoting women's rights and combating violence against women and provides a range of services to victims of domestic violence, including counseling, legal advice, and emergency accommodation.
- *European Women's Lobby*[74] *(EWL)*: The EWL is the largest umbrella organization of women's associations in the European Union. The organization works to promote women's rights and gender equality, including addressing issues related to violence against women.
- *Amnesty International*[75]: is a global human rights organization that works to promote and protect human rights worldwide, including women's rights and addressing violence against women. The organization helps fight abuses of human rights worldwide, bring torturers to justice, change oppressive laws and free people jailed just for voicing their opinion.
- *European Union Agency for Fundamental Rights*[76] *(FRA)*: The FRA is an EU agency that provides support

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[71] See also the essay *Analysis of the ECtHR judgment in Opuz v. Turkey*, 10.11.2020, on *https://www.lawteacher.net/free-law-essays/human-rights/analysis-of-the-echr-judgment-in-opuz-v-turkey-6831.php#_ftn23*, last consulted on 08.05.2023.

[72] See *https://www.necuvinte.ro/mission-vision/?lang=en*, last consulted on 20.04.2023.

[73] See *https://centrulfilia.ro/istoric/*, last consulted on 20.04.2023.

[74] See *https://www.womenlobby.org/Mission-vision-values?lang=en*, last consulted on 20.04.2023.

[75] See *https://www.amnesty.org/en/what-we-do/*, last consulted on 20.04.2023.

[76] See *https://fra.europa.eu/en*, last consulted on 20.04.2023.

and expertise to the EU and its Member States on issues related to fundamental human rights.

7. Conclusions

In Romania, domestic violence is a widespread problem, with many cases reported each year. According to statistics from the Public Ministry[77], in 2021, 1.561 victims of domestic violence in the country were reported (cases judged by the national courts of Romania), 621 of whom were minor children. However, it is important to note that many cases of domestic violence go unreported (and therefore unjudged), so the true number of incidents is likely much higher. In Europe, domestic violence is also a significant problem, with many high-profile cases reported in recent years. For example, in 2018, the case of a French woman named Jacqueline Sauvage[78] gained international attention after she was sentenced to 10 years in prison for killing her abusive husband. The case sparked a national debate in France about the treatment of domestic violence victims in the justice system. In the world, domestic violence is a pervasive problem that affects millions of people each year. Recent high-profile cases of domestic violence include the case of Sarah Everard[79], a young woman who was murdered by a police officer in the UK in 2021, and the case of Gabby Petito[80], a young woman who was found dead after going missing while on a road trip with her partner in the US in 2021. These cases highlight the serious and ongoing problem of domestic violence, both in Romania, Europe, and around the world. It is important that individuals, organizations, and governments continue to work together to raise awareness about this issue, provide support to victims, and take action to prevent and address domestic violence in all its forms.

Domestic violence is a serious violation of human rights that affects millions of individuals worldwide, including in Romania. The country has established legal provisions in both criminal and family law to prevent, intervene in, and sanction domestic violence effectively. Additionally, Romania is subject to EU and ECHR regulations that impose obligations to prevent, investigate, and punish domestic violence effectively. The ECtHR has played a significant role in shaping the legal frameworks of member states, including Romania, by emphasizing the positive obligation of states to protect victims of domestic violence and hold perpetrators accountable. However, there are still challenges to effectively addressing domestic violence, including ensuring that victims have access to support services and protection orders, providing adequate training to law enforcement and judicial personnel, and addressing cultural attitudes that normalize domestic violence. It is crucial that these challenges are addressed to ensure that victims of domestic violence receive the protection and support they need and that perpetrators are held accountable for their actions.

Domestic violence against men is a real issue, and it's important to acknowledge and address it as well. While the majority of domestic violence victims are women, men can also experience domestic violence, both in heterosexual and same-sex relationships. In Romania, the legal provisions regarding domestic violence apply to both men and women, and the criminal and family law provisions are gender-neutral. This means that any person who experiences domestic violence, regardless of their gender, can benefit from the legal protection and support services available. However, it's important to note that men who experience domestic violence may face additional challenges in seeking help and support, as there can be cultural and social stigma attached to men admitting that they are victims of abuse. This can make it more challenging for men to come forward and report domestic violence or seek support services. It's also worth noting that the dynamics of domestic violence may be different in cases where the victim is a man. For example, the abuse may be more likely to involve emotional or psychological abuse than physical violence, and the perpetrator may be more likely to use control or intimidation tactics than physical force.

De lege ferenda, we ask ourselves the need to create a jurisdiction that will be strictly specialized in the matter of marital (domestic) violence. In France, in December 2022, a legislative proposal[81] was adopted (at first reading) in order to create a jurisdiction specialized in intra-family violence. It provides for the establishment of a specialized tribunal for family violence in each court of appeal, which will include a judge specialized in this type of litigation, who will be assisted by two assessors. The Tribunal is specialized in criminal and civil disputes;

[77] See *https://www.mpublic.ro/sites/default/files/PDF/vf_2021.pdf*, last consulted on 07.04.2023.

[78] See *https://www.france24.com/en/20200729-french-woman-pardoned-for-killing-her-husband-after-years-of-domestic-abuse-dies-at-72*, last consulted on 07.04.2023.

[79] See *https://mirror.shorthandstories.com/saraheverard/index.html*, last consulted on 07.04.2023.

[80] See *https://www.cbsnews.com/news/gabby-petito-brian-laundrie-timeline/*, last consulted on 07.04.2023.

[81] See *Vers une juridiction spécialisée en matière de violences conjugales*, in Revue Actualité Juridique Famille, no. 1/2023 (January), Ed. Dalloz, p. 6.

in the latter case, it can issue a protection ordinance (*ordinance de protection*). In Romania, there is no court strictly specialized in this respect, as there is (only formal and conceptual) the Tribunal for Minors and the Family and Criminal Sections for Minors and Family in some of the courts of appeal, which adjudicate cases in the common law procedure. Also, in the case of acts of violence that constitute offenses, there is no special procedure for such disputes in the Criminal Procedure Code, although in the Criminal Code there is a chapter on offenses committed against a family member (Chapter III of Title I – offenses against a person), which criminalizes domestic violence (art. 199), in which an aggravated sanctioning regime is established for classical violent crimes (murder, qualified murder, hitting or other violence, bodily injury, death-giving blows) and the killing or injury of the new-born by the mother (art. 200).

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ANALYSIS OF MEDICAL CARE IN EUROPEAN PRISONS IN THE LIGHT OF THE ECTHR JURISPRUDENCE

Florin PROCA[*]

Abstract

Since ancient times, people have been interested in leading the best possible life, and with the evolution of society, individuals have gradually and permanently focused on improving the quality of life, on maintaining physical and mental health for as long as possible throughout their lives. Even if in the early part of life most people think they are invincible, believe they have no limits, believe they can do almost anything and overcome any obstacle encountered, with advancing age they realize the limits of the human body and the normal course of life. With the increase of humanity's interest in preserving bodily integrity for as long as possible, medical studies at the physical level as well as those at the psychological level have intensified, and medical innovations have appeared that have reached unimaginable limits just a few decades ago, states began building more hospitals and medical centers while pouring more money into the health care system.

The right to health is in close connection with the right to life because the deterioration of the first element inevitably leads to the faster loss of the second element. In penitentiaries, the right to health is guaranteed to all those in custody permanently, free of charge, equally and without discrimination. Perhaps because of this, once in detention, some begin to fake all sorts of medical problems in order to receive certain benefits such as better food for a falsely declared digestive problem, better accommodation in the unit's infirmary at least for a short amount of time etc. Others use this ruse and feign very serious medical problems to try to escape their penance and regain their freedom before the sentence set by the court expires.

Keywords: *life, health, rights, penitentiary, justice.*

1. Introduction

The usefulness of the judicial body at the European level has been proven unequivocally and the ECtHR decisions have lit the way to a healthy practice in many social fields. The penitentiary environment, however, is atypical and can be difficult to understand for those who have not had direct contact with people serving custodial sentences and with the mechanisms of a prison. The analysis made by the courts can sometimes be rigid and based only on judicial custom. An analysis by a person who has both the life experience required establishing all the circumstances of the case and experience in the field under analysis is often required. Deprivation of liberty forms, transforms and influences the behavior and way of thinking of all those involved in the criminal execution process, and the patients in prisons are little different from patients in a hospital in the public health network. At the first contact with the prison environment, the medical personnel tend to analyze all the causes without analyzing the patient as well, starting from the premise that the person requesting medical assistance is in good faith and the problem presented is a real one. Not infrequently, people in detention have feigned a certain condition and lied about their actual state of health in order to obtain some benefits. Only medical personnel with more experience can notice these aspects, those at the beginning of their medical career being easily convinced by the inmates that they have sufferings or medical conditions.

Based on this premise, some people in detention speculated about a weakness in the system and tried to gain undeserved sums of money. The health of an individual is closely related to the environment in which he spends his life, to his diet and to all the conditions he has in his daily life. In the same way, the right to health in prisons is very often associated with the totality of the conditions of detention, cumulating the degree of crowding of the accommodation spaces, the food received, the conditions and the equipment of the cells. Most of the complaints of persons deprived of their liberty concerned the violation of the right to health and medical assistance and also referred to the failure to ensure normal conditions of detention.

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2. The general assembly on the right to health

Since the beginnings of humanity and civilization, the rulers of conquering empires have felt unstoppable, they have believed that nothing can stop their rise, and maintaining ascendancy over others has proven time has defeated them all. Realizing that no one can be immortal, people began to analyze and study the human body, its mechanisms, reactions to certain substances or processes in order to maintain normal life, without physical or mental problems, for a period of time as long as possible.

Thus, nowadays, life expectancy has increased considerably and is constantly rising, along with the evolution of medicine and science in general. At the same time, life and health have transformed from simple possibilities into mandatory rights for all people, these being inserted in the most important international documents and later taken over at the local level by the legislation of the signatory states. The right to health has become a right with universal access and the citizens' path to this benefit must be non-discriminatory, dignified and transparent. The state, through its institutions, has an essential role in this whole process which must ensure the participation of medical personnel with a quality, transparent, responsible medical act and with positive active participation regardless of name, origin, occupation, age, financial power or other aspects regarding the patient.

The European Union was conceived as a group of partner countries, peoples who ally and guarantee each other's support, trying to standardize to the highest possible standard the way of thinking, acting and respecting citizen values and rights. Slowly but surely, the rights and freedoms of all citizens in this union have developed and diversified positively and created the possibility of a better life for people. Exactly at the turn of the millennium, during the year 2000, the group of countries developed the Charter of Fundamental Rights of the European Union, a document[1] that brings together the social, civic, political and economic rights that must be enjoyed by all the inhabitants of the European territory. Developed in Nice and designed as a standard, the international act also allocated an important portion to the medical field, establishing the fact that any member of society has the right to receive preventive medical assistance as well as specialized medical care in the event of the occurrence of medical conditions.

Within the framework of the rights set forth in international documents, the right to health holds a well-deserved place among the essential rights that every person must enjoy without restriction, deprivation of liberty not being officially a restriction in any state. After the Second World War, in the capital of France, the foundations of citizens' rights were laid and the document that was to be a real source of inspiration for the domestic laws of all nations was drawn up. Although it had only 30 articles, the document established rights for all citizens along political, civil, economic and procedural lines. The document concerned both civilians and persons who had been legally deprived of their liberty, and established that all people have the right to a standard of living which provides them with medical care, food, housing, clothing, health and well-being for the whole family.[2] Also, in case of disability, illness, old age, unemployment, widowhood or other situations of loss of means of subsistence due to causes independent of their will, citizens have the right to insurance to be able to continue a decent life.

In order to promote and universally respect human rights and freedoms, numerous documents have been developed over the years with the role of reminding and strengthening the idea of equality of citizens. The right to health has always been presented and emphasized in most of these documents, without differentiating access to medical services between categories of people or groups of people. In most pacts, treaties and international conventions it has been shown that the state, through its institutions, has the obligation towards the entire community to promote respect for the rights and freedoms of the members of society. In 1966, the United Nations Organization felt the need for a reaffirmation of social, cultural and economic rights and issued a new document in which references related to the right of people to health were inserted, establishing that the signatory states of the document recognize the right which each individual possesses to have the best physical and mental health.[3]

The European Union, through its bodies, allocated time and resources for the formation of a legal framework and for the people who made mistakes and, following a court decision, ended up losing one of the

[1] Charter of Fundamental Rights of the European Union, Council of Nice, 7 December 2000, Title IV, art. 35, *https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex%3A12016P%2FTXT*.

[2] Universal Declaration of Human Rights, UN General Assembly, December 10, 1948, Paris, art. 25 para. 1, *https://legislatie.just.ro/Public/DetaliiDocumentAfis/22751*.

[3] International Covenant on Economic, Social and Cultural Rights, UN General Assembly, December 16, 1966, art. 12 para. 1, *https://legislatie.just.ro/Public/DetaliiDocumentAfis/82589*.

most important human rights, freedom. One of the main bodies is the Council of the European Union, which is also called the Council of Ministers and it acts as the voice of the governments of the member states, coordinates the policies of the union and adopts European legislation. One of the most important international documents in the field of criminal execution was born in 2006 when the Committee of Ministers developed and promoted a document that would target the main aspects related to the activities and mechanisms necessary for the proper functioning of a penitentiary in the third millennium. The formulated recommendation described the minimum requirements that detention facilities should meet and established rules that were later taken up, adapted and implemented in most European states. Rules of good practice related to the education of prisoners, the gainful and recreational activities in which they can participate, the detention areas, contact with the outside, cases and ways of using force, deposition, release and others were set out. Although the act was not very extensive, a good part of it focused specifically and in detail on the right to health and medical care for people in detention. The Committee of Ministers recommended as a general rule that all those deprived of liberty who suffer from problems of a nature to cause them mental disorders or whose mental health is not suitable for life in detention should be transferred to special institutions, which ensure a climate appropriate in all respects for this particular category. Given that the impact of an incarcerated environment can be shattering for many of those entering prison, the recommendation is that each individual be given a full medical examination upon submission. Also, the established diet must be adapted to the physical condition of the subject, to his age, religion, culture, to the lucrative activities he carries out as well as to his state of health.

The nine-part document devoted an entire section just for regulating healthcare in detention facilities. Unlike other regulations in the field that usually focused on general rules, the recommendation from the beginning of 2006 focused on the problem in detail by analyzing even the medical staff assigned for the observation, care and treatment of conditions of persons deprived of their liberty. It was recommended that each unit should have at least one general practitioner and well-trained medical staff and that the prison authorities should have the role of protecting the physical and mental health of all inmates. On the occasion of the specialist consultation, the medical staff will pay more attention to the aspects related to the symptoms of the lack of alcohol or narcotic substances, respect for confidentiality, informing the competent bodies in situations of detecting traces of violence, identifying emotional tensions, isolation of those with infectious or contagious disease, cooperation with other authorities for the continuation of the necessary treatment even after the execution of the custodial sentence.[4]

Medical disabilities affect people most of the time throughout their lives and sometimes, in isolated cases, even from birth. International legislation took into account groups of medically vulnerable people and tried to bring the quality of life for this category as close as possible to the level of a normal life. Desiring principles of life based on non-discrimination, equal opportunities, respect for the dignity and the possibility of the disabled to preserve their own identity, the United Nations convened the Convention on the Rights of Persons with Disabilities. The signatory states have recognized the additional needs that a citizen with medical deficiencies has within the social group, committing to take the necessary measures to ensure everyone has access to medical services in an adequate way for each one's condition. Thus, it was emphasized that the state institutions, through the decision-making factors, will provide specific medical services to disabled people and the range of services will be qualitatively and financially similar to that offered to all members of society.

Also, according to the convention[5], the state is bound to guarantee that access to health, medical services and treatments must be as close as possible to communities, including rural ones, and discrimination based on disabilities must be eliminated. The state mechanisms, through the representatives of the institutions, will prevent refusals to provide specialized care, food or treatments necessary to maintain or regain good health based on disability criteria.

A man's most precious thing in life is his children, they are the first thing that all parents think of when there is danger in the area and they are also the ones who give their love to their parents unconditionally. Unfortunately, life is not always as we plan and sometimes it happens that in a moment of distraction, due to the entourage or in the attempt to dare some young people end up behind bars after committing an act

[4] Rec 2006 (2), Recommendation of the Committee of Ministers of the member states regarding European prison rules, January 11, 2006, Meeting no. 952, *https://anp.gov.ro/wp-content/uploads/sites/33/Documente%20utile%20pdf/Regulileeuropenepentrupenitenciare-VarREC(2006)2.pdf*.

[5] Convention on the Rights of Persons with Disabilities, UN, September 26, 2007, art. 25, *https://www.fcndr.ro/index.php/2018/03/29/conventia-privind-drepturile-persoanelor-cu-dizabilitati/*.

stipulated by the criminal law. The legislation of the European states accepts the idea of criminal responsibility also for the citizens who have not came up to age and special detention units have been created for this category. The UN General Assembly also thought about this special class of society, and at the end of 1989, in order to provide the best medical conditions for children, it developed a convention for this purpose. Starting from the premise that the beginning of life matters a great deal for the subsequent course of humans, in order to guarantee that every child will have access to the best medical services, the convention established several obligations of good practice for the signatory states. Institutional efforts will ensure the actual application of this right by taking the necessary measures to end traditional practices harmful to children's health. The measures taken by the authorities will pursue goals such as reducing mortality among children, combating diseases and malnutrition, providing correct information and using the knowledge gained about the importance of hygiene, food and environmental sanitation, ensuring preventive medicine services and medical education, development of health protection measures for all children and mothers in the prenatal and postnatal time interval.[6]The importance of international cooperation to ensure common progress especially that of developing countries was also recalled.

The documents provided by the United Nations were and still are an important working guide, not only for civil society but also for prison staff. The rules established by these internationally renowned acts have been successfully implemented both in hospital facilities in the member states and in most detention facilities of the old European continent.

3. Complaints of persons deprived of liberty incarcerated in the European area

3.1. Complaints of people imprisoned in Romania

The state in the European basin, which today is considered one of those where the rights of individuals are often violated, was the first European country[7] to abolish capital punishment through the Constitution of 1866, when the Legislative Assembly of the United Principalities voted unanimously to do so. Unfortunately, the death penalty was re-introduced into the legal framework during the Second World War only to be permanently withdrawn from the legislation again in 1989, after the execution of the country's leader at that time and his wife. Even though it has always been behind the European rankings in many aspects, starting with the standard of living, continuing with the transparency of justice mechanisms and ending with the educational level, Romania has placed a constant emphasis on the lives of its citizens and has always stood out for the quality of its medical schools and quality graduates who later became renowned doctors in the field.

The state has assumed the responsibility to protect both the physical and mental integrity of all members of society and to take measures to ensure public hygiene and health through the basic law of the country.[8] Through subsequent laws, decisions and ordinances, the entire medical assistance mechanism, the social insurance system for recovery and maternity, illness and accidents, as well as the way to control the exercise of paramedical activities and specific professions in this field, were organized. However, there are always people dissatisfied with the conditions offered by the Romanian state in the medical field.

This was also the case with a prisoner born in 1977 and sentenced to 12 years and 6 months in prison in 2004. He was pre-trial arrested two years before the conviction and during his detention was transferred to many detention facilities such as Ploiești, Jilava, Mărgineni, Rahova, Bacău, Craiova and Colibași. The petitioner expressed dissatisfaction with the conditions of detention provided by most of the prisons where he served parts of his sentence, claiming that the cells were overcrowded, that no hot water was provided, that there were no chairs in the rooms or that there were cockroaches and rats in the prison. The notification also concerned the violation of the right to health. The petitioner presented the fact that during his incarceration the only disease he suffered from was hepatitis and during his detention he developed various diseases due to the poor conditions of detention to which he was subjected, due to the inadequate treatments given by the medical personnel and the lack of medicines necessary for the ailments which he developed. He repeatedly requested dental interventions, but his situation was not considered urgent and due to the fact that the dentist was on maternity

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[6] Convention on the Rights of the Child, UN General Assembly, 20.11.1989, Part I, art. 24, *https://legislatie.just.ro/Public/DetaliiDocumentAfis/28981*.

[7] T. Tandin, *Sentenced to death*, p. 8, Aldo Press Publishing House, Bucharest, 2004.

[8] Constitution of Romania, Parliament of Romania, Bucharest, updated form, 31.10.2003, Chapter II, art. 34, *https://www.presidency.ro/ro/presedinte/constitutia-romaniei*.

leave, the National Penitentiary Administration informed him in writing that he would be transferred to another penitentiary which has a practicing dentist, but this has not happened.

Towards the end of 2010, the prisoner was already diagnosed with a series of medical problems such as chronic hepatitis, biliary dyskinesia, urinary tract infection, chronic hepatitis and duodenal ulcer, and during the following year he had already lost fourteen teeth due to the lack of a specialist doctor and suitable treatment. He also complained, among other things, about the lack of medical care for his sight problems and chose to start a separate action only against a medical staff employed at the prison. Although the Romanian Government's version was largely different from the one presented by the petitioner, the Romanian authorities admitted that they could not provide the court with proof that a therapeutic plan had been devised for the patient's medical needs. Moreover, another negative aspect confirmed even by the Romanian authorities was the fact that during August 2009, while he was serving his sentence in Jilava Penitentiary Hospital Bucharest, he was bitten by a rat and it was necessary to vaccinate him. The case[9] was completed only in 2012, when it was established that the petitioner's right to health was violated through improper treatment of his ailments and the Romanian state was forced to pay him the sum of 20,000 euros for the material and moral damage caused, as well as the amount of 4,800 euros for court costs related to the trial.

3.2. Complaints of persons imprisoned in Poland

Recognized as a state with a high level of development and a low level of corruption, the Poland was not bypassed by the complaints of people who ended up in prisons on its territory. The state located in the center of the old European continent has been complained to the ECtHR by a person arrested for committing the crimes of fraud and forgery. The detained person repeatedly requested to be released because he claimed to be suffering from depression and to try to draw attention to his cause he resorted several times to the refusal of food. During October 1991, he tried to commit suicide, which led the decision-makers to request a detailed psychiatric analysis in his case. Following the investigation, the measure was taken to periodically admit the petitioner to a specialized penitentiary hospital for people with psychiatric problems. During the following year, the court ordered a thorough investigation in this case by the Psychiatry Clinic in Krakow. Only after the clinic, following the checks carried out by specialist doctors, established that the prisoner had persistent suicidal tendencies and an acute depression that endangered his life in the penitentiary environment, the court annulled the incarceration decision. His trial continued, but the defendant did not appear at the court dates and his lawyer argued that he has some medical problems and could not come to the received deadlines, and will present the necessary documents in this regard. However, the ex-detainee did not present the medical certificates within the deadline requested by the court to justify his absence from the hearings and in 1993 he was arrested again.

Despite more than twenty requests for release by the petitioner's lawyer, the court did not respond positively and the prisoner tried again to end his days. The suicide attempt was categorized by the court as a simulation that aims to draw attention to the petitioner and this form of emotional blackmail is organized with the aim of regaining his freedom. In 1995, he was found guilty of the acts he was originally accused of and was sentenced to a six-year prison term with execution and ordered to pay 5,000 zlotys. Later, with the help of family members, the petitioner addressed the European Supreme Court claiming that he was not provided with the necessary treatments for his mental condition and that several rights such as life, health and physical and mental integrity were violated through detention. The arguments presented by the government of the Polish state were not sufficient and the Court determined[10] that the petitioner was right and obliged Poland to pay within three months a total amount of 50,000 zlotys, also establishing an interest for the situation of non-payment of the established amount on time.

Closed between four walls after committing crimes, people often end up trying by various methods to speculate on the loopholes of the justice system and to make money from the incomplete or interpretable legislation. This was also the case of a prisoner of Polish origin named Zdzislaw Nitecki who suffered from amyotrophic lateral sclerosis and complained that his right to health was being violated. The petitioner requested that the state pay all the costs of the drugs necessary for his medical situation, but this was not allowed because

[9] ECtHR, Case *Iacov Stanciu v. Romania*, final judgement from 24.10.2012, *https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-112420%22]}*.

[10] ECtHR, Case *Kudla v. Poland*, final judgement from 26.10.2000, *https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-58920%22]}*.

the national legislation covered for all citizens the settlement of only 70% of the cost of the medication. Even though the local courts explained to him that it is not normal for him to receive an amount higher than that received by those in the civilian population, the prisoner appealed to the higher court. The case had the same outcome and the final decision transparently highlighted a state of normality and balance between the citizens of a state, without distinguishing between the applicants.[11]

3.3. Complaints of persons imprisoned in Albania

The parliamentary republic geographically located in the south-eastern area of Europe has access to the Adriatic Sea and the Ionian Sea, an aspect that gives it economic possibilities based on trade as well as a high tourist potential. Although it is a small state, which does not exceed the threshold of three million inhabitants, Albania has not been bypassed by the complaints of those sentenced to prison. A prisoner named Ilir Dybeku, born in 1971, was serving a custodial sentence in 2006 for killing three people, two of them minors, by means of an explosive device placed in a home. He was sentenced to life imprisonment for the offenses of murder and possession of explosive materials and suffered from chronic paranoid schizophrenia for several years. During the execution of his prison sentence, he was transferred to several penitentiary units in Tirana, Tepelene and Peqin and was housed together with the other persons deprived of liberty without taking into account the mental problems he presented.

Through the father and the lawyer, the prisoner complained that his state of health is deteriorating due to shared accommodation with the normal prison population and that he is not provided with medical treatment adapted to his needs. Although his requests at the domestic level were unsuccessful and were considered unfounded, he appealed to the higher court and during the year of 2006 it was established[12] that the Albanian state did not provide the necessary accommodation conditions for the petitioner's mental problems, problems that worsened during the incarceration. The decision of the European Court of Human Rights also took into account the checks carried out by different bodies for verifying the respect of human rights from that period. All the checks carried out during the trial found problems with the conditions of detention in Albania. With the granting of justice to the petitioner, the authorities were ordered to pay the sum of 5,000 euros as moral damages for the detention in improper conditions, inconsistent with his state of health.

3.4. Complaints of people imprisoned in France

Being unanimously recognized as a great power of the world, both from an economic and social point of view as well as from a tourist and military point of view, the French state is among the countries often complained to the ECtHR. The national motto „Liberty, Equality, Fraternity” has often been put to the test for good reasons or just to get money from a prosperous people. Requests to the Court can also be made through a representative, on behalf of people who, for various reasons, do not want or cannot submit a claim or notification in their own name.

This is what happened in February 2005, when Hélène Renolde, the sister of a former prisoner, presented the fact that her brother's right to life and health were violated during the execution of the custodial sentence. The plaintiff was represented by her father and the former prisoner’s father and the case wanted to highlight the fact that their family member committed suicide in the cell because of the authorities, who did not take into account the fact that he was suffering from very serious mental illnesses. The French government presented arguments in favor of the administration of the detention unit and exposed the fact that the prisoner was very violent, attacked a prison employee and it was necessary to isolate him from the prison collective to avoid further acts of aggression. However, the international court highlighted the fact that the French authorities did not take into account the fact that the person in custody suffered from serious mental illnesses, had attempted suicide during detention and established that he was not provided with adequate medical treatment for the diseases he suffered from. The family of the ex-prisoner only received the favorable decision in early 2009, which was only a moral remedy for the suffered loss.[13]

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[11] ECtHR, Case *Nitecki v. Poland*, judgement from 21.03.2002, *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-22339%22]}*.
[12] ECtHR, Case *Dybeku v. Albania*, final judgement from 18.12.2007, *https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:[%22dybeku%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-84028%22]%7D*.
[13] ECtHR, Case *Renolde v. France*, final judgement from 16.01.2009, *https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22renolde%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-88972%22]}*.

Another person deprived of liberty, this time a woman, born in 1962 and sentenced to prison for forgery, fraud, abuse of trust and violence against some state employees addressed the international forum declaring her dissatisfaction with being kept in a state of detention and the fact that the medical treatments he received were not adapted to her health problems. The woman was diagnosed with anorexia and serious problems of the respiratory system and requested to be released, claiming that her medical conditions are incompatible with the penitentiary system and by continuing her sentence her life is endangered. Since 2007, when she addressed the Court, the petitioner was transferred to several penitentiary hospitals and resorted to the form of protest of the refusal of food to direct the attention of the authorities to her request. Despite the fact that the representatives of the French government pointed out that the petitioner had been subjected to several specialist evaluations which determined that the medical problems were compatible with the prison environment, the Court granted the prisoner's request. The final decision came only in the spring of 2011 and stated that the French authorities had violated the right to health[14] by keeping her in detention. Petitioner Raffray Taddei did not seek financial compensation in this case.

With age, the entire human body changes, and at very old ages the danger of an aggressive temperament substantially decreases. A French prisoner aged ninety also focused on this aspect. Detained at the Sante Penitentiary in the French capital, the ninety-year-old held many high-ranking positions in the state during his life, such as head of the Paris police or minister. After leaving public life, in 1983 he was accused of crimes against humanity committed during the Second World War and was only sentenced to prison in 1998. Right at the turn of the millennium, he decided to go to court and ask to spend the end of his life in freedom. Although the petitioner contested the violation of several procedural aspects in his trial, he also focused largely on the presentation of the fact that, due to his poor health and advanced age, he no longer presents a social danger. Although money was no longer a priority for Maurice Papon [15], along with the admission of his request, the court also decided to grant an amount of almost 30,000 euros for court costs, funds invested in the trial that lasted two years. Given the caliber of the detainee, the whole process had an international resonance and several human rights bodies pointed out that Papon was favored because of his influence in the political world, while other people accused of similar things did not benefit of release.

The news of being diagnosed with an incurable disease can defeat even the strongest characters, and if this affliction comes together with the lack of freedom, it certainly has a devastating effect on the whole being. Jean Mouisel, a French citizen sentenced to fifteen years in prison for armed assault, kidnapping and fraud was diagnosed with lymphocytic leukemia while serving his sentence. His state of health deteriorated rapidly, which led to his transfer to several penitentiary hospitals at the same time as following periodic treatments in hospital units from the public health network. He addressed the competent institutions requesting his immediate release because he believed that his right to health and life were being violated by being subjected to ill-treatment and torture. Moreover, he also specified the fact that he is being presented to civil hospitals in order to carry out the treatment specific to his illness in chains and handcuffs. During the trial, the petitioner emphasized the fact that he has already served a large part of the punishment he received and his health condition is aggravated by being kept in the penitentiary in conjunction with the method of escorting him to civil hospitals. Although the prisoner requested a very large amount of money from the authorities, the final decision of the Court[16] was favorable to him, but he stated that the sum of 15,000 euros is sufficient to compensate for the grievances that he experienced.

3.5. Complaints of people imprisoned in Russia

The world's largest country, currently in armed conflict with its neighbors to the west, is renowned for its economic potential as well as its military power. Occupying over one-eighth of the land area, the Russian state spans two continents and enjoys extensive maritime borders. At the same time, over the years, the nation of

[14] ECtHR, Case *Raffray Taddei v. France*, final judgement from 21.03.2011, *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-102439%22]}*.

[15] ECtHR, Case *Papon v. France*, final judgement from 25.10.2002, *https://hudoc.echr.coe.int/eng#{%22languageisocode%22:[%22FRE%22],%22appno%22:[%2254210/00%22],%22documentcollectionid2%22:[%22CHAMBER%22],%22itemid%22:[%22001-65190%22]}*.

[16] ECtHR, Case *Mouisel v. France*, final judgement from 21.05.2003, *https://hudoc.echr.coe.int/eng#{%22languageisocode%22:[%22ENG%22],%22appno%22:[%2267263/01%22],%22documentcollectionid2%22:[%22CHAMBER%22],%22itemid%22:[%22001-60732%22]}*.

almost 150 million inhabitants has been categorized as quite rigid and its prisons are considered some of the strictest and toughest in the whole world.

The suffering caused by an incurable disease has negative effects on both the physical and mental state, and its occurrence at a young age is even more difficult to accept and manage. If the patient is also deprived of freedom, the frustrations and the need to accept this state grind the entire human body. In this situation was a boy of only twenty years who was arrested for the crimes of drug possession and trafficking. The young man's father addressed the authorities and asked for his release, emphasizing the serious medical problems his son suffers from. Deprived of his freedom in Moscow, the young man suffered for several years from epilepsy, pancreatitis, chronic viral hepatitis of type B and C as well as other mental problems. Following the requests made by the family, the general state of health of the young man was checked, being subjected to several tests and analyzes that indicated that he was a carrier of the HIV virus. During the detention, the young man's health had a negative evolution; he was also diagnosed with pneumonia and bronchitis.

After he had several epileptic seizures, both the mother and the father of the inmate, began to address several institutions, complaining that their son is not provided with sufficient medical assistance for the ailments he suffers from. After the transfer through several hospital detention facilities and several attempts to obtain freedom, the Russian authorities determined that the petitioner's actions are very serious, pose a serious danger to the citizens and presented the fact that the continuation of the deprivation of liberty is necessary. The petitioner was able to present his case[17] to the ECtHR, which established that several rights were violated, including the right to health. 12,000 euros were awarded to the petitioner as damages for court costs and 105,000 Russian Rubles were awarded to him for moral damages.

Another case lost by the Russian Federation for the violation of the right to health came during 2011, when a prisoner named Aleksandr Mikhaylovich Vasyukov won the sum of 18,000 euros in moral damages for suffering caused during his detention. Sentenced to prison for the crime of murder, the petitioner, born in 1973, was diagnosed with tuberculosis after being housed in a room with another inmate who suffered from this disease. Although he requested several times to be moved from that room, since he was not suffering from tuberculosis at that time, the administration of the penitentiary where he was serving his sentence did not comply with his request. The Russian authorities emphasized that it could not be established beyond doubt that there was a causal link between the lodging with a sick person and the petitioner's infection with tuberculosis. The person deprived of liberty specified the fact that he was healthy when he was deposited in the penitentiary and during the execution of the custodial sentence, due to the negligence of the management of the penitentiary unit, he fell ill. The defense presented by government representatives in Moscow was not sufficient in the opinion of the judges who ruled that there had been a violation of the right to health and declared the detainee's claim admissible two years after his release in 2009.[18]

Prisons in the Russian space are recognized for the strictness and harsh conditions to which those who cross their doorstep are subjected, but sometimes the rigidity of the authorities exceeds a limit that should not be reached. A resounding case was that of a petitioner who wished to remain anonymous, being identified only by the initials A and B. Born in 1963 and convicted of several frauds, the prisoner was diagnosed with chronic hepatitis type C and HIV, while in prison. Because of his health, he was separated from the collective and housed individually in a cell without a heating source where the winter temperature was between 7 and 10 degrees. Noticing that his health is getting worse, the management of the penitentiary unit did not order the granting of adequate treatment, but considered that supplementing the food with margarine and sugar was sufficient. The petitioner complained about the inhumane treatment he was subjected to but was informed that there were insufficient funds for his medical needs. He asked to be transferred to a hospital but was refused, citing the lack of space in penitentiary hospitals. The Court found in the final decision[19] the violation of several articles of ECHR and established the admissibility of the request made by the detainee, granting him substantial sums for the

[17] ECtHR, Case *Khudobin v. Russia*, final judgement from 26.01.2007, *https://hudoc.echr.coe.int/eng#{%22docname%22:[%22\%22CASE%20OF%20KHUDOBIN%20v.%20RUSSIA\%22%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-77692%22]}*.

[18] ECtHR, Case *Vasyukov v. Russia*, final judgement from 05.04.2011, *https://hudoc.echr.coe.int/eng#{%22docname%22:[%22Vasyukov%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-104295%22]}*.

[19] ECtHR, Case *A.B. v. Russia*, final judgement from January 2011, *https://hudoc.echr.coe.int/eng#{%22docname%22:[%22A.B.%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-100964%22]}*.

court costs incurred during the trial and for the moral damages caused by the violation of the right to medical assistance and being subjected to inhuman and degrading treatment in detention.

3.6. Complaints of people imprisoned in Greece

Also known since ancient times as Hellas, the state at the crossroads of several continents has a fairly solid economy based mainly on tourism. Although most of the territory consists of mountains, the strategic position together with the access to three seas raised the commercial and tourism potential to a very high level. The Greek state is a founding member of the UN and a member of the Eurozone since the beginning of the millennium. The problem of overcrowding in the prison environment did not bypass Greece and the complaints of the incarcerated did not take long to appear. A person deprived of his liberty decided in 2007 to address the international forum claiming that his right to health and proper medical assistance for the ailments he suffers from is being violated. The petitioner, a citizen of Greek origin, born during 1962, was sentenced to prison for participating in several terrorist activities in which various explosive materials were used. He suffered from several medical problems such as severe hearing, vision and motor problems prior to his incarceration. All his medical problems were also due to his participation in terrorist activities because, during the preparation of a terrorist attack, a bomb exploded near him. Although he lost his right hand during the explosion, this did not prevent him from continuing to participate in terrorist demonstrations.

Sentenced to a prison term of twenty-five years and imprisoned in the state capital, Athens, the prisoner requested the authorities to suspend the execution of his prison sentence in order to be treated in specialized medical centers for the deficiencies he had. The petitioner considered that keeping him in detention considering his physical condition represented torture and at the same time inhuman and degrading treatment. The request was not accepted, considering that all medical problems can also be treated in penitentiary hospitals and that the individual represents a high social danger, considering the criminal case history. Despite the arguments presented by the Greek government in defense of the authorities' decisions, the ECtHR final decision, with a thin majority, came with a positive answer for the detainee.[20]

3.7. Complaints of people imprisoned in Ukraine

In full armed conflict with its eastern neighbors, Ukraine was on an upward trend from an economic point of view before the start of the conflict and was planning to join the European Union. The penitentiary system was in constant change and development, the authorities in the state capital decided to abolish some outdated detention facilities and build or modernize others. The people, which include a population of over forty million inhabitants, were not bypassed by the petitions of those deprived of freedom. Among the petitioners is a life sentence for murder named Aleksandr Vladimirovich Logvinenko, a Ukrainian citizen diagnosed with HIV. In addition to the incurable disease, the petitioner also suffered from tuberculosis and his state of health was very fragile. The applicant submitted to the international court that he is housed in very poor conditions, is subjected to inhumane treatment and is not given any kind of medical treatment to improve his health and reduce his physical suffering. He also complained that during the period of deprivation of liberty he was physically assaulted and was kept in cells with low temperatures without providing him with clothing for the cold season. Despite the fact that representatives of the Kyiv government claimed that the petitioner's accusations were unfounded and denied most of the issues presented in the trial, the court determined that there was a violation of the right to health and the applicant was subjected to inappropriate accommodation conditions. The prisoner considered that he is entitled to receive a very large amount of money for the damages caused, but the court decided that the amount of 8,000 euros is sufficient for moral damages. Court fees could not be documented by the inmate and were not taken into account in determining the final decision.[21]

The year 2013 came with a first in the line of jurisprudence of the European Court of Human Rights, both for Ukraine and for the entire European space, because in this year the first favorable decision was issued regarding the suffering of a parent of a person deprived of liberty. The case was started by the prisoner Linar

[20] ECtHR, Case *Xiros v. Greece*, final judgement from 21.02.2011, *https://hudoc.echr.coe.int/eng#{%22languageisocode%22:[%22 FRE%22],%22appno%22:[%221033/07%22],%22documentcollectionid2%22:[%22CHAMBER%22],%22itemid%22:[%22001-100375%22]}*.

[21] ECtHR, Case *Logvinenko v. Ukraine*, final judgement from 14.01.2011, *https://hudoc.echr.coe.int/eng#{%22docname%22:[%22 Logvinenko%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-100972%22]}*.

Irekovich Salakhov who died during the execution of the prison sentence and the trial was continued by his mother named Aliya Fazylovna Islymova. She continued the line of proceedings begun by his son and added some complaints in his own name. The original petitioner was infected with the HIV virus and was sentenced to prison for theft during 2007. During his detention his health deteriorated and his family requested that their son be admitted to a hospital but the request was not granted positive answer. The family members also asked to be given more medicines necessary for the disease he was suffering from and following the refusal of the authorities, the medicines were provided by the prisoner's family.

Noticing a worsening of the petitioner's health, the prison administration decided to transfer him to a hospital and the family members requested his release because they considered that the detention put his life in danger. On July 18, 2008, the detainee was finally released, but unfortunately, he died after only two weeks. His mother continued the lawsuit[22] and claimed that inadequate medical care in prison led to her son's death. The amount of 50,000 euros requested by the petitioner was fully accepted by the court, as the defense presented by the government of the Ukrainian state was weakened by the lack of documents that could confirm the medical assistance provided to the original petitioner.

4. Conclusions

The idea that, once deprived of freedom following a court decision, a person must benefit from free medical assistance is necessary and welcome, but if we balance this aspect with the cruel reality of society, we notice that civilians do not have quick access to medical services. In order to procure medicines necessary for the proper functioning of the body or for a simple prescription, some citizens, especially the elderly, make enormous efforts and have to give up many things necessary for a decent life, starting with the purchase of new clothes or visits to family members or relatives and even reaching to food or heat restrictions in the home.

Another benefit that only those convicted of committing one or more criminal acts is the fact that once in detention; they are permanently assisted from a medical point of view by nurses or doctors who work in shifts, in an uninterrupted schedule. In case of physical or mental problems, they are assisted by a medical staff in an extremely short period of time and even if they can no longer announce any emergency, there are employees of the unit who constantly supervise them who will announce the incident and even they will transport them, if necessary, to the medical office existent inside the place of detention. This is in contrast to the length of time a civilian can access medical services in an emergency. People outside a detention facility, in the event of a medical emergency that makes it impossible for them to notify someone, only if they are accompanied by a family member or close person to call the emergency services can have a chance at life. Even if there is the possibility of informing the emergency medical service, the period of time that will pass until the arrival of the medical staff is very long compared to that of those behind bars.

The idea of not providing medical assistance to those who have lost their freedom cannot even be considered these days but compensation from the beneficiaries can be considered. After the completion of the two major conflicts at the global level, a great emphasis was placed on the evolution of people's rights and sometimes the highlighting of differences according to the degree of development of society, mentality, financial power or traditions of some peoples compared to others was overshadowed; the social reality at a given moment or the situation of the subject beneficiary of rights.

In the last decades, the pool of rights offered to citizens has grown significantly, both numerically and qualitatively, and many obligations have become optional in the absence of coercive factors. In criminal enforcement law, the work of the convicted has turned from an obligation of the convicted into a possibility that they can use only if they want or if they have certain interests. For the collective support of society, to alleviate the financial strain of the state and to compensate for rights that are sometimes greater for prisoners than for civilians, participation in gainful activities should once again become an obligation for all those in prisons, of course only those who are physically and mentally fit for work. The release, the insertion of the subject who committed a criminal act should be closely related to his availability to engage in gainful activities.

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[22] ECtHR, Case *Salaknov and Islyamova v. Ukraine*, final judgement from 14.06.2013, *https://hudoc.echr.coe.int/eng#{%22docname%22:[%22Islyamova%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-117134%22]}*.

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THE NATURE OF TERMS SET FORTH IN THE PROVISIONS UNDER ART. 250^2 CPP AND THE SANCTION TO BE APPLIED AS A CONSEQUENCE OF THEIR VIOLATION

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Abstract

This article focuses on reviewing the aspects regarding the nature of terms of 6 months, respectively, of 1 year, which were established for checking the legality and judiciousness of the precautionary measure in the criminal trial, by introduction of art. 250^2 CPP.

Thus, starting from the review of the nature of such terms, in corroboration with reviewing the purpose itself of this new regulation, one may also conclude what was the legislator's intention with regard to the sanction to be applied when such are violated, a sanction that was not, however, mentioned expressly.

Starting also from the judicial practice which is not constant, namely from the non-uniform mode of construction and application of legal provisions, this article intends to clarify, from a theoretical perspective, the nature of terms referred to in art. 250^2 CPP, and also the sanction to be applied as a consequence of violating such terms. We will conclude further with the practice of courts of law, in support of our opinion.

Keywords: *precautionary measures, nature of terms, procedural terms, sanction for violating the terms, lawful termination of precautionary measures.*

1. Introduction

Through the Law no. 6/2021 laying down some measures for the application of Regulation (EU) 2017/1939 of the Council of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO), was inserted in the Criminal Procedure Code, art. 250^2, pursuant to which „*throughout the criminal trial, the prosecutor, Pre-Trial Chamber judge or, as the case may be, the court of law should check periodically, but not later than 6 months in course of the criminal prosecution, respectively, one year in course of adjudication, whether the grounds determining taking or maintaining the precautionary measure still subsist, ordering, as the case may be, maintaining, restricting or extending the measure ordered, respectively, elimination of the measure ordered, the provisions under art. 250 and 250^1 being applicable accordingly*."

In spite of the fact that the legislator's intention was to establish terms for checking the legality and judiciousness of the precautionary measure, pursuing thus the elimination of arbitrariness upon maintaining for an unlimited period of time a right restrictive measure, in the judicial practice two opinions became prevalent: the opinion we also share, namely that the absence of a check within the term provided by law results in lawful termination of the precautionary measure, and the opinion we disagree with, namely that absence of a check within the term provided by law does not result in any sanction, the legislator not mentioning expressly any such sanction.

Besides the non-uniform practice in such matters, HCCJ, the Panel for solving some law issues, under the dec. no. 30/2022 in the case no. 664/1/2022, pronounced on 25.05.2022, ordered the dismissal as inadmissible of the complaint filed by Alba Iulia CA, crim. s., in the case no. 4184/107/2017/a9.1, whereby it requested to pronounce a preliminary decision for solving the following law issue: „*Upon construction of art. 250^2 CPP, what is the legal nature of the 6-month term in course of the criminal prosecution, respectively, 1 year in course of adjudication, within which is necessary to check periodically the subsistence of grounds that determined taking or maintaining the precautionary measure?*".

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Therefore, considering that, on the one hand, up to the present, specialist literature has not approached the legal aspects related to the nature of terms referred to under art. 250^2 CPP, and also the sanction applicable as a consequence of violating such terms and, on the other hand, considering the non-uniform mode of construction and application of the provisions under art. 250^2 CPP, we consider that this article contributes to the clarification of these theoretical aspects.

2. Content

Precautionary measures are real process measures, whose effect is to freeze movable and immovable goods belonging to the suspect, defendant or the civilly responsible party, for the purpose of their avoidance, concealment, destruction, disposal or evasion during prosecution. Such measures are ordered, pursuant to art. 249 para. (3)-(5) CPP, in order to guarantee the punishment by fine is enforced, in view of special seizure or extended seizure, or for the purpose of repairing the damage caused by the crime, and in order to guarantee fines and judicial expenses, which could be ordered in the ruling of the relevant case, would be paid.

For achieving this end, precautionary measures consist in freezing the goods considered, by establishing their sequestration. As an effect of establishing sequestration, the owner of such goods loses the right to sell or encumber them, such measure affecting, therefore, the attribute of legal and material disposition, for the entire duration of the criminal trial, until the final ruling in the case. As showed by the HCCJ – the Panel with jurisdiction to adjudicate the appeal in the interest of law, under the dec. no. 2/2018, *„the notion of freezing, referred to in the provisions under art. 249 para. (2) CPP, involves that the holder of the asset is no longer able to dispose of it freely, in the meaning that he is no longer able to sell, encumber, donate, lease it, being prohibited in general from any voluntary act that might lead to a devaluation of the asset or its evading the prosecution. The assets are not removed from, but they remain in the civil circuit, being suspended for the duration of implementing the measure, only the right of voluntary disposition over them belonging to the owner*".

Further, under dec. no. 894/17.12.2015[1], regarding the objection of unconstitutionality of the provisions under art. 249 para. (1) first thesis CPP, the Court has retained that the interference generated by ordering sequestration of the movable and immovable goods of the suspect, defendant, the civilly responsible person or of other persons the goods are owned or possessed by regards fundamental rights, namely the right to property, is governed by law, namely by art. 249 *et seq.* CPP, has as its legitimate purpose the performance of criminal discovery, being a judicial measure that is applicable in course of the criminal trial, is required, being adequate *in abstracto* for the legitimate purpose pursued, is non-discriminatory, and is necessary in a democratic society, for the protection of the values of the state of law. Further, the interference under review is proportional to the cause that determined it, given that precautionary measures are temporary in character, for they are ordered for the duration of the criminal trial, while the Court, reviewing the proportionality principle in its constant case-law, retained that this involves the exceptional character of restricting the exercise of fundamental rights or freedoms, a fact involving necessarily also their temporary character (para. 30).

Likewise, under the dec. no. 24/20.01.2016[2], CCR has retained that, in the absence of ensuring an efficient court control over the measure of freezing the goods in course of a criminal trial, the state fails to fulfill its constitutional obligation to guarantee the private property of the natural/legal person.

Based on the facts described above, we may conclude that precautionary measures are real process measures, temporary and provisional in character, which have the purpose to guarantee the repair of the damage caused by the crime, to enforce the fine punishment, to enforce the measure of special seizure or extended seizure, as well as to guarantee payment of legal expenses generated by the deployment of the criminal legal proceedings. At the same time, these are right restrictive measures, being a restriction of the right to property in the component of the right of voluntary disposition over the frozen goods.

Pursuant to the provisions under art. 250^2 CPP: *„Throughout the criminal trial, the prosecutor, the Pre-Trial Chamber judge or, as the case may be, the court of law should check periodically, but not later than 6 months in course of criminal prosecution, respectively, one year in course of adjudication, whether the grounds that determined taking or maintaining the precautionary measure subsist, ordering, as the case may be, maintaining, restricting or extending the measure ordered, respectively, lifting the measure ordered, the provisions under art. 250 and* 250^1 *being applicable accordingly*."

[1] Published in the Official Gazette of Romania, Part I, no. 168/04.03.2016.
[2] Published in the Official Gazette of Romania, Part I, no. 276/12.04.2016.

Thus, by the new regulation, the legislator intended to establish some terms of 6 months, respectively 1 year, for disciplining and systematizing the process activity regarding precautionary measures.

The reason for which terms were established for checking the legality and judiciousness of the precautionary measure is to respect the proportional character of such measure, subject to the duration and evolution of the proceeding, respectively, to eliminate arbitrariness with regard to maintaining for an unlimited period of time a right restrictive measure.

All the more so given that maintaining the precautionary measure in the criminal trial should respect the proportionality exigencies imposed by ECtHR, the Court from Strasbourg stating that *„lifting the precautionary measure should be possible when its effective duration is exaggeratedly long by comparison with the duration and evolution of the proceeding, and the consequences it generates exceed the normal effects of such a measure"*[3].

The immediate purpose of the terms established under art. 250^2 CPP is the protection of the accused person's right to use their goods, in order to avoid the imposition of an excessive individual burden. Therefore, by establishing the term, the legislator's priority was respecting the proportionality of the duration of the precautionary measure, by restricting the right to property.

Therefore, as we will explain I detail hereinafter, the sanction for not respecting the terms mentioned is the one set forth in the provisions under art. 268 para. (1) CPP; thus failure to respect them results in withdrawing the judiciary authorities the right to check the precautionary measure, respectively the nullity of the act performed for this purpose, by exceeding the term.

Also with regard to the sanction for not respecting the terms, under the dec. no. 16/2018[4], HCCJ emphasized that *„subject to the effects they generate, procedural terms were classified into peremptory or imperative terms – those within the duration when an act should be fulfilled or performed, a term creating a limitation, given that the act should be performed before the term expires; the sanction applicable if the term is not respected is withdrawing the exercise of the right and the nullity of the tardy act [art. 268 para. (1) CPP; dilatory or prohibitive terms – those allowing the fulfillment or performance of an act only after their duration expires; the sanction applicable for not respecting the term is the nullity of the unexpected act [art. 268 para. (1) CPP]; arranged or recommended terms – those terms that establish a period of time for the performance of some process or procedural acts, in view of the proper deployment of the criminal trial, while not respecting them does not result in process sanctions with regard to the validity of the act fulfilled*".

We consider thus that the **terms provided under art. 250^2 CPP are imperative**, the consequence being the lawful termination of the measure when the check was performed outside the relevant term.

Further, an essential aspect for establishing the sanction for not respecting the obligation to check the precautionary measure consists in establishing the nature of the term set forth by the legislator, whether such term is a substantial term, or a recommended term.

Substantial terms are the ones protecting off-court rights, prerogatives and interests, existing prior to the criminal trial and independent of it, limiting the duration of some measures or conditioning the fulfillment of some acts or the promotion of some actions that would annihilate an off-court right or interest. Substantial terms (of material or substantive law) should be determined pursuant to the provisions under art. 186 CP, based on the natural computation system (*computado naturalis*) when the term is stated in days or weeks (a day is considered 24 hours, while a week 7 days) and based on the civil computation system (*civilis computado*), when the term is stated in months or years.

Unlike substantial rights, procedural terms are terms that protect the process rights and interests of participants in the criminal trial and contribute to disciplining and systematizing the process activity, in view of ensuring that the purpose of criminal trial is achieved timely and justly. All the terms provided by the Code are procedural terms, apart from the ones previously mentioned.

Our opinion is that, given that the matter is about protection of some preexisting off-court rights, the maximum terms of 6 months and 1 year within which the precautionary measure should be checked **are substantial terms**.

The mode of computation of such substantial terms is governed by the provisions under art. 271 CPP, according to which *„upon the computation of terms regarding preventive measures or any right restrictive*

[3] Case *Forminster Entreprises Limited v. The Czech Republic*, judgment of 09.01.2009, para. 76-78.

[4] Published in the Official Gazette of Romania, Part I, no. 927/02.11.2018.

measures, the time or day the term starts from or ends with forms its duration". Consequently, these shall be computed as full days, in the meaning that the term starting day (*dies a quo*) and the term ending day (*dies ad quem*) are within its computation.

The fact that the legislator did not provide in the newly inserted law text also a sanction for not respecting such terms does not grant them the nature of some recommended terms, insofar as the legal provisions under discussion govern an obligation and not only a possibility.

As we stated, precautionary measures are right restrictive process measures, given that they prejudice the attribute of disposition specific to the right to property, while any right restrictive measure may not prejudice the existence of the right itself, according to art. 53 para. (2) in the Constitution. Or, the absence of a term for which a restriction of rights may be established amounts to a deprivation of the right itself.

Should the terms be considered only recommended ones, this would mean that the judiciary authority would not have in reality any obligation to check the precautionary measure. This would mean that the precautionary measure may be maintained *sine die* for the entire duration of the trial, which would amount to a loss *de facto* of the attribute of disposition itself, specific to the right to property.

Moreover, such construction (recommended terms) contravenes to the purpose itself for the introduction of terms for checking precautionary measures in the Criminal Procedure Code by the Law no. 6/2021.

Thus, should the legislator have considered the terms for checking as recommended terms, he would not have mentioned explicitly „*checks periodically, but not later than*". According to the same construction, we consider that he could have said „*checks periodically whether the grounds subsist*", without any term and, in such a case, it would have been logical that the judiciary authority performs the check when considered necessary, even more so when the absence of checking would not result in any sanction.

Even if in the regulation under art. 249 *et seq.* CPP there is no explicit mention of the type „*the precautionary measure should be taken for the duration of*", the very obligation of checking it „*not later than*" shows the legislator's clear intention to have the precautionary measure taken or maintained only for a certain limited term.

Our contention is confirmed also by a similar situation that existed within the scope of the old Criminal Procedure Code in the matter of preventive measures.

Thus, under GEO no. 109/2003, in the old Criminal Procedure Code was inserted art. 160b, which required the court to check, in course of adjudication, periodically, „*but not later than 60 days, the legality and judiciousness of remand custody*".

At that moment, art. 140 para. (1) letter a) CPP 1968 did not provide the sanction for the failure to respect the checking term (this was introduced subsequently, by the Law no. 356/2006).

In this context, HCCJ pronounced the Appeal in the interest of law no. 7/2006, stating that the fact the court failed to check, in course of adjudication, the legality and judiciousness of the remand custody of the major defendant before the expiry of the 60-day duration, referred under art. 160b CPP 1968, „*results in the lawful termination of the remand custody measure, taken against the defendants, and their immediate release*". The High Court motivated then, inclusively by reference to the provisions under art. 23 para. (6) in the Constitution, whose wording is similar to the one under art. 250^2 CPP („*in the adjudication phase, the court is required, according to law, to check periodically and not later than within 60 days the legality and judiciousness of remand custody and to order forthwith the release of the defendant, if the grounds that determined remand custody ceased, or if the court establishes that there are no new grounds justifying maintenance of privation of freedom*").

Last but not least, in relation to this issue, we invoke also the Minutes of the meeting of the presidents of criminal sections of the High Court of Cassation and Justice and of appellate courts at Craiova, on 3-4 June 2021, when „*the attendees agreed on the ruling, in the meaning that the absence of a check within the term provided by law should result in the lawful termination of the precautionary measure*."

The opinion presented in this article is shared also by the judiciary practice in such matters, namely:

- **crim. dec. no. 330/C/08.11.2022, Galați CA, crim. s. and for cases with minors, the case no. 9987/3/2016/a49**, according to which: „Reviewing the case in light of the reasons invoked by complainants, as well as ex officio, in all *de facto and de jure* aspects, the Court considers – contrary to the opinion stated by the court of first instance in the ruling appealed – that the one-year term set forth by the provisions under art. 250^2 CPP for checking – in course of adjudication –the subsistence of the grounds that determined taking or maintaining the precautionary measure, is an imperative term and not at all a recommended one, the wording used by the legislator being completely unequivocal from this point of view.

Precautionary measures, even if not genuine criminal sanctions, by their very nature generate interference in the legitimate rights and interests of the persons the goods subject to such measures belong to. Thus, as in the case of any other interference, the court should ensure a just and fair balance between the purpose pursued by the measure and the individuals' interests. In this case, the de jure problem referred to the Court's review is the moment when the precautionary measures established during 2015 were checked, pursuant to the provisions under art. 250^2 CPP, introduced by the Law no. 6/2021[5](…). According to this legal provision, throughout the criminal trial, the prosecutor, Pre-Trial Chamber judge or, as the case may be, the court of law should check periodically, but not later than 6 months in course of criminal prosecution, respectively, 1 year in course of adjudication, whether the grounds that determined taking or maintaining the precautionary measure subsist, ordering, as the case may be, maintaining, restricting or extending the measure ordered, respectively, lifting the measure ordered, the provisions under art. 250 and 250^1 CPP being applicable accordingly. Reviewing first the request for establishing the lawful termination of precautionary measures ordered in the case, the Court has found that the precautionary measures were established in the case under ordinances issued during 2015 and checked previously at the term on 23.04.2021 (related case a39), when the court ordered maintaining as legal and judicious the previously ordered precautionary measure. Subsequently, the court of first instance omitted to act according to art. 250^2 CPP, insofar as the review of subsistence of the grounds determining taking precautionary measures and maintaining them as such took place after 23.04.2022, the deadline by which the court notified by address should have pronounced itself on the precautionary measures ordered in the case. This finding does not result, according to regulation of precautionary measures, a specific sanction, like in the case of preventive measures. However, the Court is not able either to accept the contention according to which a procedural sanction not provided in the Criminal Procedure Code may not be applied. In the opinion of the Court, it is not acceptable that, by establishing a term for checking precautionary measures, the legislator would have intended this to be only a recommended term, while exceeding it would not result in any consequence with regard to the precautionary measure. The term set forth in the provisions under art. 250^2 CPP is not only a term for expediting proceedings, but a term protecting substantial rights among the fundamental ones, so that protection should be materialized, by considering that, upon the expiry of such maximum legal duration, in the absence of a disposition maintaining the measure, the measure is lawfully terminated. As regards the contention that some precautionary measures whose creation is mandatory may not be removed, such contention cannot be retained as grounded, given that it would fully invalidate the provisions under art. 250^2 CPP. The acceptance as such of these contentions would lead, in fact, to eluding the provisions under art. 250^2 CPP, the failure to comply with would not result practically in any consequence. Or, in the opinion of the Court, such construction is inadmissible. In this respect, the Court notes, in addition, that in the recent practice of the supreme court[6] was stipulated that, even if ordering precautionary measures for tax evasion crimes is mandatory *ope legis*, these may not be maintained *sine die*, unless reviewing their purpose and proportionality against the duration of the interference in the right of disposition of goods (). Consequently, under art. 425^1 para. (7) item 1 letter b) CPP, the Court is to admit the appeals filed by the defendants, is to rescind partially the session ruling dated 29.04.2022 of Brăila Trib. and upon re-adjudication: is to remove from the content of the appealed ruling the provisions regarding maintaining the precautionary sequestration measure, established on the goods belonging to the defendants. The Court is to establish as lawfully terminated the precautionary sequestration measure (...)".

- **dec. 547/20.09.2022, HCCJ, crim. s., case no. 5588/2/2018/a6**, according to which: «The fact that the legislator did not provide in the newly introduced law text also a sanction for the failure to respect these terms does not impart them the nature of some recommended terms, insofar as the legal provisions under discussion govern an obligation and not a mere possibility. Consequently, exceeding the one-year peremptory term provided under art. 250^2 CPP shall result in withdrawing the criminal judicial authority the exercise of the process right to order maintaining the precautionary measure, as well as the nullity of the process act performed after the term, and, from a substantial standpoint, the lawful termination (*ope legis*) of precautionary measures. The legal nature of this term is given by the purpose of regulation, the term being established in order to discipline and systematize the process activity with regard to precautionary measures. To this effect is also the Statement of Reasons in the Law no. 6/2021, which sets forth that „in practice, were reported other cases in which ANABI

[5] Published in the Official Gazette of Romania no. 167/18.02.2021.

[6] HCCJ, crim. s., crim. dec. no. 260/20.04.2022, available on the website *www.scj.ro*.

was addressed requests for sale of some goods frozen for over 5 years, which became valueless, becoming over time unmarketable, and the management costs exceeding the value of goods. In order to increase the efficiency of measures available to ANABI, it was necessary to regulate checking *ex officio* whether a precautionary measure generates disproportionate losses or costs.”».

3. Conclusions

Given the importance of the fundamental rights under discussion, by establishing precautionary measures, we note that protection of property is a fundamental right in the legal order of the European Union, being safeguarded both by the provisions under art. 17 in the Charter of Fundamental Rights, and by art. 1 in the First Additional Protocol to the European Convention on Human Rights. Further, the person’s private property is safeguarded also by the Romanian Constitution in the provisions under article 53 par. (2).

Therefore, the immediate purpose of the term established under art. 250^2 CPP is the protection of the accused person’s right to use their goods, in order to avoid the imposition of an excessive individual burden. Thus, by establishing the terms, the legislator’s priority was respecting the proportionality of the duration of the precautionary measure with restricting the right to property.

Taking into account that the reason for the terms provided under art. 250^2 CPP is to ensure respecting the proportionality of the duration of the precautionary measure with restricting the right to property of the person against whom the measure was taken and to remove arbitrariness with regard to its maintenance, these terms have the legal nature of a procedural and peremptory term, and not of a recommended one, this being the only construction that determines the compatibility of the process norm with the conventional and constitutional provisions regarding protection of the person’s property.

Exceeding the peremptory terms of 6 months and, respectively, 1 year provided under art. 250^2 CPP shall result in withdrawing the criminal legal authority the exercise of the process right to order maintaining the precautionary measure, as well as the nullity of the process act performed after the term and, from a substantial standpoint, the lawful termination (*ope legis*) of precautionary measures.

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ASPECTS REGARDING THE USE OF COLLABORATORS IN THE CRIMINAL TRIAL

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Abstract

This work covers the review of the main issues arising in judicial practice with regard to the use of special surveillance or investigation methods, especially the use of undercover investigators and of collaborators, starting from ordering such measures all the way through the limits the intervention of such investigator/collaborator should respect.

Keywords: *evidence taking fairness principle, special surveillance methods, collaborators, judge of rights and freedoms authorization, agent provocateur, evidence exclusion.*

1. Introduction

In matters of evidence taking during criminal prosecution, are extremely important special surveillance or investigation methods, which are, otherwise, the most used by criminal prosecution authorities. Further, more and more often, the practice of criminal prosecution authorities uses undercover investigators and collaborators.

Given that their intervention during investigations requires compliance with the safeguards provided by law, it is essential, firstly, that the mode in which criminal prosecution authorities impart a person the investigator/collaborator status meets the conditions provided by law. Secondly, the investigator/collaborator's intervention should respect both the standards of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and the privilege against self-incrimination in light of respecting the defendant's right to choose to collaborate or not with the investigation authorities.

Or, judicial practice set out situations in which criminal prosecution authorities do not respect strictly the regulations in such matters, using artifices in order to obtain evidence in the criminal trial, although, in this manner, the safeguards provided by law are violated.

2. Content

Evidence taking in the criminal trial is governed by the evidence taking fairness principle, which is set out in the provisions under art. 101 CPP. According to such principle, it is forbidden to use threats, violence or other constraining methods, promises or advice for the purpose of obtaining evidence. According to para. (2) in the same article, it is forbidden to use listening methods or techniques that would result in prejudicing the status of the person listened to, that is making it impossible for such person to confess deeds voluntarily and consciously, when such deeds are the object of evidence.

Another interdiction criminal process law provides consists in forbidding criminal prosecution authorities to provoke a person to commit or continue to commit a criminal deed, in order to obtain evidence in the criminal trial. The sanction applicable to evidence obtained by illegal methods consists in evidence exclusion and in the impossibility of using such evidence in the criminal trial. Thus, pursuant to art. 102 CPP, the evidence obtained by torture or the evidence arising from the evidence obtained by torture may not be used in the criminal trial. Further, the law excludes using in the criminal trial the evidence obtained by illegal methods.

Moreover, if the act whereby evidence taking was either ordered or authorized, or whereby the evidence was taken is illegal, this fact prejudices also the evidence as such, and determines its exclusion from the criminal trial. In this meaning, is relevant the CCR dec. no. 22/2018, which established that provisions are constitutional

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only to the extent the phrase „*evidence exclusion*" would mean also „*the elimination of the evidence from the case file*".

Thus, obtaining evidence in the criminal trial should respect both the ECHR standards, and the privilege against self-incrimination, in light of respecting the defendant's right to choose to collaborate or not with the investigation authorities.

It is relevant also in this regard the ECtHR case law[1], which stipulates that „*the Court has no jurisdiction to assess the judiciousness of accepting and taking evidence in a certain case, this being the duty of national courts, but only the task to assess whether the proceeding as a whole, inclusively the mode in which the evidence was obtained, was fair in character*".

Pursuant to the doctrine, ECtHR underlined that one should not ignore the inherent difficulties of the investigations carried out by the police authorities that have to gather evidence regarding the crimes they investigate; for such, they are forced to appeal, more and more often, especially in the fight against organized crime and corruption, to infiltrated agents, informers and practices called generically „*undercover*".

Such practices are special methods of surveillance or investigation, and are set forth in the provisions under art. 138 CPP, namely: intercepting communications or any type of remote communication; access to a computer system; video, audio or photo surveillance; localization or tracking via technical means; obtaining data about a person's financial transactions; retaining, delivering or searching mail deliveries; using undercover investigators and collaborators; authorized participation in certain activities; delivery under surveillance; obtaining traffic and localization data processed by public electronic communication network providers or by providers of electronic communication services to the public.

The use of special investigation techniques, especially the use of infiltrated agents, should not prejudice the rights and obligations arising from international multilateral conventions on the protection of human rights.

The Court emphasized that, while the intervention of some „*infiltrated agents*" during preliminary investigations may be accepted, to the extent it is clearly based on and accompanied by adequate safeguards, public interest may not justify the use of evidence gathered as a consequence of a provocation on part of the police authorities; such procedure is prone to deprive *ab initio* and definitively the „*accused*" of a fair trial.

Thirdly, ECtHR decided that there is provocation on part of the police authorities or of the investigation authorities, in general, when the law enforcement members, or the persons intervening at their request do not limit themselves to examine passively the criminal activity, but exercise over the person carrying out such activity some influence and incite such person to commit a crime that, otherwise, that person would have not committed, for the purpose of making possible to establish that such crime was committed, therefore, in order to evidence it within criminal prosecution. Finally, the Court concluded that, in such a situation, when the information presented by the criminal prosecution authorities do not allow it establishing whether the plaintiff was or was not the victim of some provocation on part of the police authorities, it is essential that the court examines the proceeding within which the judgment was pronounced based on such „*provocation*", in order to check whether, in that case, the right to defend oneself was protected adequately, especially if the *audi alteram partem* and equality of arms principle was respected.

Based on using such criteria, in the Case *Romananskas v. Lithuania*, the Court considered that the actions of agent provocateurs, police officers, had as a consequence the instigation of the plaintiff to commit the crime he was convicted for, and no elements in the case file data indicated that, in the absence of their intervention, the defendant would have committed the relevant crime. Considering the incriminated intervention and its use in the criminal trial under discussion, the Court considered that it was not fair, violating the provisions under art. 6 ECHR.

In the same light, we underline also the fact that the right of an accused to keep silent with regard to the deeds imputed to him and the right not to contribute to their own incrimination are essential aspects of a fair proceeding in the criminal trial.

The European Court has decided constantly that, even if art. 6 ECHR fails to mention expressly such rights, they are generally recognized norms, in the center of the notion of a „*fair trial*", consecrated by this text. The reason for their recognition consists, especially, in the need to protect the person accused of committing a crime against the criminal prosecution authorities exercising some pressure, in order to avoid judicial errors and to allow achieving the purposes under art. 6. The European court decided that the right not to contribute to one's

[1] Case *Luca v. Italy*, judgment of 27.02.2001, *www.echr.coe.int*.

own incrimination involves that, in a criminal case, the prosecution tries to support their arguments, without using the evidence obtained by constraint or pressure, against the defendant's will. In this regard, such right is closely related to the presumption of innocence, as provided under art. 6 para. 2 ECHR.

In our meaning, provoking a person, in view of recognizing or generating some evidence against such person may be assimilated to the conduct forbidden by the legislator, an attitude that is also prohibited by the European Court of Human Rights.

For the same reasons, the legislator, in art. 103 para. (3) CPP, established that *„the decision to convict, waive the punishment or defer the punishment may not be grounded, to a decisive extent, on the statements of the investigator, collaborators or of protected witnesses*".

In this regard, ECtHR made a clear distinction between the provoking/setting up the defendant and the mere use of some legal techniques specific to undercover activities. Therefore, according to the European Court, the use of special investigation methods, especially of undercover techniques, may not violate in itself the right to a fair trial. The risk involved by the instigation by the police, via such techniques, involves that the use of the relevant methods is not maintained within well determined limits. The instigation by the police or by persons acting at their order will not be limited to the investigation of criminal activity passively, but will involve exercising some influence on the defendant, so that to incite the latter to commit some crime or to continue to commit some crimes, for the purpose of obtaining evidence.

Further, the distinction between *„police provocation*" and performance of some proactive investigation required the Court from Strasbourg to make a review. In this context, the Court underlined comprehensively the conditions that should be cumulatively fulfilled, so that the state agents' activity may be considered a passive activity that does not involve provocation:

- the Court established that, *ab initio*, there should be a reasonable suspicion that a person takes part in a crime, or prepares to commit such criminal deed, or has a predisposition to take part in some criminal activities;
- It is necessary that the activity of criminal prosecution authorities or their collaborators was previously authorized according to law;
- State agents or their collaborators did nothing else than giving the perpetrator an opportunity to commit crimes.

To the same effect, ECtHR sanctioned such conduct upon the ruling of the Case *Allan v. United Kingdom*. As a matter of fact, after invoking the right to silence, the defendant was placed in a cell together with an informer of the criminal prosecution authority. The evidence, namely the confession obtained by an informer who directed the conversation to the circumstances in which the crime under investigation was committed, was not obtained spontaneously and in the absence of provocation. For this reason, the European Court stipulated that the information obtained through the informer's intervention, was taken against the defendant's will. Moreover, in the Court's meaning, the use of such evidence in the criminal trial amounts to depriving the right to silence of its legal effects, being also violated thus art. 6 para. 1 ECHR.

Otherwise, national courts took over this European reasoning and stipulated that *„recalling the cases Teixeira de Castro v. Portugal of 09.06.1998 and Ramanauskas v. Lithuania of 05.02.2008, showing that agent provocateurs are state infiltrated agents, or any person acting under the management or supervision of some authority (prosecutor), who, during the activity carried out, exceed the limits of duties granted by law to act for the purpose of showing a person's criminal activity, provoking such person to commit crimes, in view of evidence taking upon prosecution*"[2].

The obligation of fair evidence taking, as well as respecting the right to silence of a person suspected of committing a crime are emphasized especially also by the recent practice of the CCR, and also of the HCCJ with regard to the witness, who is granted the right not to self-incriminate, materialized even by the judge on the merits of the case within the judgment with regard to another co-defendant.

The collaborators of criminal prosecution authorities, whether under their real identity or not, should not exercise a certain influence on the relevant person, so that the latter makes confessions with regard to alleged deeds. Further, it is evident that the purpose of the influence previously mentioned would be to obtain evidence, a conduct that is vehemently prohibited by ECtHR, as we showed previously.

[2] Judgment no. 199/18.08.2011, pronounced by Tulcea Trib., maintained also in the dec. no. 125/P/21.10.2011 of Constanța CA, sheet 6.

Consequently, by acting in such manner, the provisions under art. 6 ECHR are violated, such action amounting to the one of an agent provocateur.

Moreover, we should emphasize that the use of undercover investigators or real identity investigators and of collaborators, as provided under art. 148 CPP, is distinct from the technical surveillance of some person(s).

Pursuant to the provisions under art. 139 CPP, technical surveillance is ordered by the judge of rights and freedoms, when the following conditions are cumulatively fulfilled:

„a) there is a reasonable suspicion with regard to the preparation of or committing a crime among those provided in para. (2);

b) such measure should be proportional to the restriction of fundamental rights and freedoms, given the particularities of the case, the importance of information or of the evidence to be obtained, or the severity of crime;

c) the evidence could not be obtained in another manner, or obtaining it would involve special difficulties that would prejudice the investigation, or there is a danger to safety of persons or of some valuables.

(2) Technical surveillance may be ordered in case of crimes against national security provided in the Criminal Code or special laws, as well as in case of crimes such as drug trafficking, doping substances, illegal operations with precursors or with other products prone to have psychoactive effects, crimes related to not respecting the status of arms, ammunition, nuclear materials, explosives and restricted explosive precursors, trafficking and exploiting vulnerable persons, terrorism, money laundering, counterfeiting coins, stamps or other valuables, forgery of electronic payment instruments, in case of crimes committed via computer systems or electronic communication means, against property, blackmail, rape, deprivation of freedom illegally, tax evasion, in case of corruption crimes and crimes similar to corruption crimes, crimes against the financial interests of the European Union, or in case of other crimes for which the law provides punishment with imprisonment for 5 years or longer."

As such, the difference is emphasized also by the need for fulfilling some different conditions from the ones provided under art. 139 CPP.

Further, under the CCR dec. no. 55/2020, the objection of unconstitutionality was admitted, and it was established that the provisions under art. 139 para. (3) final thesis CPP are constitutional to the extent they do not regard recordings resulted from the performance of activities such as information gathering, which involve restriction of the exercise of some fundamental human rights or freedoms, carried out in compliance with legal provisions, authorized pursuant to the Law no. 51/1991.

Consequently, there is a difference between the recordings mentioned under art. 139 para. (3) CPP and the recordings regarding which authorization procedures are regulated.

The decision aforementioned stated that *„therefore, when reviewing the legality of evidence and of the evidence taking the recordings were obtained by, for the system governed by the Criminal Procedure Code, the Pre-Trial Chamber judge should consider, on the one hand, the conditions imposed by the legal provisions for authorizing such measures, and, on the other hand, the authority with jurisdiction to issue such authorization*."

Pursuant to art. 148 para. (10) CPP, *„in exceptional situations, if the conditions provided in par. (1) are fulfilled, and the use of an undercover investigator is not sufficient for obtaining the data or information, or is not possible, the prosecutor that supervises or carried out the criminal prosecution may authorize the use of a collaborator, assigning the latter another identity than the real one. The provisions in para. (2)-(3) and (5)-(9) shall apply accordingly*".

Further, in accordance with art. 148 para. (1) and (2) CPP, *„(1) The prosecutor supervising or carrying out criminal prosecution may order authorization of the use of undercover investigators for a period of maximum 60 days, if:*

a) there is a reasonable suspicion with regard to the preparation of or committing a crime against national security provided by the Criminal Code and by other special laws, as well as in case of crimes such as drug trafficking, illegal operations with precursors or with other products prone to have psychoactive effects, crimes related to not respecting the status of arms, ammunition, nuclear materials, explosives, trafficking and exploiting vulnerable persons, terrorism or similar, terrorism financing, money laundering, counterfeiting coins, stamps or other valuables, forgery of electronic payment instruments, in case of crimes committed via computer systems or electronic communication means, blackmail, deprivation of freedom illegally, tax evasion, in case of corruption crimes and crimes similar to corruption crimes, crimes against the financial interests of the European Union, or in

case of other crimes for which the law provides punishment with imprisonment for 7 years or longer, or there is a reasonable suspicion that a person is involved in criminal activities in relation to the crimes listed above;

b) such measure is necessary and proportional to the restriction of fundamental rights and freedoms, given the particularities of the case, the importance of information or of the evidence to be obtained, or the severity of crime;

c) the evidence or localization and identification of the perpetrator, suspect or the defendant could not be obtained in another manner, or obtaining such would involve special difficulties that would prejudice the investigation, or there is a danger to the safety of persons or of some valuables.

(2) The measure shall be ordered by the prosecutor ex officio or at the request of the criminal prosecution authority, via an ordinance that should contain, besides the mentions provided under art. 286 para. (2):

a) indication of the activities that the undercover investigator is authorized to carry out;

b) the period such measure was authorized for;

c) the identity assigned to the undercover investigator."

It is obvious that the legislator established very strict conditions for the scenario of using a collaborator, exactly because, most times, such evidence taking prejudices the evidence taking fairness principle, as provided under art. 101 CPP.

As regards the condition provided under art. 148 para. (1) letter b) CPP, the specialist literature states that *„the legislator regulated the measure subsidiarity principle, underlining its exceptional character, given that it is not adequate that a significant part of the evidence taking in a case consists of acts of undercover investigators, performed in the phase of preliminary acts. Other less intrusive methods should be used for discovering the crime, or for the identification of perpetrators, if liable to lead to the same results and if their use does not raise significant practical obstacles*"[3].

Consequently, the use of a collaborator and, subsequently, of conversations this had with the defendant, in relation to past deeds, is a serious violation of the right to silence and of the privilege against self-incrimination. Otherwise, the ECtHR case law sanctioned repeatedly such type of approaches.

Thus, it stated that *„the right not to contribute to one's own incrimination involves that the accusation should be grounded on evidence that should be taken without appealing to constraint or pressure, or by infringing the defendant's will*"[4].

Art. 148 para. (3) CPP states that *„if the prosecutor assesses that it is necessary that the undercover investigator be able to use technical devices in order to obtain photos or audio and video recordings, the first should inform the judge of rights and freedoms in view of issuance of the technical surveillance warrant. The provisions under art. 141 shall apply accordingly.*"

Therefore, when, after assigning the quality of *„collaborator*" to a person, the prosecutor fails to inform the judge of rights and freedoms in view of issuance of the technical surveillance warrant, as imperatively prescribed by the text aforementioned, the use of a collaborator is illegal.

As regards the nature of activities the prosecutor may authorize in the ordinance issued, we should state that the use of some evidence taking procedures, especially of some technical surveillance measures, could not have been included. The only technical surveillance measures that may be used by undercover investigators and by collaborators are the ones provided under art. 138 para. (1) letter c) CPP, and only if the judge of rights and freedoms issues a technical surveillance warrant for such – a warrant that evidently, considering the provisions under art. 148 para. (3) CPP, should be issued subsequent to the issuance of the ordinance on the use of collaborators. Consequently, any other technical surveillance measures might not be implemented by the collaborator, and no evidence taking procedures through the collaborator might be performed, any violation of such limitation resulting in the illegality of the evidence taken.

All these because the authorization activity, the judge's exclusive power, has as its purpose to point out the criminal activity, and should be based on the purely passive conduct of the judicial authority, while carrying out some activities without authorization is a violation of the fairness and equity principles.

Ambient recording of a conversation in virtue of the quality of collaborator is different from the scenario provided under art. 139 CPP, such distinction consisting both of the fact that a collaborator receives technical

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[3] M. Udroiu, O. Predescu, *Protecția europeană a drepturilor omului și procesul penal român*, C.H. Beck Publishing House, Bucharest, 2008, p. 782.

[4] Case *Shannon v. Great Britain*, judgment of 04.10.2005, para. 32.

assistance and also of the fact that the conversation is performed deliberately by the person collaborating with the criminal prosecution authorities in a certain direction, its purpose being to obtain certain information that, in other circumstances, could not have been obtained.

All the contentions above are fully confirmed also by judiciary practice, namely by the practice of Bucharest Trib. that, in the ruling of the Pre-Trial Chamber judge dated 15.12.2016, unpublished[5], states as follows:

„The defense contented that it is illegal to intercept ambient conversation between A and B. Thus, the ambient conversation was not carried out in view of discovering some crimes, and neither was it performed because of the existence of some reasonable suspicion with regard to the preparation or committing of a corruption crime. This is assessed and ordered only in light of the preparation or committing of a crime, and only if the evidence could not be obtained in another manner, or could be obtained with difficulty.

The Court considered that interceptions should be used in a fair manner only when, in the intercepted conversations, references to facts that took place several years ago are voluntary, or when there are judicious clues that the persons involved in the relevant conversation try to cover the tracks of such facts, or to hinder the smooth course of criminal prosecution.

Thus, during the conversation, B. mentioned that he no longer remembers the actual circumstances that were the object of the criminal case. In this context, A. led deliberately the conversation towards the remembrance of some facts and circumstances related to the case matters, referring also to the defendant V.L.O. The entire conversation between the two shows clearly that B. was pressed and directed «to remember» certain matters of interest for the prosecution, and that his story, interspersed with several replies such as «I don't know», «I don't remember», was affected by the insistence and perseverance of witness A.

In such circumstances, the Pre-Trial Chamber judge considered that, in order to inspire safety in the use of evidence for finding the truth, the use of special surveillance techniques should not be «doubled» by witnesses eliciting statements from some persons subject to surveillance, about facts or circumstances that occurred years ago and that the person under surveillance does not narrate on their own, consciously, freely and voluntarily."

3. Conclusions

The use of special surveillance or investigation methods, especially of undercover techniques, may not violate by itself the right to a fair trial, while obtaining evidence in the criminal trial should respect both the ECHR standards and the privilege against self-incrimination, in light of respecting the defendant's right to choose to collaborate or not with the investigation authorities.

The collaborators of criminal prosecution authorities, whether they act under their real identity or not, should not exercise a certain influence on the relevant person, so that the latter makes confessions exactly as a consequence of the influence exercised on them.

Moreover, the use of undercover investigators or real identity investigators, provided under art. 148 CPP, is distinct from the technical surveillance of some person(s), being necessary that, after a person is assigned the quality of „*collaborator*", the judge of rights and freedoms is informed, in view of issuance of the technical surveillance warrant, as set forth expressly by legal provisions.

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PECULIARITIES OF THE CRIME OF DRIVING A VEHICLE UNDER THE INFLUENCE OF PSYCHOACTIVE SUBSTANCES, PROVIDED BY ART. 336 PARA. (2) CP. THEORETICAL AND PRACTICAL ASPECTS

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Abstract

In the current social and legal context, the crime provided by art. 336 para. (2) CP is increasingly common in the practice of criminal investigation bodies and courts. Both theorists and practitioners have been faced with problems of interpretation of the incriminated text, regarding the meaning of the notion of psychoactive substances, the way in which the influence that these substances have on the ability to drive a vehicle or detention in competition of this crime with the one provided by art. 4 of Law no. 143/2000. The present paper aims to analyze the controversial aspects stated above, both from a theoretical and a practical point of view. The opinions of legal authors in the matter will be presented and interpreted, as well as the solutions pronounced by the High Court of Cassation and Justice, by other national courts and by the criminal prosecution bodies. The present study will present, with regard to each controversial aspect to which I have referred, both the authors conclusions and possible proposals for lege ferenda. At the same time, the possibility of ensuring the uniform interpretation of the incriminated text by all courts will be analyzed, regarding all the aspects that were the subject of this paper.

Keywords: *driving on public roads, psychoactive substances, possession of drugs, under the influence.*

1. Introductory aspects and brief history of the regulation of the act provided for by the criminal law that is subject to this analysis

According to art. 336 para. (1) and (2) CP: (1) Driving on public roads of one vehicle for which the law provided compulsory hold of a driver 's license by a person who, at the time of biological samples, has an alcoholic strength imbibition over 0.80 g/l alcohol pure blood is punished by imprisonment from one to 5 years or by a fine.

(2) With the same punishment is sanctioned the person under the influence of some psychoactive substances, who drive a vehicle for which the law provided compulsory hold of a driver 's license.

The offense of driving a vehicle under the influence of psychoactive substances is not new in Romanian criminal law. Before the entry into force of the new Criminal Code, it was provided for in art. 87 of GEO no. 195/2002, being sanctioned, according to para. (2) „(…) the person who drives a motor vehicle or a tram and is under the influence of narcotic substances or products or drugs with similar effects." It should be noted here that, before the appearance of GEO no. 195/2002, Decree no. 328/1966[1] regarding traffic on public roads only sanctioned the driving of a motor vehicle by a person with an alcohol concentration above the legal limit or in a state of intoxication, driving under the influence of psychoactive substances being a relatively recent crime.

With the entry into force of the new Criminal Code, it was provided for in art. 336 para. (2), with a partially modified form:

- the terms motor vehicle and tram were replaced with the phrase a vehicle for which the law stipulates the obligation to obtain a driving license;
- psychoactive substances were used instead of narcotic substances or products or drugs with similar effects;

If, with regard to the first amendment mentioned above, it was considered natural, in relation to the new regulations in the matter (the current form being applicable to any vehicle covered by the provisions of criminal legislation – with the natural additions found in GEO no. 195/2002), the definition of the term „psychoactive

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[1] Art. 38 of Decree no. 328/1966 regarding traffic on public roads, published in the Official Bulletin of the Socialist Republic of Romania no. 28-29/31.05.1966.

substances" required extensive debates in the doctrine, but also contradictory solutions pronounced by the criminal investigation bodies and the courts.

The main reason that determined the non-unitary interpretation and application of the law is the non-definition, by the legislator, of the phrase „psychoactive substance". As long as this term appeared for the first time in the criminal legislation, it would have been natural - in our opinion - to have a definition, which would allow both theorists and practitioners to understand the concept exactly. The specification found in art. 241 of Law no. 187/2012, according to which *psychoactive substances mean the substances established by law, at the proposal of the Ministry of Health, it* has no legal relevance, as long as no such normative act has been issued.

Thus, at the time the new Criminal Code came into force, there were three regulations defining the substances that could be subject to the application of art. 336 para. (2) CP:

- Law no. 143/2000, which defines drugs and, separately, new psychoactive substances[2];
- Law no. 339/2005, which deals with narcotic or psychotropic substances;
- Law no. 194/2011 on combating operations with products likely to have psychoactive effects, other than those provided for by the normative acts in force.

It should be noted, here, that none of the cited normative acts clearly define the notion of *psychoactive substances*. Moreover, from the formalistic interpretation of the three legal texts, we can draw the conclusion that high-risk and high-risk drugs are different from psychoactive substances, as long as Law no. 143/2000 makes this distinction, the other legal provisions cited being applicable to narcotic substances, psychotropics or products likely to have psychoactive effects.

Even if there were also authors who appreciated that the legislator's explanation was not necessary, since the belonging of high-risk and high-risk drugs to the notion of psychoactive substances can be deduced from a simple semantic or historical-theological analysis and by reference to new or old practice [3], we maintain our view on the usefulness of the definition of the concept or an interpretation decision because:

- the legal language is a specific one, which can even be appreciated as cumbersome, imprecise and difficult to approach[4]. There are many situations where the legal meaning of some expressions is different from that of the common language, even when we compare identical words;
- *lex stricta* principle implies, logically, that whenever the law is unclear, it cannot be interpreted to the disadvantage of the offender, being fully applicable the adage *in dubio mitius* and not *in dubio pro reo,* which refers to the evaluation of the evidence[5];
- the proof of the law's ambiguity (regarding the cited term) is the multitude of contradictory solutions pronounced by the courts and the criminal investigation bodies in the matter that is the subject of this study.

In fact, after the entry into force of the new Criminal Code, although the criminal prosecution bodies were notified about driving under the influence of cannabis, there were cases in which it was ordered either to change the legal classification in the crime of possession of dangerous drugs, or even classification of the case[6]. In the motivation of these solutions, it was noted that the use of the term *psychoactive substance* limits the analysis of the existence of the offense to the substances indicated in Law no. 194/2011, which do not refer to high-risk and high-risk drugs.

In this context, it was natural to notify the HCCJ with the pronouncement of a preliminary decision that would definitively clarify the scope of application of the provisions of art. 336 para. (2) CP. By dec. no. 48/2021, pronounced in case no. 833/1/2021, the panel for resolving some legal issues of HCCJ established that the use of the notion of psychoactive substances under art. 336 para. (2) CP includes the substances provided by Law no. 143/2000, Law no. 339/2005 and Law no. 194/2011, definitively putting an end to any contradictory interpretations regarding this legal issue.

Without going into the analysis of the reasoning of the cited decision, we feel the need to emphasize that it was „confirmed" by the Constitutional Court which, in a decision[7] rejecting an exception of unconstitutionality,

[2] Art. 1 of Law no. 143/2000 defines substances under national control, high-risk drugs, high-risk drugs, but also new psychoactive substances - which are not part of the narcotic or psychotropic substances specified in the UN Conventions of 1971 and 1972.

[3] V. Cioclei, *The meaning of the phrase psychoactive substances from the content of art. 336 para. (2) CP*, *www.bizlawyer.ro*.

[4] D. Mellinkoff, *The Language of the Law*, Boston: Little, Brown and Company, 1963, pp. 3-29.

[5] M.A. Hotca, *Criminal Law Manual, General Part*, Universul Juridic Publishing House, Bucharest, 2022, p. 56.

[6] R.Al. Nestor, *Aspects regarding the establishment of the typicality conditions of the crime of driving a motor vehicle under the influence of psychoactive substances, www.juridice.ro*.

[7] CCR dec. no. 452/2021, published in the Official Gazette of Romania no. 1138/26.11.2021, para. 32.

assessed that the phrase „psychoactive substances" contained in art. 336 para. (2) CP is clear, precise and predictable.

2. Aspects related to the necessity of establishing the existence of the „influence" of psychoactive substances on the driver of the vehicle, in order to retain the existence of the offense provided for in art. 336 para. (2) CP

If in the case of the standard crime, provided for in art. 336 para. (1) CP, the legislator established that, in order to fulfill the conditions of typicality, it is necessary for the offender to have an alcohol concentration of over 0.80 g/l of pure alcohol in the blood, in the case of the assimilated variant provided for in para. (2), only the necessity for the person who drove the vehicle to be under the influence of psychoactive substances was established.

The reason why a minimum level of psychoactive substances was not indicated in the criminal law is obvious: unlike alcohol, there are a multitude of drugs, psychotropic or narcotic substances, it being practically impossible for the Criminal Code to provide a concentration for each substance in part. These arguments were also retained by CCR in two decisions rejecting the exception of unconstitutionality of art. 336 para. (2) CP[8].

What is to be criticized, in our opinion, is that the phrase *under the influence of psychoactive substances* does not provide sufficient clarity and predictability, which is the reason why contradictory solutions have been issued by judicial bodies, nor does the doctrine[9] have a unified approach regarding this legal issue.

Thus, the first (majority) opinion is that, regardless of when the psychoactive substance was consumed, or the concentration identified in its biological samples, the perpetrator will be held criminally liable. The reason for this theory is that the legislator appreciated that any substance referred to in art. 336 para. (2), once ingested (regardless of how it got into the perpetrator's body) produces certain changes in the nervous system, but also in the cognitive functions, affecting with certainty the ability to drive a motor vehicle of any person. The main „weapon" of those who agree with this interpretation is HCCJ dec. no. 365/16.10.2020[10], in which it was noted, among other things, that: „*The state of danger for social relations regarding the safety of traffic on public roads arises as a result of the simple act of driving a vehicle by a person who has consumed substances with a psychoactive effect, because the cognitive functions, including the driver's attention and reaction capacity, are inevitably affected by the consumption of psychoactive substances, even when the consumption of said substances is not objectified in unequivocal, easily perceptible behavioral changes. This one mean that regardless of the substance concentration identified in the biological samples or the eventualities psychophysical alterations effectively presented by the author de facto, the act of driving a vehicle by the person whose body psychoactive substances are present, creates a state of danger for social relations protected by art. 336 para. (2) CP and justify so deed penalties through means criminal charges.*".

The minority opinion, to which we subscribe, is that in for ordering a judgment of conviction for the offense provided for by art. 336 para. (2) CP, it is not enough to show from the evidence that the person who drove the vehicle consumed psychoactive substances, but also the fact that they influenced or could influence in any way the ability to drive.

In this regard, the Constanța CA also ruled in case no. 6360/118/2016[11]. In justifying the decision, the judges held that the prosecution did not prove, beyond any doubt, that the defendant was under the influence of psychoactive substances, although it was discovered during the analysis carried out after the arrest in traffic, that he had consumed cannabis. Moreover, the judges of the court of appeal considered that it was the responsibility of the prosecution to prove, through a medical certificate, that the defendant's ability to drive was impaired, the mere finding of the existence of the dangerous drug in the body not being sufficient to lead to a sentencing solution. It should be noted that such a solution is not exceptional, as there are other situations where the judges from Constanța reached similar conclusions[12].

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[8] CCR dec. no. 138/2017, published in the Official Gazette no. 537/10.07.2017, para. 21, respectively dec. no. 101/2019, published in the Official Gazette no. 405/23.05.2019, para. 24.

[9] C. Ghigheci, *Criminal law. Special Part*, vol. II, Solomon Publishing House, Bucharest, 2021, p. 680.

[10] HCCJ, dec. no. 365/RC/16.10.2020, *www.scj.ro*.

[11] Constanța CA, dec. no. 341/13.03.2018, in R.Al. Nestor, *Aspects regarding the establishment of the typicality conditions of the offense of driving a motor vehicle under the influence of psychoactive substances*, *www.juridice.ro*.

[12] Constanța CA, crim. sent. no. 485/03.04.2020, in R.Al. Nestor, *op. cit., loc. cit.*

The Cluj CA ruled in the same way, before the entry into force of the new Criminal Code[13], holding that the influence of certain substances or narcotic products or drugs with similar effects must be proven[14], this cannot be presumed.

Beyond the issues cited above, the arguments for which we do not support the majority opinion in this paper – based on the decisions cited above – are the following:

- if the legislator wanted to penalize any person who drives a motor vehicle after ingesting drugs, the incriminating article should have contained such a mention. For example, *the same penalty applies to a person who drives a motor vehicle after consuming a psychoactive substance...* ;
- in the reasoning of HCCJ decision, it is shown that the interpretation of the phrase „under the influence" should be carried out according to the meaning found in current speech, respectively *the action exerted on a being, possibly leading to their change.* Or, this is precisely our argument: we consider that the change in the driver's mental, psychological or behavioral state as a result of the consumption of narcotics must be proven!
- the decisions of the CCR rejecting the exceptions of unconstitutionality regarding art. 336 para. (2) CP emphasized the impossibility of establishing a concentration with regard to each psychoactive substance separately, recognizing – implicitly – that a certain level of concentration is necessary for any drug to negatively influence the person who consumed it;
- the state of danger created by the consumption of narcotics is not doubted by anyone, this is the reason why in Romania not only drug trafficking is sanctioned, but also their possession with a view to consumption. In this context, the criminal conviction of a person who got behind the wheel a week after consuming a cigarette containing cannabis does not even have a criminal policy justification;
- in Romania, practice is not a source of law. The reasoning of a decision by a panel of the HCCJ does not have a definitive and binding character for all courts;
- one of the fundamental principles of criminal law is that of legality. It is not normal for the judge to be put in a position to presume that a person is under the influence of psychoactive substances, just because, at a given moment, he has also consumed such substances, without having any relevance as to how much time has passed since at that time and what quantity was consumed.

The present study does not only aim to ascertain certain contradictory opinions and solutions, or to criticize certain arguments that were the basis of the substantiation of some theories or the reasoning of some court rulings, but we also try to propose a solution to the legal problem.

The solution at hand, in terms of the lack of clarity of the commented legal text, seems to be the pronouncement of a preliminary ruling or a decision of the Constitutional Court. Unfortunately, in relation to the inadvertence noticed in the content of the criminal law, such a decision cannot definitively solve the legal problem, the legislator having to intervene to modify the text – regardless of the solution pronounced by the courts.

Our opinion is that the text is perfectable and the solution is simple and easy to apply in practice.

The proposed law *ferenda* is that art. 336 para. (2) has the following content: *With the same the punishment is sanctioned also the person under the influence of some psychoactive substance confirmed by a medico-legal report* (s.n.)*, who drives a vehicle for which the law provided a compulsory hold of a driver's license.*

The solution proposed does not imply, in any case, the aggravation of the investigation or of delaying criminal prosecution since, at the time detection in the traffic of one driver who consumed some psychoactive substance, there is already regulated a procedure that assumes involvement specialists within INML.

Thus, according to the methodological rules regarding harvesting, storage and transport the biological sample for the view probation court through the establishment alcohol or presence in the body of substances or drug product or of drugs with similar effects, the people involved in event or circumstances related to road traffic[15], biological sample for the determination of the existence of psychoactive substances in the body is carried out through a procedure complex that involves:

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[13] Dec. no. 38/A/09.03.2011, in V. Pușcașu, C. Ghigheci, *Annotated Criminal Code*, vol. I, Universul Juridic Publishing House, 2021, p. 620.

[14] The previous regulation was different only in terms of the definition of psychoactive substances, the condition that the perpetrator was under the influence of these substances remained unchanged.

[15] Annex to Order no. 1512/2013 for the approval of the Methodological Norms regarding the collection, storage and transportation of biological evidence for the purpose of judicial probation by establishing the alcohol level or the presence in the body of narcotic substances or products or of drugs with similar effects in the case of persons involved in events or circumstances related to road traffic, published in Official Gazette no. 812/20.12.2013.

- transport of the author to an assistance facility healthcare authorized or in the medico-legal institutions where he is taken over by specialized personnel;
- collection of a blood sample of at least 20 ml;
- collection of a urine sample of at least 20 ml;
- permanent supervision by the traffic police of the medical staff and the perpetrator;

In addition, the determination of, in view of judicial probation, of alcoholism or presence in the body of a person of the products or drug substances or of drugs with similar effects, named in the continuation drugs, it is realized no more in the toxicology laboratories within medico- legal institutions, accordingly to the territorial authority.

In this context, since the existence the crime provided by art. 336 para. (2) CP depends on the expert report done in the INML laboratories, it seems natural that the specialists within this institution to review in what measure the person who was surprised driving a motor vehicle is or not under the influence noun identified in his body.

Such a solution legislation would be in accordance with the above mentioned CCR decisions, by which it is indicated the impossibility of establishing a minimum concentration for every substance psychoactive in part, remaining at discretion INML experts to review the incidence of criminal standard, depending on the substance swallowed by its characteristics and the impact which he has regarding the capacity of the perpetrator to drive the vehicle.

3. Retention of the contest of crimes with regard to the facts provided for in art. 336 para. (2) CP and in art. 4 of Law no. 143/2000

According to art. 4 of Law 143/2000 growing, producing, manufacturing, experimenting, extracting, preparing, transforming, buying or possessing drugs for own consumption (s.n.), without right, is punishable by imprisonment from 3 months to 2 years or with a fine.

There is no discussion about the retention in competition of the offense provided for by art. 336 para. (2) CP with that provided by art. 4 of Law no. 143/2000, in the situation where a driver of a vehicle is caught while driving the car under the influence of psychoactive substances and was in possession of high-risk or high-risk drugs . In this sense, both the doctrine and the practice of criminal investigation bodies and courts are unitary [16].

The issue of the existence of a contest between the two crimes is nuanced, when the author of the act provided by art. 336 para. (2) CP does not possess any drug (of risk or high risk) at the time of his detection in traffic, but he consumed such prohibited substances, as it appears from the toxicological analysis report issued by INML.

The authors of criminal law believe (rightly so, we say) that the offense provided for by art. 4 of Law no. 143/2000, as long as the perpetrator does not possess any quantity of high-risk or high-risk drugs (with a view to consumption), proof of the presence of any such substance in his body – regardless of the amount – not being sufficient to meet the elements constitutive of the crime of possession of drugs for consumption.

In this regard, it was shown in the specialized literature[17] that the legislator understood not to regulate the illicit use of drugs, but only certain preparatory activities, including their purchase and possession for this purpose. In fact, in our legislation drug use was criminalized (partially) only in the interwar period, when Law no. 58/1928 for combating drug abuse[18] established punishments only if it was practiced in a group, respectively in the company of others[19].

Contrary to the will of the legislator and the doctrinal interpretations, HCCJ found in a criminal case[20] that a defendant must also be sentenced for simple drug use, since to claim that drug use as such cannot be punished, but only the possession in view of consumption, would mean that the goal action (consumption itself), although achieved, remains unpunished, and the means action (possession), although less dangerous, remains punished. This solution was criticized, of course, by the authors of criminal law, among the arguments against the solution

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[16] M. Hotca, in V. Dobrinoiu, M. Gorunescu and others, The new Criminal Code annotated, Universul Juridic Publishing House, Bucharest, 2016, p. 762.

[17] T. Dima, A.-G. Păun, *Illicit Drugs*, Universul Juridic Publishing House, Bucharest, 2010, p. 256.

[18] Law no. 58/1928 published in Official Gazette no. 90/1928.

[19] T. Dima, *Again about illicit drug use*, in RDP no. 4/2004, p. 57.

[20] HCCJ, crim. s., dec. no. 3241/29.05.2006, *www.scj.ro*.

and the reasoning of the supreme court being the violation of the principle of the legality of criminalization[21] or the expansion of the content of the criminal law through its interpretation[22].

It is possible, and sometimes real, for a person to take a smoke or more from an artisanal cigarette that is in another person's hand. Another similar situation is when a user finds a large amount of cocaine on a friend's table, and only takes as much as he needs. It is noted that, in both cases, we are dealing with drug consumption (of risk, respectively high risk), in the conditions where the person in question has never possessed any prohibited substance.

An extreme interpretation of the decision mentioned above would involve the conviction, both for drug trafficking and for possession of drugs for consumption, of 10 young people who „share" a cigarette containing cannabis. From a strictly formal point of view, as long as they „passed" the cigarette from one to the other, but also consumed it, each one's act would meet the constitutive elements of both the crime of high-risk drug trafficking (in the form of offering), but also of the crime provided by art. 4 of Law 143/2000, which, in our opinion, would be absurd.

Unfortunately, although the authors were consistent in appreciating the non-punishment of drug use, there are cases in the practice of criminal investigation bodies, in which the contest of crimes is retained [between art. 336 para. (2) CP and art. 4 of Law no. 143/2000], although the author of the act provided by art. 336 para. (2) CP does not possess any drug (of risk or high risk) at the time of its detection in traffic.

In this regard, we note that, at the level of Dolj county, the Police bodies that detect drivers in traffic who are under the influence of psychoactive substances notify the DIICOT prosecutors, who, even when the author of the alleged act of art. 336 para. (2) CP does not possess any drug (at the time of its detection in traffic or in one's own home), it states the existence of both crimes!

Thus, by the indictment of DIICOT, ST Craiova, it was ordered to send the defendant BI to court for the concurrent commission of the crime of „driving a vehicle under the influence of alcohol or other substances" provided by art. 336 para. (2) CP and „possession of dangerous drugs for own consumption, without right", provided by art. 4 para. (1) of Law no. 143/2000. With regard to the offense provided for by Law no. 143/2000, it was noted that „During the criminal investigation, the witnesses PC, CA, AM were heard and of the defendant BI, resulting undoubtedly that <u>the author voluntarily consumed a cannabis cigarette in the evening of 20/21.08.2021</u> (s.n.) while he was at the home of PC"[23]. Although initially, the representative of DIICOT assessed before the court that „the claim regarding the arrival of drugs in the defendant's body is illogical, stating that he could not have done otherwise unless he had previously come into possession of them"[24], at the time when the Dolj Court questioned the change in legal classification (in the sense of removing the offense provided for by Law no. 143/2000) the hearing prosecutor agreed, appreciating that the crime of drug possession would be absorbed into that provided by art. 336 para. (2) CP[25].

In the end, the court ordered the change of legal classification from the two initial crimes, to a single crime provided by art. 336 para. (2) CP[26]. Even if the pronounced solution is novel, considering that the crime of driving under the influence of psychoactive substances absorbs that of possession of drugs with a view to consumption, the effect is favorable to the defense, in the sense of removing the provisions of art. 4 of Law no. 143/2000.

If at the level there is such a practice in Dolj County most of the cases from Romania, in the event of the crimes provided for by art. 336 para. (2) CP, the notified criminal investigation body is the Prosecutor's Office corresponding to the Court that is going to judge the case on the merits, regardless of the amount and of the kind drugs consumed by the defendant. Thus, by sent. no. 538/16.07.2021, pronounced by the Sector 2 Court in case no. 1135/300/2021 (final through non-appeal), was arranged condemnation 4050 lei fine to the defendant criminal, in conditions in which he drove under the influence following substances: <u>Nordazepam 0.1 ug /ml, THC - COOH 0.017 ug /ml, benzodiazepines, cannabinoids and cocaine, ketamine and metabolites, cocaine metabolite, oxazepam</u>[27]. Another case in which he decided condemnation for a person who was surprised at the wheel after consuming may several drugs is case no. 14349/4/2021 of the Bucharest CA[28] in which the application

[21] M. Hotca, M. Gorunescu and others, *Offenses provided for in special laws*, C.H. Beck Publishing House, Bucharest, 2019, p. 32.

[22] T. Dima, A.-G. Păun, *op. cit.*, p. 280.

[23] The indictment issued in case no. 381/D/P/2021 of DIICOT, ST Craiova – AS own archive.

[24] The conclusion of November 16, 2022, pronounced by the Dolj Court in case no. 834/63/2022 – AS own archive.

[25] The conclusion of February 22, 2023, pronounced by the Dolj Court in case no. 834/63/2022 – AS own archive.

[26] The conclusion of March 15, 2023, pronounced by the Dolj Court in case no. 834/63/2022 – AS own archive.

[27] Sent. no. 538/16.07.2021, pronounced by the 2nd District Court, in file no. 1135/300/2021 – AS own archive.

[28] Bucharest CA, dec. no. 902/29.06.2022, *www.portal.just.ro*.

was ordered (dec. no. 902/29.06.2022). of a criminal fine, in conditions in which the defendant had consumed cocaine, methadone, cannabis and opium. Also, by way of example we indicate the dec. no. 39/2023 of the Zarnesti Court, pronounced in the case no. 4208/338/2022[29], in which it was accepted a plea agreement for driving under the influence cocaine.

We indicate, as judicial practice, and other decisions given by the national courts, in which it was detained only the crime provided by art. 336 para. (2) CP, in conditions in which the defendants had previously consumed high-risk[30] drugs: sent. no. 183/2021 of the Bistrita Court, sent. no. 243/2021 of the Bolintin Vale Court, sent. no. 247/2018 of the Odorheiu Secuiesc Court, sent. no. 311/2019 of the Constanța Court, sent. no. 1170/2021 of the Gherla Court, sent. no. 1272/2021 of the Cluj-Napoca Court, sent. no. 1275/2021 of the Târgu Mureș Court.

It is obvious that, to some extent overwhelmingly, the courts and the prosecutor's offices in Romania do not detain in competition the offense of driving under the influence of psychoactive substances and that of drug possession for own consumption, than in the situation in which the author of the first acts owns at the moment identified in the trafficking, dangerous drugs or high risk about himself. Just in the extent in which the exceptional situations that we have made references to, they will repeat, the intervention from the Supreme Court will be needed, to clarify finally this legal issue.

4. Conclusions

The present work proposed not only to consider controversial issues about the theoretical interpretation and practice of provisions of art. 336 para. (2) CP but, where we considered necessary, to propose solutions too.

If in the event of the term „psychoactive substances”, the HCCJ rulings (Complete for absolution some matters of law), but also CCR intervened and they clarified the legal issue appeared, regarding the others aspects which they did the object of this study, the intervention of the legislature or the courts ability with interpretation / solving legal issues appear as being necessary.

The fact that in the doctrine there are unitary reviews or majority regarding certain legal problems does not exempt legislature or superior courts to clarify issues which generated different settlements of the causes, by tracking criminal bodies or courts of law. We can't accept that the same legal issue can be judged differently according to the „practice” of one prosecutor or court. Moreover, the impact on litigants of the decisions in the criminal material is a decisive one.

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[29] Dec. no. 39/2023 of the Zărnești Court, *www.portal.just.ro*.
[30] All the cited decisions were identified on the website *www.rolii.ro*.

POSSESSION AS A PREROGATIVE OF PROPERTY: A REAPPRAISAL

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Abstract

My lecture is concerned with possession as an element of right, a legal institution that is apart from the Romanian context less common in the European legal framework. It is nevertheless universally recognized that possession is primarily a state of fact, being, according to a prevalent expression, "the shadow of property". I will show in the following pages that, in fact, this is also its only genuine stance, since possession as an element of right does not represent a theoretical position that can be successfully defended. I will also prove that all the powers of the owner are in fact exercised by means of the classical prerogatives, and hence possession as an element of right is not necessary for this reason either.

Keywords: *possession, element of right, usus, fructus, abusus.*

1. Introduction[1]

For a long time, private property had a stable theoretical foundation. From the adoption of the first Romanian Civil Code, going through the interwar period, property was understood as the crowning of three powers. Of course, by power in the civil sense we mean to say prerogatives, that are exercised directly on the object of the property, or possibilities to interact with it. The first of these consisted in the possibility of the owner to make good use of his asset, *i.e.*, to utilize it for the needs that the object was called to satisfy. This is called, after the Roman moniker, *usus* or *ius utendi*. The second ability gave the owner the power to obtain the fruits of the good, either by exploiting or cultivating it directly, and even by ceding its use to a third party, which is still referred to today as *fructus* or *ius fruendi*. Finally, the prerogative to dispose of the asset, which could mean alienating the good or changing the substance of the asset, is known as *abusus* or *ius abutendi*.

We can clearly see that possession was not listed initially among the attributes of private property. Even immediately after the war, the situation was the same in this regard. The doctrine of that period holds that "from Roman law until today, the right of ownership, in its exercise, has been broken down into three attributes or prerogatives"[2], again listing *usus*, *fructus* and *abusus*. But things would soon change, as towards the end of the 60s we will find that real rights "entitle their holders to exercise certain faculties in relation to a thing - for example, in the case of ownership, *possession*, use and disposal"[3]. So, it seems that possession now appears, probably for the first time, incorporated in the right of property, as its faculty.

And from „faculty" it will eventually graduate to „element", a step which was taken in the mid-80s. Now, in a legal scholarship work[4], that soon became reference, outlining possession in native law, we find that possession, „an important element", is found in the structure of all real rights. This element is seen to have special characteristics, that differ according to the proper nature of each of these rights and without it the „appropriation" of natural goods cannot be conceived. We will see that this optic, with small nuances, still stands today. In fact, the contemporary doctrine[5] still holds on the distinction between possession as a state of fact and possession as a prerogative that enters into the legal content of each main real right. And in this last situation, possession is an element of right.

Therefore, possession seen as an element of right constitutes, together with *use* (*ius utendi and ius fruendi*) and disposition (*ius abutendi*), the legal content of the right of ownership. The fact that use now also means picking the fruits is, up to a point, a far-fetched idea. The reason for this agglutination cannot be other than that

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[1] The present article is the presentation in English of a small part of my PhD thesis entitled „The Theoretical Foundations of Possession", which is in its final stages and will be publicly defended soon.

[2] G.N. Luțescu, *Teoria generală a drepturilor reale. Teoria patrimoniului. Clasificarea bunurilor. Drepturile reale principale*, Bucharest [s.n.], 1947, p. 254.

[3] T. Ionașcu *et al., Tratat de drept civil*, vol. I, Bucharest, Academiei Publishing House, 1967, p. 196.

[4] D. Gherasim, *Teoria generală a posesiei în dreptul civil român*, Bucharest, Academiei Publishing House, 1986, p. 19.

[5] V. Stoica, *Drept civil: drepturile reale principale*, 4th ed., Bucharest, C.H. Beck Publishing House, 2021, p. 54.

by introducing possession into property a bundle of 4 prerogatives would have been created, which in turn stand to shatter the illusion of continuity of the Roman law triad. Therefore, it was necessary to keep the shell but change the core.

2. Element of right

The national legal system does not allow the agglutination of several rights into one. We are far from understanding property as a *bundle of rights,* the beautiful metaphor used in the Anglo-Saxon sphere. On the contrary, a Romanian subjective civil right is an inalienable and irreducible intellectual entity. It cannot be fragmented into other rights that may be within it. What it is permitted, however, is to include in its content powers or prerogatives which the holder has. That is why the *stricto sensu* right of ownership does not contain *the right* to harvest the fruits of the property, but only the *prerogative* to harvest these fruits. This aspect is very important, as we will soon see, since the national doctrine[6] has built a vision of subjective civil right, understood as a *bundle of prerogatives*, both substantive and procedural. By means of the latter being, in reality, the former defended. Subjective rights are, thus, complete and self-sufficient.

Indeed, the position is not only elegant, but also accurate. For our part, we appreciate that any subjective right has two sides: a *substantial* one that potentiates the options that its owner has over other people (obligational rights) or carried over certain assets (real rights), and a *procedural* one in which the plenitude of the first one is defended and will activate itself when the former is touched. Of course, there are two ailments they suffer from. While *prescription* extinguishes the procedural side, *decay* (in Romanian *decădere*) closes both.

Seen through this lens, a subjective right will never allow another right inside it, because the consequence would assume that the right inside would have its own procedural side. However, this does not happen. The loss of the use of the good can sometimes be regained through an action to revendicate, the procedural coordinate of the ownership right, and not through an action specific to its use. For this reason, lacking a procedural aspect, use is reduced to an element of right.

We will therefore say that *an element of right represents that power or faculty, legally recognized, but without direct protection, nevertheless still indirectly protected alongside other prerogatives which, together and only in this way, outline a right*.

3. Why is possession (as an element of right) different from other prerogatives?

Possession, as a civil faculty, has a legal nature. In this sense art. 555 para. (1) CC lists it among other faculties of the owner. Therefore, it will be distinguished from the faculties inherent in the human personality, which are seen as natural, or from those which are conventionally constituted, thus being obtained from the other contracting party. Above all, however, the prerogative of possession is not at all like the others. In order to understand this, it is necessary to start from the definition of possession as an element of right and then observe the differences it implies in relation to the prerogatives of use, of harvesting the fruits and of disposition.

The legal doctrine[7] is unanimous in fixing possession as *ius possidendi* in the form of the right to appropriate and possess the good that is the object of the right of ownership. It was therefore found that „because a person is the holder of the right of ownership over an asset, the law gives him the ability to possess it, respectively to appropriate and own it as a recognized owner”[8], possession being thus „the legal expression of appropriation and possession of good”[9]. We will note that the two sides that circumscribe the idea of possession as an element of right are appropriation and possession, which we will subject to a careful examination.

[6] V. Stoica, *op. cit.,* p. 469.

[7] G. Boroi, L. Stănciulescu, *Instituții de drept civil în reglementarea noului Cod civil*, Bucharest, Hamangiu Publishing House, 2012, p. 19; E. Chelaru, *Drept civil: drepturile reale principale*, 4th ed., Bucharest, Hamangiu Publishing House, 2013*,* p. 39; C. Bîrsan, *Drept civil: drepturile reale principale*, 4th ed., Bucharest, Hamangiu Publishing House, 2020*,* pp. 48-9; V. Stoica, *op. cit.,* pp. 101-2; I. Sferdian, *Drept civil, Drepturile reale principale: studiu aprofundat*, Bucharest, Hamangiu Publishing House, 2021*,* pp. 155-156; Fl.-A. Baias *et al.* (coord.), *Codul civil. Comentariu pe articole*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2021, p. 740.

[8] E. Chelaru*, op. cit.,* p. 39.

[9] V. Stoica, *op. cit.,* p. 101.

4. Appropriation

The notion of appropriation only makes sense in relation to corporeal things. As stated, „as a result of appropriation, anything, without losing its material meaning, becomes good in legal terms" [10]. The French doctrine also considers that the appropriation of the thing marks the moment when the thing enters into patrimony, in the form of the right to which it serves as an object[11].

Therefore, the first consequence of appropriation becomes the economic value that the thing, after appropriation, acquires. It was noted in this sense that "things acquire economic value and become goods only through appropriation"[12], so appropriation "presupposes the existence of the use value of things and adds their exchange value, so that the goods (appropriated things) have economic value"[13]. In an opinion that is in the same vein, albeit with a little twist, it is found that through appropriation it is not the thing that acquires value, but the right it carries over it, so "the exchange value that is obtained through appropriation is an assigned value, which it is observed at the level of law"[14].

The second conclusion concerns the notion of *civil circuit*. We have defined the civil circuit elsewhere[15] as *the multitude of assets that are capable of changing their ownership rights, by any legal means*. It is not necessary to repeat now the arguments used there, but it makes sense in this context to remember that in another opinion it was justly noted that in order to be possessed, "the goods must be appropriated, that is, they must be in the civil circuit or be able to enter the circuit civil"[16]. In a nutshell, appropriation implies the introduction of the good into the logic of the dynamics of transfers, which is the essence and foundation of the civil circuit.

Of course, the history of the concept of appropriation has a venerable tradition. If we go back in time, we notice that for Hugo Grotius appropriation meant the introduction of the thing into the *dominium*, and for Locke it is justified by the absolute and exclusive possession of one's own body which, touching the thing through its labor, makes it become an object of property.

The concept of law, a creation of the millennial collective imagination, remains an intellectual reality. This being so, he cannot receive sense-objects into him, these naturally pre-existing to it and having a reality independent of law. That is why the legal sphere is forced to create an intellectual entity to house these sensory objects (things), giving them the name of *goods*. Our national doctrine notices this aspect when it states that "as a rule, the thing pre-exists the appropriation, but the patrimonial right, as a concrete subjective right, through which the thing is appropriated, does not pre-exist this process, but is born during it"[17].

To fully understand appropriation, we need to imagine a physical space in which the legal concept lives. Naturally, it cannot be separated from humans, seen as storytellers and, in turn, listeners of those stories. In the end, the whole web of rights and obligations can be understood simply as narratives that have power as long as we believe in them and thus bringing them to life. Robinson Crusoe couldn't be part of a legal universe because there was no one to listen to him and believe his story.

Now let's imagine the limits of this legal space, its membrane. It separates the legal from the non-legal, the world of things that cannot be the object of our narrative. On July 21, 1969, when Neil Armstrong landed on the Moon, the quantitative disparity between the two worlds was overwhelming. But the moment he picked up a piece of moon rock with the intention of keeping it, the membrane that encompassed him, a human being with rights and obligations, would surround this lunar rock, turning it into good. *The passage of the thing through the legal membrane to become good is the essence of appropriation*.

Appropriation takes place here through occupation, but the two are not to be confused. While *occupation* is an original mode of acquisition through the effect of the instant acquisitive prescription of possession, *appropriation* is the exclusive mode of entry into the legal order. Appropriation therefore uses the whole palette

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[10] V. Stoica, *op. cit.,* p. 322.

[11] W. Dross, *Droit des biens*, 5th ed., LGDJ, Paris, 2021, p. 20.

[12] V. Stoica, *Noțiunea de bun incorporal în dreptul civil roman*, in Revista Română de Drept Privat no. 3/2017, p. 34. For the similar idea, see also C. Stătescu, *Drept civil. Persoana fizică. Persoana juridică. Drepturile reale*, Bucharest, Didactică și Pedagogică Publishing House, 1970, p. 530.

[13] V. Stoica, *op. cit*., p. 59.

[14] I. Sferdian, *op. cit.,* p. 57.

[15] For a broader treatment of the concept of civil circuit see S. Boţic, Comentariul art. 6[1], in S. Boţic (coord.), *Legea nr. 50/1991 privind autorizarea executării lucrărilor de construcții. Comentarii și jurisprudență pe articole*, Bucharest, Hamangiu Publishing House, 2021, pp. 293-6.

[16] I. Sferdian, *op. cit.,* p. 249.

[17] V. Stoica, *op. cit.,* p. 23, n. 21.

of ways in which the membrane between things and goods can be penetrated, regardless of whether we are talking about occupation, constitution, manufacture or confection.

However, what is of the essence of appropriation – and here we are probably parting ways with a good part of the national doctrine, is the fact that appropriation necessarily involves the transition from things to goods. More precisely, wrapping it in a legal garment that makes it intelligible to the legal order[18]. *The good is therefore a thing dressed in the garment of legality*.

Several conclusions emerge immediately from this. The first is that at the time of the transfer of ownership, appropriation does not operate, because we have an asset that changes hands, the ownership of which is passed from one person to another. But the good is the same, the thing within being already draped in the legal toga. There is no transition from things to goods, so we have no appropriation in the basic sense. The same is the situation of usufruct or acquisition by possession in good faith, because despite the original character of the acquisition, what is born is *a new right, not a new asset*. The good is already in the legal order, being irrelevant that the right to it is extinguished so that another right is born in favor of the prescriptive acquirer or the acquirer.

The second conclusion implies that, in the proper sense of the word, *we can never speak of an individual appropriation*. Our moon rock is not appropriated *by* Armstrong, but *thru* him. A finer explanation is needed here, since apparently it is the famous astronaut who makes the appropriation for himself and on his behalf. But in reality, the real profit belongs to the concept of law, not to the one who made the occupation. This is because he acquires a right, while the legal world is enriched with a good. Once back on Earth, Neil will be able to sell or donate his asset[19], which means that the right to it will come out of his patrimony, but the asset remains won for the civil circuit.

The legal order is therefore the real beneficiary, for Neil Armstrong temporarily acquires a right, but the concept of law permanently gains an asset. Or, the appropriation concerns exclusively the assets, not the rights they carry over them, from which it follows that the appropriation is the way of acquiring the asset, while the transfer, the usufruct, the accession and all the others that the legislator instituted or will institute[20] are nothing more than ways of acquiring the right to property.

That is why the appropriation can only be of two kinds, *private* and *public*, because what interests us is the place the good will have in the legal world, namely if it can be characterized by dynamism, being in the general civil circuit, or if, on the contrary, it will be fixed only for the scope of a type of property. In the situation of private appropriation, but also in the context of public appropriation, we will be able to find a man in the proximity of the thing. In the strict sense, however, it will never appropriate the thing, but it will be *the agent* of appropriation.

Once we understand the mechanism of appropriation in this way, it becomes obvious that possession as an element of right cannot be the expression of an appropriation. Indeed, appropriation is the foundation of any property right, as we have seen, because it alone delivers its object (the good). But after the appropriation, after the thing has become good, its role fades. The real right no longer needs it, since the asset exists and thus has its object.

Equally important, accepting the contrary thesis would lead to a split in private property, which is inadmissible. This is because if *ius possidendi* is a prerogative of property, and it is the expression of appropriation, then the right of ownership acquired through the material realization of the thing or through occupation would indeed respect the mechanism of appropriation. But the right acquired through transfer would not, because now we would have the same *asset* that carry from one person to another (not a thing that metamorphoses into a good). So, we would have two types of property, one that would contain possession as an element of right, and another that would not, with the consequence of different degrees of rights. However, in addition to the complete lack of practical utility of such an arrangement, national law does not even allow it. The conclusion being absurd, the thesis must be abandoned.

For all these reasons, we will consider that *ius possidendi* is mistakenly seen as an expression of appropriation. If the role of appropriation is to make something external to the person come into his sphere of

[18] It has been noted somewhat in the same sense that „right is the mental, psychological mechanism by which a thing becomes good through the relation of appropriation", in I. Popa, *Sunt bunurile incorporale susceptibile de posesie?*, in Revista Română de Drept Privat no. 5/2010, p. 89.

[19] Subject to certain regulations specific to celestial objects which for the architecture of our argument have no relevance.

[20] Art. 557 para. (3) CC, in the case of private property and art. 863 letter f) CC, in the case of public property, provides for the possibility of establishing other ways of acquisition than the already existing ones.

power, to belong to him or serve his interests[21], then appropriation would be just another word for acquiring the right to the property, totally identifying itself with the different types of acquisition. However, as we think we have managed to show, *appropriation represents the acquisition of an asset for the benefit of the legal order, not the acquisition of a right over the asset thus embodied*.

5. Mastery of the good

It is rather indisputable the fact that in itself the phrase „mastery of an asset” refers to possession and ownership, for only the possessors and owners can be said to have omnipotence over their goods. But in the context of an *ius possidendi* this mastery, and here the legal doctrine is again in full agreement[22], is a purely intellectual one. Accordingly, we are not talking about *corpus*, but about *animus*, more precisely about its intellectual coordinate. In this sense, it has been rightly stated[23] that possession as a state of law is the intellectual expression of the right to rule.

It is true that it is unimaginable for an owner not to have the representation of the idea of ownership. Samuel Pufendorf made once a persuasive argument that the possessor must understand the legal notion he emulates (property). But this condition imposed on the owner is not a true prerogative or power, but a condition of legal capacity which, moreover, is absolutely presumed. There is no possibility in Romanian law that a person who has full capacity to exercise, but who does not have, for any reason, the representation of the idea of ownership, can be deprived of his real right.

Therefore, what kind of prerogative is this intellectual mastery of the good in reality?! Well, we can begin to answer this by first noticing that there is a deep gulf between this power and the others which the law confers on the owner. First of all, all other powers can be exercised materially over the good: *usus* through its use, *fructus* through the perception of natural and industrial fruits through separation[24], and *abusus* through the separation of products or any other manifestations of the material disposition over the good. Possession as intellectual possession is incapable of any objectification! Rigorously speaking, there isn’t any kind of material manifestation for possession that is not already an attribute of the other powers (*usus*, *fructus* and *abuses*).

Secondly, some of the owner's powers can be exercised by legal acts. It is the case of *fructus* in the case of civil fruits and of *abusus* as a legal disposition. Possession as intellectual dominion is incapable of this form of objectification, any imaginable legal act under it being in fact absorbed into the power of reaping civil fruits and into the power of disposition.

Thirdly, all powers over good are possible in their negative aspect, by which we usually understand the restraint from their exercise does them no harm. This, again, is commonplace in the doctrine[25]. The owner may not make use of his work, may not reap its fruits, may not alter its substance, or alienate it, and all this does not cause his powers to suffer anything.

On the contrary, the „prerogative” of possession cannot fail to be exercised. The doctrine very correctly held it „has a meaning of continuity until the moment of the loss of possession of the good or the right of ownership by its owner”[26]. It becomes more and more obvious that possession, in this sense of *ius possidendi*, cannot be understood as a prerogative of property, its content making it untenable with classic prerogatives of real law.

Of course, it could be argued that the idea of ownership expresses the relationship between the owner and his property, a relationship established legally by mentioning possession among the elements of the right of ownership in the legal definition encapsulated in art. 555 CC. In principle we agree with the idea that possession can be understood as a legal relationship, but with an important nuance: we do not consider that we can speak of a relationship between the owner and his property. The good is an intellectual reality that is molded on a

[21] P. Berlioz, *Droit des biens*, Paris, Ellipses, 2014, p. 38.

[22] G. Boroi, L. Stănciulescu, *op. cit.*, 2012, p. 19; E. Chelaru, *op. cit.,* p. 39; C. Bîrsan, *op. cit.,* pp. 48-9; V. Stoica, *Drept civil...,* pp. 101-102; I. Sferdian, *op. cit.,* pp. 155-6; Fl.-A. Baias, *op. cit.,* p. 740.

[23] V. Stoica, *op. cit.,* p. 102.

[24] *Idem,* p. 103.

[25] O. Ungureanu, C. Munteanu, *Tratat de Drept civil. Bunurile. Drepturile reale principale*, Hamangiu Publishing House, Bucharest, 2008, p. 573; E. Chelaru, *op. cit.,* p. 40; C. Bîrsan, *op. cit.,* pp. 49-50; V. Stoica, *op. cit.,* pp. 103 *et seq.* ; I. Sferdian, *op. cit.,* p. 156; Fl.-A. Baias, *op. cit.,* p. 740.

[25] V. Stoica, *op. cit.,* p. 102.

[26] *Ibidem*.

thing[27]; therefore, the thing cannot be the other necessary side of any relationship. Relationships can only be established between people, because only they can adjust their conduct as a result of entering into that legal relationship. In this sense, the legal doctrine[28] agrees with us, property being a relationship between an owner „and those who, as a consequence, are deprived of that property"[29].

6. Conclusions

For all the reasons mentioned, we consider that possession as an element of right is not theoretically supported. Therefore, it must be abandoned. In fact, as we have seen, it is not even necessary as a power, the other prerogatives being more than sufficient to make up for it. On the other hand, possession (as a state of fact) is one of the most powerful legal institutions, and its effects are far-reaching. That is why it must remain well defined in its essential elements, and the permanent confusion with an institution that bears its name, but cannot actually support itself, only saps its power of persuasion. It is high time to take a closer look and remove all the theoretical jumble that has settled, here and there, upon our national legal framework.

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- O. Ungureanu, C. Munteanu, *Tratat de Drept civil. Bunurile. Drepturile reale principale*, Hamangiu Publishing House, Bucharest, 2008.

[27] We will leave aside here the situation of animals, seen as movable corporeal goods, as well as of artificial intelligence programs, as incorporeal goods, since for the logic of our argument, even if it could be said that they can somehow change their behavior, this makes no difference other than to find that we again have property rights of different degrees, an unacceptable situation of course. See for an argument tending to the same conclusion M. Nicolae, *Drept civil: teoria generală. vol. II: Teoria drepturilor subiective civile,* Solomon Publishing House, Bucharest, 2018, p. 3.

[28] M. Nicolae, *op. cit.*, p. 3 *et pass.*

[29] V. Stoica, *op. cit.,* p. 96.

NEW ASPECTS IN THE MATTER OF PROTECTION MEASURES FOR PEOPLE WITH INTELLECTUAL AND PSYCHOSOCIAL DISABILITIES

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Abstract

In order to comply with the CCR dec. no. 601/2020, the Law no. 140/2022 on some protection measures for persons with intellectual and psychosocial disabilities and amending and completion of some normative acts was adopted. According to art. 26 of the Law, most of its provisions entered into force 90 days after the date of publication in the Official Gazette of Romania, i.e., on August 18, 2022, except for the provisions of article 20 paragraph (6) thesis III and of article 23, which entered into force 3 days after publication. The measure of placing under judicial interdiction has been replaced, the current study aiming to analyze the new legal instruments of support and protection that are addressed to these categories of vulnerable persons that were created by Law no. 140/2022. The adoption of this normative act, whose solutions we will present in this study, is welcome and long awaited because the lack of a legislative framework in this important matter starting with the date of the publication of the Constitutional Court Decision left open the way for the courts to issue divergent solutions in cases having as object the „judicial interdiction". Within 3 years from the entry into force of Law no. 140/2022, the ex officio re-examination of the injunction measures by the courts is carried out, in the sense of ordering either their replacement with the protective measures provided for by the new regulation, or the lifting of the measure, and the fulfillment of the deadline does not remove the obligation of the courts to re-examines, further, ex officio, all the measures of placing under judicial interdiction.

Keywords: *persons with intellectual and psychosocial disabilities, assistance for concluding legal documents, judicial counseling, special guardianship, protection mandate.*

1. Introduction

According to art. 164 para. (1) CC, in the form prior to the amendments made by Law no 140/2022, „A person who lacks the discernment necessary to look after his or her own interests, due to alienation or mental debility, shall be placed under a judicial interdiction." The doctrine extracted the following features of the judicial interdiction: a civil law protection measure; a measure taken by judicial means; it applies absolutely strictly only to natural persons lacking discernment due to alienation or mental debility; its effect consists in depriving the natural person of exercise capacity and establishing guardianship[1]. The singular criticisms that were expressed in the doctrine related to this regulation were rightfully aimed at the fact that „for the most part, the New Civil Code would merely resume, almost unchanged, the provisions of the Family Code of 1953 with regard to the substantive aspects of the measure, and the new Civil Procedure Code on those of Decree no. 32/1954, regarding the procedure for taking this measure, or, given the age of the Family Code and Decree no. 32/1954, it is obvious that since then concepts have evolved and practical needs demanded a more modern and flexible regulation, as is the case in most modern states, as well as other legal systems"[2].

The need for a paradigm shift in the matter was imposed in order to align the national legislation with the standards provided for by art. 12 of the Convention on the Rights of Persons with Disabilities, signed by Romania on September 26, 2007 and ratified by Law no. 221/2010[3] which enshrines certain guarantees that must accompany the protection measures instituted regarding persons with disabilities and provides in point 1 that

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[1] O. Ungureanu, C. Munteanu, *Drept civil. Persoanele în reglementarea noului Cod civil*, Hamangiu Publishing House, Bucharest, 2011, p. 264. For a presentation of the judicial interdiction, see also M. Nicolae (coord.), V. Bîcu, G-A Ilie, R Rizoiu, *Drept civil. Persoanele*, Universul Juridic Publishing House, Bucharest, 2016, pp. 239-251.

[2] C. Chirică, *Ocrotirea anumitor persoane fizice prin măsura punerii sub interdicție judecătorească în lumina dispozițiilor Noului Cod Civil și a Noului Cod de Procedură Civilă*, in Dreptul no. 1/2012, p.55.

[3] Published in the Official Gazette of Romania, Part I, no. 792/26.11.2010. The Convention on the Rights of Persons with Disabilities was adopted in New York by the UN General Assembly on December 13, 2006 and opened for signature on March 30, 2007. See also General Comment no. 1/2014.

„persons with disabilities have the right to recognition, wherever they may be, of their legal capacity". Ever since 2018, the Commissioner for Human Rights of the Council of Europe has requested the Romanian authorities to take measures to replace the system of „substituted decision-making" with that of „assisted decision-making", which would ensure these people some independent assistance, away from conflicts of interest and subject to regular judicial control[4].

By dec. no. 601/16.07.2020[5], CCR found that the provisions of art. 164 para. (1) CC, as stated above, are unconstitutional. The Court held that in the absence of the establishment of the guarantees that accompany the measure of protection of the placing under judicial interdiction, prejudices are brought to the constitutional provisions of art. 1 para. (3), of art. 16 para. (1) and of art. 50, as interpreted according to art. 20 para. (1) and in the light of art. 12 of the Convention on the rights of persons with disabilities. For the compliance with the CCR dec. no. 601/2020, the Law no. 140/2022 on some protection measures for persons with intellectual and psychosocial disabilities and amending and completion of some normative acts was adopted[6].

The adoption of this normative act, solutions of which we will present below, is welcome and long awaited because the lack of a legislative framework in this important matter starting with the date of the publication in the Official Gazette of the CCR dec. no. 601/2020 left open the way for the courts to issue divergent solutions in cases having as object the "judicial interdiction"[7]. Within 3 years from the entry into force of Law no. 140/2022, the ex officio re-examination of the injunction measures by the courts is carried out, in the sense of ordering either their replacement with the protective measures provided for by the new regulation, or the lifting of the measure, and the fulfillment of the deadline does not remove the obligation of the courts to re-examines, further, ex officio, all the measures of placing under judicial interdiction[8]. The new regulation provides for the organization by the National Institute of Magistracy with priority of continuing professional training actions for judges and prosecutors for the years 2022-2024 in this field[9].

2. Assistance for concluding legal documents

The new support measure of assistance for the conclusion of legal documents is regulated in Chapter I of Law no. 140/2022, art. 1-6, being a non-jurisdictional measure under the competence of the notary public that does not affect the exercise capacity of the major person.

The measure of assistance for the conclusion of legal documents is addressed to the major person who, due to an intellectual or psychosocial disability, needs support to take care of his person, manage his patrimony and to exercise, in general, his rights and civil liberties. It is a priority measure; the judicial protection measures (judicial counseling and special guardianship) are subsidiary in nature and will not be able to be instituted if the protected person can be adequately protected through assistance for the conclusion of legal documents[10].

As well as the duration, the measure of assistance for the conclusion of legal documents is ordered for a maximum of 2 years, which can be renewed. Law no. 140/2022 does not include provisions limiting the number of renewals. The measure is free of charge, but the major person is obliged to reimburse the assistant for the reasonable expenses advanced by the latter in the performance of his task.

The assistant is authorized to act as an intermediary person between the major person who benefits from the assistance and third parties. According to the law, it is presumed that the assistant acts with the consent of the major person in granting the assistance, it being a simple presumption. The personal assistant can transmit and receive information on behalf of the major person and can communicate the decisions related to him to third parties, but he does not conclude the documents on behalf of the assisted major person nor approve the

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[4] Commissioner for Human Rights of the Council of Europe, Dunja Mijatović, Report following her visit to Romania from 12 to 16 November 2018, para. 53 of the Report.

[5] Published in the Official Gazette of Romania no. 88/27.01.2021. For a presentation of the jurisprudence of the Constitutional Court on the matter, see also I. Bratiloveanu, *The judicial interdiction. Special review on the jurisprudence of the Constitutional Court*, in CKS Journal 2021, Challenges of the knowledge society, Bucharest, 2021, pp. 569-579.

[6] Published in the Official Gazette of Romania no. 500/20.05.2022. For a presentation of the new legal framework in this matter, see also R.M. Roba, *Considerations regarding Law no. 140/2022 on some protection measures for persons with intellectual and psychosocial disabilities and amending and supplementing some normative acts*, in Curentul juridic no. 2(89)/2022, pp. 82-89.

[7] I-A Filote-Iovu, *Divergențe jurisprudențiale în cauzele având ca obiect „punere sub interdicție judecătorească"*, available at: *https://www.juridice.ro/750387/divergente-jurisprudentiale-in-cauzele-avand-ca-obiect-punere-sub-interdictie-judecatoreasca.html*.

[8] According to art. 20 para. (2) and (6) of Law no. 140/2022.

[9] According to art. 25 of Law no. 140/2022.

[10] According to art. 164 para. (3) and (5) CC, as amended by art. 7 point 22 of Law no. 140/2022.

documents that the assisted major person concludes alone. By virtue of this role, the assistant must act in relations with third parties according to the preferences and wishes of the assisted major person.

According to art. 4 para. (1) of Law no. 140/2022, the quality of assistant can be held by a person who can be appointed guardian; being applicable the cases of incompatibility with the quality of guardian provided in art. 113 para. (1) letter a)-d), f) and para. (2) CC. It is about the following cases of incompatibility: the minor, the person who benefits from special guardianship or judicial counseling, assistance for the conclusion of legal acts, who has been granted a protection mandate or placed under guardianship; also, the person deprived of the exercise of parental rights or declared incapable of being a guardian; the person whose exercise of civil rights was restricted and the one with bad behavior that must be recognized as such by the court; the person who was removed from the exercise of guardianship under the conditions of art. 158 CC[11], and, finally, the person who, due to conflicting interests with those of the represented minor, could not be his guardian. As can be noted, the case of incompatibility determined by the state of insolvency of the person provided for by letter e) was excluded. Also, the case provided for by letter g) was excluded from the incompatibility with the quality of assistant, according to which the person who was removed by authentic document or by will by the parent who exercised alone at the time death the parental authority cannot be a guardian.

Regarding the control mechanisms of the measure, art. 5 of Law no. 140/2022 stipulates the role of the guardianship authority to which the assistant is obliged to submit an annual report or, as the case may be, at the end of the term for which he was appointed regarding the fulfillment of his task and the role of the guardianship court in whose territorial jurisdiction he is domiciled or the residence of the major person who benefits from the measure of assistance that will resolve the complaints that any person can make regarding the activity of the assistant harmful to the major. The complaint regarding the activity of the assistant is urgently resolved by the court of guardianship, through an executive order, with the summoning of the parties and the hearing of the assisted major person, the order being communicated to the notary public and the guardianship authority[12].

Finally, art. 6 para. (1) letters a)-e) of Law no. 140/2022 lists the cases in which the measure of assistance for the conclusion of legal documents ceases. Thus, this measure ceases upon the expiration of the term for which it was ordered. Also, the assisted major person can make a request for the termination of the assistance that he addresses to the notary public. Another case of termination of assistance concerns the situation in which a protective measure is ordered against the major person or the assistant. The measure of assistance also ceases if the guardianship court admits the complaint regarding the activity of the assistant harmful to the major person. Finally, the assistance ends on the date of the death of the major person or the assistant, as well as by the express resignation of the assistant.

It should be noted that the appointment of the assistant and the termination of the assistance are registered in the National registry of support and protection measures taken by the notary public and the guardianship court[13]. In case of replacing the assistant, according to art. 6 para. (2) of Law no. 140/2022, it is sufficient to register the new assistant in the aforementioned register.

The procedure for appointing the assistant for the conclusion of legal documents is regulated in Chapter V, Section 7^1-a, art. 138^1-138^5 of the Law no. 36/1995 on public notaries and notarial activity[14], as supplemented by art. 9 point 5 of Law no. 140/2022, to which we will refer further.

The application for appointment made by the major person together with the person to be appointed assistant includes the identification data of the applicants, the reasons on which it is based, a summary inventory of the assets of the major person, as well as any other relevant documents that justify the institution of the measure. According to art. 15 letter f^1) from Law no. 36/1995, the notary public in the notary office located in the jurisdiction of the court where the major person has his domicile or residence is competent.

From a procedural point of view, the notary public sets a deadline for resolving the request and communicates it, in a copy, to a person from the major's family so that he or she can raise objections to the institution of the measure. At the request of the major, a person with whom he lives can be cited, even if he is

[11] Art. 158 CC, with the marginal name *„Removal of the guardian"*, provides: *„Apart from other cases provided by law, the guardian is removed if he commits abuse, serious negligence or other acts that make him unworthy to be a guardian, such as and if he does not properly fulfill his task".*

[12] Art. 5 para. (3)-(5) of Law no. 140/2022.

[13] According to art. 138^4 para. (2) of the Law no. 36/1995 on public notaries and notarial activity, republished, amended by art. 9 point 5 of Law no. 140/2022.

[14] Republished in the Official Gazette of Romania, Part I, no. 237/19.03.2018, with subsequent amendments.

not his relative. The law provides that any other concerned person can participate in the procedure of appointing the assistant, provided that the major person does not object.

According to art. 138^2 of Law no. 36/1995, it is mandatory to listen to the major person, in the presence of the person to be appointed assistant, and in terms of the obligations of the notary public, he must check if the major person understands the meaning of the procedure and if he is able to express his wishes and preferences.

The request for the appointment of the assistant is resolved by a reasoned conclusion that is communicated to the major person, the assistant, the guardianship authority specifying that in addition to the conclusion, the guardianship authority will receive copies of the documents attached to the request and the National register of records of support and protection measures taken by the notary public and the guardianship court.

Art. 138^5 of Law no. 36/1995 lists the situations in which the notary public rejects the request to appoint an assistant, the most common in practice being the one provided for in letter a), respectively when there are serious doubts about the major's understanding of the meaning of the request. The other situations, as provided for in letter b)-e) refers to the existence of serious doubts regarding the possibility for the major to express his wishes and preferences, the fear that he will suffer damage by appointing the assistant, the formulation of objections by a member of the major's family or another interested person and, finally, failure to fulfill the legal conditions for appointment.

According to the law, the major person or the person indicated in the application can file a complaint against the decision rejecting the application within 30 days of its communication. The guardianship court in whose territorial constituency the major person who requested the appointment of the assistant resides is competent to resolve the complaint. The complaint is resolved by a decision that is not subject to any appeal[15].

3. Judicial counseling and special guardianship

Depending on the degree of deterioration of his/her mental faculties, the adult person can benefit from the measure of judicial counseling or the measure of special guardianship, as regulated in Book I, Title III, Chapter III of the Civil Code whose name was changed from *„Protection of the court-ordered interdiction”* to *„Protection of the major person through judicial counseling and special guardianship”.* The measure of assistance for the conclusion of legal documents is a priority, being followed by judicial counseling and, last but not least, by special guardianship. A measure of protection cannot be taken toward a major person unless it is necessary for the exercise of his/her civil capacity.

A person can benefit from judicial counseling if the deterioration of his/her mental faculties is partial and it is necessary to be constantly advised for the exercise of his/her rights and freedoms. Such a protection measure is ordered for a period that cannot exceed 3 years. As far as the scope of the persons who can benefit from the measure of judicial counseling is concerned, it is about adults or minors with restricted capacity to exercise their rights, with the clarification that in the case of the latter, the measure can be ordered one year before reaching the age of 18 and begins to take effect from this date.

A person can benefit from special guardianship if the deterioration of his/her mental faculties is total and, as the case may be, permanent and it is necessary to be constantly represented in the exercise of his/her rights and freedoms. Such a protection measure is ordered for a period that cannot exceed 5 years. However, according to the law, if the damage to the protected person's mental faculties is permanent, the court can order the extension of the special guardianship measure for a longer period that cannot exceed 15 years. Both adults and minors with restricted exercise capacity can benefit from the measure of special guardianship.

In the following, the effects of judicial protection measures will be exposed in terms of the legal capacity of the natural person, some of which are common to both measures, others being specific to each of them.

If the law does not provide otherwise, in the case of the person who benefits from judicial counseling, the rules regarding the guardianship of minors who have reached the age of 14 are applied, and in the case of the person who benefits from special guardianship, the rules regarding the guardianship of minors who have not over the age of 14[16]. So, pursuant to the decision based on which the protection measure was instituted, the guardianship court shall establish, depending on the degree of autonomy of the protected person and his/her specific needs, the categories of documents for which approval is necessary or, as the case may be, his/her representation. Therefore, the guardianship court can order that the protective measure concerns even only one

[15] Art. 138^5 of the Law no. 36/1995 of public notaries and notarial activity.

[16] According to art. 171 CC, as amended by art. 7 point 29 of Law no. 140/2022.

category of documents. In addition, the court can order that the protection measure refers only to the person under protection or only to his/her assets. The order of the protective measure shall not affect the capacity of the protected person to conclude the legal deeds for which the court has established that the consent of the protector or, as the case may be, his/her representation is not necessary.

In the matter of non-patrimonial relations, with regard to the marriage of the person who benefits from a judicial protection measure, art. 276 CC, as amended by art. 7 point 41 of Law no. 140/2022, establishes a possible preventive control by regulating the obligation of the person who benefits from judicial counseling or special guardianship to notify in advance, in writing, the guardian who can formulate opposition to the marriage, in which case the guardianship court will decide on the validity of the opposition. Art. 275 CC, as amended by art. 7 point 40 of Law no. 140/2022, establishes the impediment to marriage based on guardianship status. The protected person can conclude or modify a matrimonial agreement only with the consent of the legal guardian and with the authorization of the guardianship court[17]. The court can pronounce the separation of assets when this is in the interest of the protected person and the request is made by the guardian of the protected spouse or the family council[18]. Art. 375 para. (3) CC, as amended by art. 7 point 51 of Law no. 140/2022, stipulates that divorce by the consent of the spouses cannot be admitted by the agreement of the spouses by administrative means or by notarial procedure; the new regulation, unlike the previous one, allows divorce by agreement of the parties only through the courts, specifying that there can be no agreement on requests ancillary to the divorce[19].

If one of the parents benefits from the measure of special guardianship, according to art. 507 CC, as amended by art. 7 point 57 of Law no. 140/2022, he retains the right to supervise the child's upbringing and education, as well as the right to consent to his adoption, unless he is unable to express his will due to lack of discernment, this being, in our opinion, a case of unilateral exercise of parental authority.

If with respect to one of the parents, judicial counseling was instituted, according to art. 503 para. (1^1) CC, introduced by art. 7 point 56 of Law no. 140/2022, the guardianship court can decide that the rights and duties regarding the child's assets are exercised by the other parent, and if the protected adult exercises parental authority alone, the court orders, depending on the circumstances, on the continuation of the exercise of parental authority or establishing guardianship over the child.

In the matter of patrimonial relations, the person protected by the measure of judicial counseling, having limited exercise capacity, can conclude the legal documents that the minor who has reached the age of 14 can also do. The rule is that the legal acts are concluded by the protected major through judicial counseling with the consent of the guardian, and in the cases provided by law[20], also with the authorization of the guardianship court. Art. 41 para. (3) CC lists the legal acts that he can conclude on his own, without any approval or authorization: conservation acts, administrative acts that do not prejudice him, acts of acceptance of an inheritance or acceptance of liberalities without encumbrances as well as dispositional acts of small value, current and which execute on the date of their conclusion.

Regarding the person for whom the special guardianship is established, the legal acts are concluded in his name by the guardian, it being forbidden to conclude them directly by the protected person. The categories of acts that the person protected by this measure can conclude alone, are listed in the content of art. 43 para. (3) CC: the specific acts provided by law, conservation acts and disposition acts of small value, current in nature and executed at the time of their conclusion.

Regarding the sanction applicable to acts concluded with non-compliance with the legal provisions by the major person who benefits from a measure of judicial protection, art. 172 para. (1) CC[21], provides that acts are voidable or benefits arising from them can be reduced, even without proof of damage and even if at the time of their conclusion he had discernment. Herewith, testamentary dispositions of the protected adult are considered valid, provided they are authorized or confirmed by the guardianship court[22]. On the other hand, the legal acts concluded before the establishment of the protection measure are voidable or the benefits arising from them can be reduced only if the condition provided by art. 172 para. (2) CC is met that *„on the date when they were*

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[17] Art. 337 CC, the form in force from August 18, 2022.

[18] Art. 370 para. (1) CC, introduced by art. 7 point 48 of Law no. 140/2022.

[19] Art. 930 para. (2) CPC, as amended by art. 8 point 22 of Law no. 140/2022.

[20] These are the acts of disposal provided for in art. 144 para. (2) CC: acts of alienation, division, mortgage or encumbrance with other real charges, relinquishment of patrimonial rights and any act that goes beyond the administration acts.

[21] Amended by art. 7 point 29 of Law no. 140/2022.

[22] Art. 172 para. (3) of Law no. 140/2022.

concluded, the lack of discernment was notorious or known to the other party". The new regulation[23] gives the possibility to the co-contractor of the protected adult, even if he knew about the establishment of the judicial protection measure, to request the maintenance of the contract, to the extent that it offers balancing benefits, by reducing or increasing his own benefit; he cannot oppose the annulment of the contract, nor can he exercise the action for annulment. Para. (1) of art. 1205 CC remained unchanged, according to which *„The contract concluded by a person who, at the time of its conclusion, was, even if only temporarily, in a state that made him unable to realize the consequences of his act is voidable".*

Regarding civil liability in tort, the law distinguishes depending on the measure of protection instituted and the discernment of the protected person at the time of the commission of the offence; thus, by the provisions of art. 1366 CC, as amended by art. 7 point 66 of Law no. 140/2022, the relative legal presumption regarding the lack of tortious capacity of the person benefiting from special guardianship and the relative legal presumption regarding the tortious capacity of the person benefiting from judicial counseling were established.

For the benefit of the protected person, the new regulation contains a series of guarantees such as the regular revaluation of the chosen protection regime or the possibility of the permanent individualization of the protection measure by the guardianship court, considering the specific situation of the adult person in question. Thus, art. 168 para. (6) CC, as amended by art. 7 point 26 of Law no. 140/2022, orders that the guardian or the legal representative of the protected person to have the obligation to notify the guardianship court whenever there are data or circumstances justifying the revaluation of the measure, as well as at least 6 months before the expiry of the duration for which it was ordered, with a view for its revaluation. The guardianship authority has the role of verifying the fulfillment of this duty. In case of non-fulfillment, the guardianship authority shall notify the guardianship court, which can order, following the same procedure, the extension, the replacement or lifting of the protection measure.

In the new regulation, considering the inner features that animate them, the protection of the disabled adult remains primarily the responsibility of the family. Thus, art. 170 para. (2) CC, as amended by art. 7 point 28 of Law no. 140/2022, stipulates as follows: *„In the absence of an appointed guardian, the guardianship court shall appoint, as a matter of priority, in this quality, if there are no valid opposite reasons, the spouse, the parent, a relative or in-laws, a friend or a person who lives with the protected person if the latter has close and stable ties with the protected person, able to fulfill this task, taking into account, as the case may be, the bonds of affection, the personal relationships, the material conditions, the moral guarantees presented by the person considered to be appointed guardian, as well as the proximity of their homes or residences".* As a novelty, it is also considered the situation in which none of these persons can assume guardianship, in which case the guardianship court shall appoint a personal representative, aiming to create a profession for the personal representative[24]. Upon the appointment of the guardian, the guardianship court shall take into consideration the preferences expressed by the protected person, his/her usual relationships, the interest expressed with regard to his/her person, but also any possible recommendations formulated by the people close to him/her, as well as the lack of interests contrary to the protected person[25].

Art. 174 para. (2) CC, as amended by art. 7 point 32 of Law no. 140/2022, lays out in detail the legal guardian's duties that emphasize his/her role as a person who provides permanent support to the protected person, namely: to take into account, as a matter of priority, the will, the preferences and the needs of the protected person, to provide the support necessary in establishing and expressing of his/her will and to encourage his/her to exercise his/her rights and fulfill his/her obligations alone; to cooperate with the protected person and to respect his/her private life and dignity; to ensure and to allow, whenever possible, the information and the clarification of the protected person, in a manner adapted to his/her condition, about all the acts and the facts that could affect him/her, about their utility and degree of urgency, as well as about the consequences of a refusal from the part of the protected person to conclude them; to take all necessary measures in order to protect and to achieve the rights of the protected person; to cooperate with natural and legal persons with duties in the care of the protected person; to maintain, as far as possible, a personal relationship with the protected

[23] According to art. 46 CC, as amended by art. 7 point 7 of Law no. 140/2022.

[24] Art. 170 para. (3) CC, the form in force from August 18, 2022. The provisions of art. 118 para. (2) and art. 170 para. (3) CC, republished, with subsequent changes, as they were regulated, respectively modified by Law no. 140/2022, will enter into force on the date provided by the special law regarding the personal representative.

[25] Art. 170 para. (4) CC, the form in force from August 18, 2022.

person; in the cases provided by law, to undertake all the necessary steps for the preparation of evaluation reports and notification to the guardianship court.

The protected person can be cared for at home, in a social department or in another institution. According to art. 174 para. (3) CC, as amended by art. 7 point 32 of Law no. 140/2022, the guardianship court will decide the place of care after listening to the protected person, taking the opinion of the family council and consulting the medical, psychological evaluation and social investigation surveys. The authorization of the guardianship court shall be necessary to change the place of care.

Art. 177 para. (1) CC, as amended by art. 7 point 35 of Law no. 140/2022, lists the causes of termination of the protection measure: 1) death of the protected person; 2) expiration of the duration; 3) the replacement of the measure; and 4) lifting the measure.

Furthermore, we shall present the changes brought by Law no. 140/2022 regarding the procedure for establishing judicial counseling and special guardianship.

By art. 8 point 25 of Law no. 140/2022, Chapter I of Title II, Book VI, art. 936-943, with the generic name *„Procedure for the establishment of judicial counseling or special guardianship”* was introduced in the Civil Procedure Code[26].

Law no. 140/2022 has not brought any changes with regard to the territorial competence of the courts that must rule on the protection measure, the request for the establishment of judicial counseling or special guardianship falling within the competence of the guardianship court in the jurisdiction of which is located the domicile[27].

In addition to the elements provided for by common law (art. 194 CPC), the request for the establishment of the protective measure shall include the facts from which it results the deterioration of his/her mental faculties, the means of evidence, the data related to the family, social and patrimonial situation of the person, any other elements regarding his/her degree of autonomy, as well as the name of his/her attending physician, to the extent that they are known to the applicant, the purpose of the rule being that the court could form, from the very beginning of the process, an accurate and exhaustive picture of the situation of the person in question.

Given that the protective measures must correspond to the degree of incapacity and be individualized according to the needs of the protected person, a favorable provision for the person in question is also that the court is not restricted by the object of the application and can institute a protective measure different from the one requested.

As in the previous regulation[28], the procedure for establishing the protective measure goes through the following phases: the pre-judgment phase, non-contentious[29]; the trial phase, contradictory phase[30] and the phase of the communication of the decision[31].

In the preliminary phase, the president of the court notified with the request for the establishment of the measure of judicial counseling or special guardianship shall order to communicate to the person of whom the establishment of the protection measure is requested the copies of the application and from the attached documents, the same communication being made to the prosecutor, when the request was not introduced by him. As a novelty, in this procedure, shall be to the benefit of the person in respect of whom the establishment of the protection measure is requested the provisions of art. 938 para. (2) CPC which allow the appointment of a lawyer ex officio in case the person in question did not choose a lawyer.

In this phase, the prosecutor shall carry out the necessary research, among which, he shall order the performance of a medical and a psychological evaluation[32], for the person hospitalized in a health institution, he

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[26] Law no. 134/2010 regarding the Civil Procedure Code (CPC), republished in the Official Gazette of Romania, Part I, no. 247 of April 10, 2015, with subsequent amendments and additions.

[27] For the interpretation according to which the notion of „domicile” can have no other meaning than that assigned by the rules of the Civil Code, see I. Ilies Neamt, I.-A. Filote-Iovu, *“O analiză a orientărilor jurisprudențiale privind competența teritorială a instanțelor învestite cu soluționarea cererilor având ca obiect ocrotirea persoanei fizice”* in Revista de Dreptul Familiei no. 2/2022, pp. 164-190.

[28] For a presentation of the procedure of placing under judicial interdiction, see A. Tabacu*, Drept procesual civil*, Universul Juridic Publishing House, Bucharest, 2019, pp. 542-547; M. Fodor, *Punerea sub interdicție în reglementarea Noului Cod Civil și a Noului Cod de Procedură Civilă*, in Dreptul no. 2/2013, pp. 29-47; G. Boroi, M. Stancu, *Drept procesual civil*, 5th ed., revised and added, Hamangiu Publishing House, Bucharest, 2020, pp. 962-967.

[29] Art. 938 *et seq.* CPC.

[30] Art. 940 CPC.

[31] Art. 941 CPC.

[32] Also see the joint Order of the Ministry of Health and the Ministry of Labor and Social Solidarity no. 3423/2128/2022 regarding the approval of the methodology and the medical and psychological evaluation report of persons with intellectual and psychosocial disabilities, published in the Official Gazette no. 1128/23.11.2022. It must be said that this medical and psychological evaluation report constitutes a very

will order the drawing up a report and he shall order the preparation of a social survey report by the guardianship authority.

With regard to the person in respect of whom the establishment of the protection measure is requested, involuntary temporary hospitalization can be ordered pursuant to the conditions of art. 939 CPC, as amended by art. 8 point 29 of Law no. 140/2022. The prosecutor, upon notification of the physician who performs the medical evaluation, shall request, on solid grounds, the guardianship court to take this measure. Involuntary temporary hospitalization in a specialized health institution shall be ordered in case of need for a longer observation of the health condition of the person whose protection is required, which cannot be carried out otherwise, and the person refuses hospitalization. As a novelty brought by Law no. 140/2022, it is stipulated that the measure of involuntary temporary hospitalization can be taken for a maximum of 20 days, compared to 6 weeks which was the maximum duration in the procedure of placing under judicial interdiction and it is ordered only after listening to the person whose protection is requested. The involuntary temporary hospitalization is ordered on solid ground and proportionally to the goal pursued. The measure restricting the freedom of the person and being ordered for the period of carrying out the evaluation reports, the provisions of art. 939 para. (6) CPC according to which the specialized health institution immediately proceeds to the discharge of the person whose protection is requested, are to be welcomed, if it is established before the expiration of the duration of the temporary involuntary hospitalization, that this measure is no longer necessary. The court shall issue a decision that is only subject to appeal, within 3 days[33], an appeal that is to be settled within 5 days from its submission, the legislator establishing short deadlines considering the maximum duration of involuntary hospitalization.

In the next phase, the trial phase, after receiving the documents prepared in the preliminary phase, the trial term is fixed. If the law did not provide a time limit for the execution of the procedure of placing under interdiction, this being carried out according to the provisions of the common law[34], art. 940 para. (2) CPC provides that the judgment of the application for taking new protective measures to be done urgently and as a matter of priority. On the date set for the judgment, the court is obliged to hear in the Council Chamber the person in respect of whom the protective measure is requested, asking him/her questions in order to ascertain the necessity and the advisability of instituting a protective measure, as well as to find out his/her opinion with regard to the protective regime and the person of the protector. If the court deems it to be in his/her interest, he/she can be heard at his/her home, where he/her is taken care of, or in any other place deemed appropriate by the court. Upon hearing him/her, a trustworthy person can also be present. We consider that this provision is in agreement with the overall vision of Law no. 140/2022 which emphasizes the trial: the will and the preferences of the protected person, but also his/her specific needs. If, in the case of the establishment of the measure of special guardianship, the hearing of the person whose protection is requested is mandatory, by way of exception, art. 940 para. (5) CPC provides that the extension of the measure of special guardianship for a period longer than five years can be ordered without hearing the protected person if the medical report states that his/her hearing may be likely to affect his/her state of health or he/she is not able to express his/her will. The prosecutor attending the trial shall be mandatory. The new regulation provides that when the plaintiff waives the trial, the prosecutor can ask for the continuation of the trial, the criterion being that of the interest of the person whose protection is requested. Finally, the obligation to inform the person whose protection is requested is maintained for the entire duration of the procedure.

After the decision to institute the protective measure has remained final, the court that ruled it (first instance or court of appeal) shall immediately communicate the decision in a certified copy to the institutions mentioned in art. 941 CPC, as amended by art. 8 point 31 of Law no. 140/2022, namely: the Local Public Community Service for Personal Records where the birth of the one placed under protection is registered, in order to make some mention on the birth certificate; to the competent health service, in order to establish a permanent supervision; the competent Office of Cadastre and Land Registration, for the registration in the Land Register, if applicable; the Trade Register, if the person placed under protection is a professional; and, the newly

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important evidence because it includes conclusions regarding the nature and degree of severity of the mental condition and its foreseeable evolution, the extent of the person's needs and the other circumstances in which he is found, as well as mentions regarding the necessity and opportunity of establishing a protective measure for its benefit.

[33] The term flows from the pronunciation for those present and from the communication for those absent.

[34] A. Tabacu, *Drept procesual civil. Legislație internă și internațională. Doctrină și jurisprudență*, Universul Juridic Publishing House, Bucharest, 2019, p. 543.

established National registry of support and protection measures taken by the notary public and the guardianship court.

4. Conclusions

Law no. 140/2022, taking over the recommendations of the Constitutional Court made on the occasion of delivering dec. no. 601/2020 brings the modern solutions which I have exposed in this study in order to appropriately respond to the needs of people with intellectual and psychosocial disabilities, by adopting this normative act aiming at combating social exclusion and discrimination, encouraging the active participation, under equal conditions, of these categories of people in civil life, as well as their social and economic reintegration, with beneficial effects including on their health condition. The solutions offered by the new regulation are perfectible, its application is to be subject to monitoring for a period of 3 years from its entry into force, at the end of which the National Authority for the Protection of the Rights of Persons with Disabilities and the Superior Council of Magistracy will draw up impact assessment reports and formulate proposals to improve the legislation.

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THE CHALLENGES OF PROTECTING CONSUMER IN THE DISTANCE MARKETING OF FINANCIAL SERVICES DIRECTIVE

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Abstract

The European Commission's new rules presented in its Digital Finance Package at September 24, 2020, introduce much-needed improvements for the online retail financial services market which will strengthen consumer protection. However, additional new rules are needed in some key areas. On May 11, 2022, the EU Commission published a directive proposal amending Directive 2011/83/EU on consumer rights (the „Consumer Rights Directive" – CRD) and repealing Directive 2002/65/EC concerning the distance marketing of consumer financial services. The European Commission's legislative proposals are a very welcome step in the right direction to better protect consumers in the increasingly digital financial services market. While digitalisation brings opportunities for suppliers and consumers alike, it also brings a number of risks, making a proper regulation of the market necessary not only by updating it but strengthening consumers 'rights, by filling existing regulatory gaps in the online financial services market. Financial services are very different from other consumer goods and services covered by the CRD and therefore creating a specific chapter and rules for financial services is crucial. At the European level, there are numerous regulations across this area. The regulatory failure results first and foremost from the lack of adequate consumer protection standards and enforcement failings at Member State level. While the Commission's proposal brings key improvements, some much-needed measures are missing and their absence represents real challenges for effective consumer protection. This paper aims to show what are the aspects that need to be improved in the Commission's proposal and how to proceed in order to create a high level of protection and a fair financial services market, and each matter will be illustrated with examples from various Member States, including Romania how the gaps in current legislative framework have detrimental effects for consumers.

Keywords: *consumer protection, financial services, digitalization, risks, Directive 2002/65/EC.*

1. Introduction

The Directive 2002/65/EC[1] of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (DMFSD) provides a legal framework governing the distance marketing of financial services.

The DMFSD aimed to ensure the free movement of financial services and the harmonization of consumer protection rules. By laying down rules on (i) the information that consumers must receive before concluding a distance contract[2]; (ii) introducing a 14-day right of withdrawal (iii) and by regulating unsolicited distance sales and communications, it has increased the protection of consumers purchasing financial services[3] at a distance[4]. It is indisputable that, through the results obtained after the adoption of the DMFSD, the conditions for users of financial services have improved. However, financial integration has a much greater stake, consisting in creating a solid framework for the adequacy of the stability of the financial system as a whole.

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[1] *https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32002L0065*.

[2] According to DMFSD, distance contract „means any contract concerning financial services concluded between a supplier and a consumer under an organised distance sales or service-provision scheme run by the supplier, who, for the purpose of that contract, makes exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded".

[3] In DMFSD, „financial service" means any service of a banking, credit, insurance, personal pension, investment or payment nature.

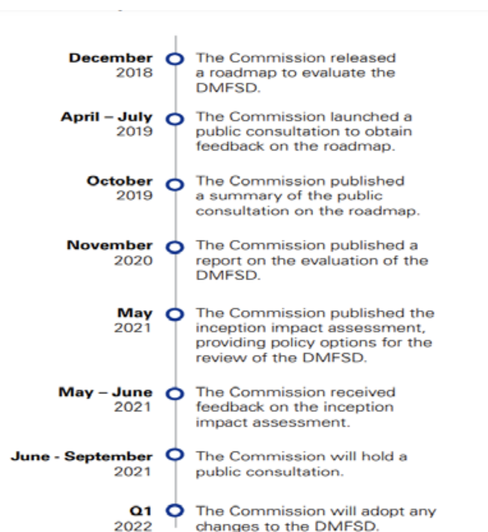
[4] According to DMFSD, „means of distance communication" refers to any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the distance marketing of a service between those parties.

2. The Commissions' evaluation of the DMFSD

In step with digitization, in the last two decades, the distance selling of financial services for consumers has changed rapidly and substantially, given that new players, new business models and new distribution channels have appeared. Consumers are now increasingly inclined to use the tools of the digital world. The Covid-19 pandemic and the restrictions that accompanied it accelerated this process, which made it necessary to revise the relevant European Union legislation in this field.

Anyway, just before the pandemic, the Commission released a roadmap to evaluate the DMFSD.

Figure 1. The EC roadmap to evaluate the DMFSD, source KPMG



One of the objectives pursued was evaluating the DMFSD in light of increased digitalisation in the financial services market and the development of product-specific and horizontal legislation (*e.g.*, GDPR no. 2016/679).

The evaluation concluded that «the DMFSD and its objectives have been achieved to some extent, however a number of areas in which it could be improved where identified:

- Articles regarding pre-contractual information do not fully address the increase in digitalisation;

The provisions regarding the right of withdrawal are still effective to a certain extent and could be better implemented if additional mechanisms have been created, so that consumers can use this right more efficiently. As in the case of the provisions regarding the pre-contractual information, the correlation of these provisions with the specific and horizontal legislation could be clarified to avoid the legal uncertainty;

- The cross-border market for financial services remains limited due to a number of issues: language barriers, consumer uncertainty and differing tax regimes;
- One of the main issues is the inconsistency of the laws on certain aspects, such as establishing the purpose and scope of the law that transposes the directive on distance financial services or defining the moment of conclusion of contracts, as well as the provisions regarding the protection of personal data, do not confer predictability, a unitary approach and or does not provide equal treatment in the relationship between professionals and in the relationship with consumers. Later on in this study we will illustrate with examples from Romanian legislative framework and some jurisprudence cases in this regard.
- Also, the poor use of the extrajudicial means of resolving disputes, caused by insufficient digitalization or lack of information regarding this tool, makes these facilities inoperative.
- Although the relevance of the Directive and the value it adds has decreased with the introduction of product specific and horizontal legislation, it still acts as a „safety net" for products which do not have associated product additional legislation in order to product consumers. However, the use of this feature is minimal».

In 2020, the EU Commission, in a staff working document, pointed out that the DMFSD had been only partially effective and had contributed in a limited way to the consolidation of the EU single market, due to internal and external barriers. The Commission observed that the ongoing digitalisation process had changed the consumer credit market (the growth of e-commerce), the wider digitalisation trends, new developments in

financial technology (*i.e.*, FinTech's and crypto assets) had exacerbated some aspects of the distance marketing of consumer financial services, not fully nor touched addressed by the DMFSD.

Added to this is the fact that the introduction of EU product-specific legislation has created significant overlaps, thus leading to both legal and practical difficulties in applying the DMFSD, which therefore seems outdated and no longer relevant in the context of recently-enacted EU legislation governing the field.

3. Regulation of the distance selling of financial services in the World

As we know, in the EU, the rules with the objectives to protect consumers when they sign a contract with a retail financial services provider at a distance (*e.g.*, via phone or online) have been in established in 2002 under the DMFSD. Outside the EU, we will illustrate with a few aimed at protecting consumers.

The Dodd-Frank Act constitutes the most significant reform of financial regulation in the United States since the 1930s. In USA, there are numerous agencies assigned to regulate and oversee financial institutions and financial markets in the United States, including the Federal Reserve Board (FRB), the Federal Deposit Insurance Corp. (FDIC), and the Securities and Exchange Commission (SEC). The FED, for instance, „is committed to promoting fair and transparent financial service markets, protecting consumers' rights, and ensuring that its policies and research take into account consumer and community perspectives”[5].

The governmental approach to e-commerce and financial services to consumers in the United States could be considered as „light touch' regulation”. The advertising or selling of financial services products to consumers or to businesses via the internet are regulated by various regulations[6]. For instance:

- Regulation Z (the Truth in Lending Act) requires certain disclosures for consumer credit and lease terms in open end credit, closed end credit and credit/charge cards;

- Regulation DD (the Truth in Savings Act) requires specific information regarding advertisement of deposit accounts.;

According to the FDIC Rules & Regulations, members promoting deposit products and non-specific banking products must identify as FDIC members. Where a FDIC member bank advertises investment or insurance products, it must disclose that the product is not FDIC insured and may lose value.

As one example, for e-commerce in China, the State Administration for Market Regulation (SAMR) issued rules on online transactions in March 2021 to „protect the legitimate rights and interests of online consumers” by offering protection against online merchants following deceptive or misleading practices, such as fake transactions and user reviews, and false marketing[7].

4. Romanian situation

In the last two decades, the remote sale of financial services for consumers has changed rapidly and substantially, given that new players, new business models but also new distribution channels have appeared. Consumers are increasingly inclined to use the tools of the digital world, and the Covid-19 pandemic and the restrictions that accompanied it accelerated this process, which made a revision of the relevant legislation of the European Union in this field.

According to the European Commission[8], the new proposal amending rules concerning financial services contracts concluded at a distance aims „to simplify and modernise the legislative framework by repealing the existing DMFSD while including relevant aspects of consumer rights regarding financial services contracts concluded at a distance within the scope of the horizontally applicable Consumer Rights Directive. The overall objective of the legislation remains unchanged: to promote the provision of financial services in the internal market while ensuring a high level of consumer protection”.

Digitalization is an increasingly present topic in all fields of activity, regarded as a necessity, as a need to adapt the entire system to the progress of the society and to the technological realities of today. In the field of financial services, digitalization not only increased the performance of activities, but has solved requirements regarding transactions from anywhere and anytime.

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[5] *https://www.federalreserve.gov/publications/2021-ar-consumer-and-community-affairs.htm*.

[6] For an extended list of USA regulation see *https://www.lexology.com/library/detail.aspx?g=385c70d8-0dc5-40aa-8eb0-d3f52b55bbd4*.

[7] *https://www.bis.org/fsi/publ/insights36.pdf*.

[8] *https://finance.ec.europa.eu/consumer-finance-and-payments/retail-financial-services/distance-marketing-financial-services_en*.

However, the legal aspects of the conclusion of financial services contracts for consumers behave certain particularities and require increased attention regarding the application of the principles of law specific to the European Union legislation, but also of the various Member States where the contracts are concluded.

On May 11, 2022, the European Commission adopted a proposal to reform the European Regulatory Framework Governing Financial Services Contracts (the Proposal). The Proposal Would Strengthen Consumer Rights and Foster the Cross-Border Provision of Financial Services in the Single Market.

In Romania, the main normative act in this matter is GO no. 85/2004 regarding the protection of consumers at the conclusion and execution of distance contracts regarding the financial services, as well as by the newer regulation of the GEO no. 34/2014 regarding the rights of consumers within the contracts concluded with the professionals, as well as for the modification and completion of some normative acts.

GO no. 85/2004 in particular regulates „the conditions of information of consumers in order to conclude and execute the remote contracts regarding the financial services".

However, in Romania legislation is found at the moment the existence of overlaps or over-regulations within the legislative framework regarding electronic trade.

Thus, there are several regulations containing provisions regarding electronic trade:

- specific regulations, respectively the Law no. 365/07.06.2002 on Electronic Trade, which transposes Directive 2000/11/EC regarding certain legal aspects regarding the services of information society, in particular electronic trade in the internal market, published in the Official Journal of European Communities no. L 178/2000;
- general regulations, regarding trade, which are also applicable to online trade.

Although we have this legislative framework created by a long period of time, we observe, in the financial market, reluctance to the credit agreements concluded at a distance, the fears, probably, coming from the difficulties of proving the legal relations.

Art. 2 points 7 of GEO no. 34/2014 defines the distance contract as „any contract concluded between professional and consumer, within a system of sales or remote services, organized, without the simultaneous physical presence of the professional and the consumer, with the exclusive use of one or of several means of remote communication, up to and including when the contract is concluded." A similar definition is included in art. 3 letter a) from GO no. 85/2004, regarding the contracts in the financial field: „distance contract – the contract for the provision of financial services concluded between a provider and a consumer, within a system of sale at a distance or of a service provision organized by the provider which uses exclusively, before and at the conclusion of this contract, one or more remote communication techniques".

The remote communication technique means „any means that, without requiring the simultaneous presence of the two parties, consumer and supplier, can be used for marketing or remote promotion of financial services".

At the European level, the moment of the conclusion of the contract is not regulated by means of remote communication or the moment of the conclusion of the contract by electronic means. In the Romanian legislation, at national level, through Law no. 365/2002, the moment of the conclusion of the contract by electronic means, if the parties have not agreed otherwise, is given by the moment when the bidder has become aware of the acceptance of the offer to contract.

At the same time, through GEO no. 34/2014, the moment of the conclusion of the contract by means of remote communication, except for the electronic means, is given by the moment of confirmation, on a sustainable support, by the professional of accepting the order transmitted by the consumer, without the possibility to derogate from this moment. GEO no. 111/2011 regarding the electronic communications, provides in art. 55 para. (9), the fact that „the moment of the conclusion of the distance contract is the moment of confirmation, on a sustainable support, by the supplier of accepting the order transmitted by the end user".

This regulatory method has the shortcoming to allow the supplier to establish, as desired, the moment of the conclusion of the contract, remaining at its latitude when it confirms, on a sustainable support, the acceptance of the order transmitted by the end user. Therefore, in order to establish an increased level of predictability of the law, a unitary approach to the moment of the contract is required, both if the electronic means are used and if other means of remote communication are used.

Also, for a better legislative coherence and in order to ensure a more predictable legislative framework, the moment of the conclusion of the contract should be treated unitary, both in the relationship between professionals and in the relationship between consumers.

A special issue is that of the validity of the contracts of financial services concluded at a distance and the moment of the conclusion, in situations such as the forced execution of consumers who do not comply with the obligations assumed in the framework of financial services concluded.

The provisions of art. 120 of the GEO no. 99/2006 regarding credit institutions and capital adequacy provide: „credit contracts, including real or personal guarantee contracts, concluded by a credit institution constitute enforceable titles".

Since the contracts concluded with the non -bank financial institutions represent enforceable titles, in case of non-reimbursed loans, these entities can resort to any legal form of forced execution. The enforceable title of the credit agreement and the real and personal guarantees confers the right of the non-bank financial institution that, in the situation of non -reimbursing by the consumer the contracted loan or as a result of declaring the anticipated maturity of the credit agreement, to proceed to its forced execution from Following, through all the forms of execution provided by the legal provisions in the matter. The forced execution can only start at the request of the creditors, according to the Civil Procedure Code. Their request must be submitted or transmitted to the competent judicial executor, together with all the necessary supporting documents, in order to approve the enforced execution by the court.

We note that, so far, there has not been a jurisprudence in the matter of the execution disputes started on the basis of the enforceable titles consisting of credit contracts, concluded at a distance. In fact, this kind are quite rare. Our assumptions are that, often, suppliers of such services mask the fact that the respective contract has been concluded at a distance and formulates the contract on paper, which we send to the consumer for signing by courier or by post, so in the case of a dispute. to present the record of the debt, in original.

Thus, in a case having as object the forced execution, the first court ruled in the sense of approving the forced execution in appeal, by the civ. dec. no. 1049/10.10.2016, basically the request for approval being rejected because the credit agreement was not signed by the borrowed, next to the signature being passed the mention „signed electronically", the substantive court considering that the qualified certificate issued to the borrower was not submitted, to attest the authorization of the extended electronic signature regarding it.

Regarding the moment of the conclusion of the contract, one county tribunal, by which, in the appeal, the forced execution of a credit agreement concluded at a distance, after the request for approval had been rejected. The first court, considers that the moment of the conclusion of the contract was not demonstrated, although the request for lending was concluded by the online consumer, the request was approved by the supplier on the spot and the amount borrowed was transferred to the account indicated by the consumer.

5. The aspects that need to be improved in the Commission's proposal. Instead of Conclusions

The European Commission proposal which is being discussed within the Council and European Parliament is a welcome change.

The pre-contractual stage is very important, in which the consumer must be very detailed and correctly informed about the financial products ordered, this information being, at the same time, a tool in favor of the providers of financial services regarding compliance with consumer protection legislation, making sure the customer has all the right information to make an informed decision on their purchase of the financial product.

In conditions of transparency and secure communication between the parties, prior to the completion of the contract concluded at a distance, this represents a safe and advantageous means of obtaining credit by consumers. The introduction of appropriate provisions to ensure that consumers receive the necessary and appropriate explanations regarding financial services and products before purchasing them through online tools, roboadvisors, live chat, Q&A, chatbots and other similar tools are requirements that must be met. Also, the proposals should include a right for consumers to request human intervention in cases where online tools such as robo-advisers are used by providers.

What is missing at the moment in DMFSD is the regulation of the activity of influences in the Financial Services marketing, known as FinFluencers. A financial influencer or 'FinFluencer', is a person who gives information and advice to investors on financial topics, usually on stock market trading, personal investments like mutual funds and insurance, primarily on various social media platforms. The project to review DMFSD has failed to cover the protection of consumers against the risks that social media and FinFluencers pose to consumers and financial stability.

Influencer marketing in financial services is widespread across Europe. According to research by the International Organization of Securities Commissions, 43% of European firms plan to increase use of influencers as a marketing tool[9]. Moreover, due to the digital environment in which they operate, fintech companies are less constrained by geographical barriers.

But right now, this practice is not regulated at EU level, leaving consumers unprotected. There are documented cases when EU citizens have lost a lot of money due to aggressive social media advertising by social media influencers of crypto assets[10].

It should be noted that the Commission's proposal addresses online fairness. Increasingly, financial service providers are using techniques such as "dark patterns" that take advantage of consumer behavioral biases. Dark patterns are some deceptive methods of using the online interface, such as, for example, the coloring of the decision buttons or the position and order in which the options are placed on the page, which have the role of tricking consumers into making decisions that are in the interest of the online business, but at the expense of the user. These practices must be properly regulated to protect consumers against mis-selling and the new proposal for the directive must cover all these aspects of consumer protection of financial services contracted through distance means.

Another problematic issue is related to the EU framework. The fragmentation of the consumer credit legislation in the EU, which limits the impact of the Directive on legal clarity, and the considerable differences in enforcement tools and remedies used by competent authorities, present a significant obstacle to the development of a well-functioning internal market for consumer credit. In the EU single market, a high level of protection in distance marketing of financial services is key in order to protect consumers' freedom and equality of choice. This being possible solely through a full harmonisation of EU law governing the field, and within the Member States.

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[9] *https://lnkd.in/e9jJVXY7.*
[10] *https://www.reuters.com/investigates/section/binance-a-crypto-black-hole/.*

BLOCKCHAIN IN COMPANIES LAW

Roxana-Mihaela CATEA[*]

Abstract

Blockchain technology has emerged as a transformative force in companies' law, revolutionizing the way businesses operate and interact within legal frameworks. This abstract focuses on the integration of blockchain technology in companies' law and its implications for transparency, efficiency, and security.

Specifically, this article explores the use of blockchain in companies' law, with an emphasis on two jurisdictions: Estonia, Switzerland, Malta and Singapore. The article highlights the advantages of blockchain technology in companies' law, including the immutability of records, enhanced security through cryptography, and the potential for smart contract automation. It also emphasizes the importance of the legal frameworks in Estonia, Switzerland, Malta and Singapore, which aim to recognize the legal validity of blockchain-based transactions and provide regulatory clarity.

By leveraging blockchain's features of transparency, immutability, and decentralization, companies can enhance corporate governance, improve shareholder rights, and streamline administrative processes. It is important for legal frameworks to adapt to these advancements and provide clarity on the legal validity and enforceability of blockchain-based shareholder management systems.

Since Romania has yet to adopt any blockchain – based business law tools, this article is aimed to provide an insight on currently available good practices, both European and from Singapore, in view of setting a standard to which we should be focusing on, as well.

Keywords: *blockchain, companies' law, shareholders registry, crypto application of blockchain, corporate governance.*

1. Introduction

This paper examines the current status of blockchain applications and the specific use of blockchain technology in company law, focusing on its definition, utilization across different jurisdictions, and the advantages it brings to businesses. It aims to cover the specific areas of company law where blockchain technology brings a positive impact and to showcase why the integration of blockchain technology is important in the context of company law.

This paper also explores specific areas where blockchain technology can be applied, including corporate governance, regulatory compliance, and shareholder management.

The relevance of the chosen theme lies in the fact that the integration of blockchain technology in company law addresses long-standing challenges related to data security, transparency, and efficiency in corporate transactions. Moreover, it enhances trust and accountability by providing a clear and transparent record of transactions. Lastly, it streamlines processes, reduces costs, and simplifies regulatory compliance, ultimately improving overall corporate governance.

To shed light on the utilization of blockchain technology in company law, this paper shall provide concrete examples of jurisdictions where blockchain has been actively employed. It will highlight the advantages offered by blockchain technology in enhancing security, transparency, and efficiency in corporate transactions.

From a scholastic perspective, this paper builds upon the existing literature on blockchain technology and its applications in company law. It aims to contribute by providing an in-depth analysis of specific use cases and practical examples from different jurisdictions. Additionally, it seeks to explore the advantages and implications of blockchain integration in company law, expanding the understanding of its potential and offering insights into its future developments.

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2. Understanding blockchain technology

Blockchain is a decentralized digital ledger that records transactions across multiple computers, ensuring immutability, transparency, and traceability. It operates on a peer-to-peer network, where each transaction is verified by consensus mechanisms such as proof of work or proof of stake. The key features of blockchain technology include:

- Decentralization: Blockchain operates on a distributed network, eliminating the need for a central authority and reducing the risk of fraud or other potential tampering of the stored information.
- Immutability and Transparency: Once a transaction is recorded on the blockchain, it cannot be altered, ensuring data integrity. Additionally, all participants have access to the same information, promoting transparency and trust.
- Smart Contracts: Self-executing contracts encoded on the blockchain facilitate automated transactions and enforce predefined rules without intermediaries.

3. Specific use of blockchain in companies' law

Blockchain technology has the potential to bring significant advancements to companies' law, particularly in the field of shareholder management.

The following potential scenarios demonstrate how blockchain technology can revolutionize shareholder management in companies' law[1]:

- Shareholder Voting: Blockchain can facilitate secure and transparent shareholder voting processes. By utilizing blockchain technology, companies can create tamper-resistant digital tokens representing voting rights. Shareholders can then cast their votes directly on the blockchain, ensuring transparency, immutability, and efficient tallying of votes. This eliminates the need for intermediaries and reduces the risk of fraud or manipulation.
- Proxy Voting: Blockchain can enhance proxy voting mechanisms by allowing shareholders to delegate voting rights to trusted parties. Smart contracts can automate the proxy voting process, ensuring accurate representation and execution of shareholder preferences. This increases shareholder participation and engagement in decision-making processes.
- Shareholder Registry: Blockchain can serve as a decentralized and immutable shareholder registry. By recording and maintaining ownership information on a blockchain, companies can establish a transparent and auditable record of shareholders and their respective holdings. This eliminates the need for manual record-keeping, reduces administrative burdens, and enhances the accuracy of shareholder information.
- Dividend Distribution: Blockchain can streamline dividend distribution processes. Smart contracts on the blockchain can automatically execute dividend payments to shareholders based on predetermined criteria. This ensures timely and accurate distribution of dividends, eliminates manual processing, and provides a transparent audit trail of transactions.
- Transfer of Ownership: Blockchain can facilitate the transfer of shares between shareholders securely and efficiently. By tokenizing shares on the blockchain, ownership transfer can occur through peer-to-peer transactions, reducing the need for intermediaries such as brokers or custodians. This improves liquidity, reduces settlement times, and minimizes transaction costs.

To implement blockchain technology in business law in Romania, several key considerations should be taken into account:

- Regulatory Framework. The first step would be to establish a comprehensive and clear regulatory framework that addresses the legal aspects of blockchain technology in business law which should provide legal recognition and clarity for blockchain-based transactions, smart contracts, and digital assets.
- Collaboration and Partnerships. Romanian Government should foster collaboration between the government, regulatory bodies, industry stakeholders, and academia to develop policies, standards, and guidelines for blockchain adoption. Also, engaging with blockchain startups, technology experts, and legal professionals to leverage their expertise in designing the legal framework and exploring potential use cases in various sectors of business law would lead to a more effective collaboration between stakeholders.
- Education and Awareness. Romanian should invest in educational programs, workshops, and training

[1] P. de Filippi, A. Wright, *Blockchain and the Law: The Rule of Code*, Harvard University Press, 2018, p. 68.

initiatives to enhance understanding and awareness of blockchain technology among legal professionals, policymakers, and business stakeholders. Also, it is important to promote knowledge-sharing platforms, conferences, and seminars focused on blockchain's potential in business law to encourage dialogue and exchange of ideas.

- Pilot Projects and Sandboxes. Romania should encourage the establishment of pilot projects and regulatory sandboxes that allow companies and startups to test and validate blockchain solutions within a controlled environment. This approach enables real-world experimentation while ensuring compliance with existing legal requirements.
- Digital Identity Infrastructure. It is indicated that Romania develops a robust digital identity infrastructure that supports blockchain-based solutions in business law. This infrastructure should enable secure and verifiable digital identities, which are essential for authentication, authorization, and privacy in blockchain transactions.

By considering these recommendations and tailoring them to the specific needs and context of Romania, our country can lay a solid foundation for the implementation of blockchain in business law, fostering innovation, efficiency, and transparency in corporate transactions.

3.1. Good Practices of Jurisdictions Embracing Blockchain in Company Law

Several jurisdictions around the world have recognized the potential of blockchain technology in transforming company law. The following are examples of jurisdictions where blockchain has been actively utilized:

- Estonia: Known for its revolutionary e-residency program, Estonia has implemented blockchain technology to enhance corporate governance. Companies registered in Estonia can manage their entire shareholder voting process through blockchain, ensuring security and transparency.
- Switzerland: With its Crypto Valley in Zug, Switzerland has emerged as the most prominent hub for blockchain innovation. The country allows companies to issue digital shares on the blockchain, facilitating efficient and transparent ownership management.
- Malta: Strongly positioned as the „Blockchain Island", Malta has enacted favorable legislation to attract blockchain-based companies. Its regulatory framework provides legal certainty for initial coin offerings (ICOs) and smart contracts, actively promoting the growth of the blockchain ecosystem.
- Singapore: On the other side of the world, Singaporean government has actively embraced blockchain technology to streamline regulatory compliance and facilitate efficient corporate transactions. It has piloted projects using blockchain for the issuance and transfer of securities, reducing administrative burdens.

3.1.1. Brief analysis of Estonia's blockchain development

Estonia, recognized for its pioneering e-residency program, has longtime taken significant steps to leverage blockchain technology in bolstering corporate governance. The country's legal framework and legislation have been pivotal in implementing blockchain solutions to enhance transparency, security, and efficiency in various aspects of company law, which set an example for other European countries. Companies registered in Estonia can now manage their shareholder voting process through blockchain, leading to a more secure and transparent ecosystem for corporate decision-making.

The Estonian e-residency program, established in 2014, allows non-residents to access digital services and remotely administer businesses within Estonia's jurisdiction. This initiative aligns with the country's commitment to digital innovation and has been instrumental in promoting the adoption of blockchain technology in company law.

Estonia's legal framework, particularly the Commercial Code and the Digital Signatures Act, provides a solid foundation for the integration of blockchain technology in corporate governance. These laws recognize the legal validity of electronic signatures and contracts, facilitating the use of blockchain-based smart contracts for shareholder voting and other corporate processes, which seems futuristic for timid states, such as Romania, which have yet to adopt any measure in respect of implementing blockchain in companies' law.

In the Estonian context, blockchain technology enables companies to ensure the security and integrity of their shareholder voting process[2]. By leveraging blockchain's decentralized nature and cryptographic algorithms, Estonia's companies can create immutable and tamper-proof records of votes, preventing any unauthorized alterations or manipulations. This enhances the transparency and credibility of the voting process, fostering trust among shareholders.

The matter of blockchain in business law has been effectively dealt with in works such as „Blockchain and the Law" by Primavera De Filippi and Aaron Wright and „Blockchain and the Law: The Rule of Code" by Professor Jerry Brito and Andrea Castillo, which explores the legal implications of blockchain technology and how Estonia's regulatory framework has created an enabling environment for blockchain adoption in various sectors, including company law.

In conclusion, the legal framework and legislation in Estonia, coupled with the e-residency program, have enabled businesses to harness blockchain's capabilities to enhance security, transparency, and trust in corporate governance processes. Scholarly works further contribute to our understanding of the legal and regulatory implications of Estonia's blockchain adoption, emphasizing the pioneering role the country plays in leveraging technology for effective corporate governance.

3.1.2. Brief analysis of Switzerland's blockchain development

Switzerland's legal doctrine and regulatory framework have played a crucial role in establishing an environment conducive to blockchain adoption, particularly in the realm of ownership management through the issuance of digital shares.

Switzerland's legal system, characterized by its stability and business-friendly approach, has been instrumental in fostering blockchain innovation. The Swiss Code of Obligations (CO) and the Federal Act on Securities Dealers (SESTA) are among the key legislations governing ownership management and securities issuance in the country.

One of the notable developments in Switzerland is the ability for companies to issue digital shares on the blockchain. This initiative streamlines the traditional process of share issuance and ownership transfer, offering increased efficiency, transparency, and security. By utilizing blockchain technology, companies can create digital tokens representing ownership rights, which can be easily traded and transferred on the blockchain network.

The Swiss legal framework recognizes the legal validity of blockchain-based shares, providing a clear legal basis for their issuance and transfer. The CO, in particular, enables the digitization of share certificates and outlines the legal requirements for their issuance and transfer.

Furthermore, Switzerland's regulatory framework, including the Swiss Financial Market Supervisory Authority (FINMA), has adopted a forward-thinking approach to blockchain and digital assets. Through clear guidelines and regulatory sandboxes, Switzerland has sought to balance innovation with investor protection and regulatory compliance.

In conclusion, Switzerland's Crypto Valley in Zug has become a prominent centre for blockchain innovation, particularly in the realm of ownership management. The country's legal doctrine, including the Swiss Code of Obligations and the Federal Act on Securities Dealers, has paved the way for the issuance of digital shares on the blockchain.

3.1.3. Brief analysis of Malta's blockchain development

Malta's legal framework, tailored to attract blockchain companies, has played a pivotal role in establishing a favorable environment for the growth of the blockchain ecosystem, particularly in the context of company law.

Malta's proactive approach to blockchain technology is reflected in its legislative initiatives. The Virtual Financial Assets Act (VFAA), enacted in 2018, provides a robust regulatory framework for virtual financial assets, including cryptocurrencies and tokens issued through initial coin offerings (ICOs). This legislation offers legal certainty and consumer protection, bolstering investor confidence and attracting blockchain-based companies to establish operations in Malta.

In the realm of company law, Malta's legal framework has been designed to facilitate the use of blockchain technology. The Companies Act, together with the Malta Digital Innovation Authority Act, supports the

[2] K. Werbach, *The Blockchain and the New Architecture of Trust*, MIT Press, 2018, p. 103.

integration of blockchain-based solutions for corporate governance, contract enforcement, and shareholder management.

One of the significant contributions of Malta's legal framework is the recognition and regulation of smart contracts. The legislation provides legal certainty for smart contracts, enabling parties to execute and enforce self-executing agreements using blockchain technology. This promotes efficiency, reduces reliance on intermediaries, and enhances the security and transparency of contract-related processes.

Additionally, Malta has established a regulatory sandbox environment, allowing companies to test innovative blockchain solutions within a controlled framework. This approach encourages experimentation and collaboration between businesses, regulators, and the government, fostering the development of cutting-edge applications for company law on the blockchain.

The legal framework in Malta, along with its commitment to regulatory clarity and investor protection, has positioned the country as an attractive destination for blockchain-based businesses[3]. Scholars and legal experts have recognized Malta's efforts in developing a comprehensive legal framework that supports the growth of the blockchain ecosystem.

In conclusion, Malta's status as the „Blockchain Island” is supported by its favorable legal framework that attracts blockchain-based companies. Through legislation such as the VFAA and support for smart contracts, Malta provides a regulated and secure environment for the integration of blockchain technology in company law.

3.1.4. Brief analysis of Singapore's blockchain development

Last but not least Singapore, renowned for its forward-thinking approach to technology adoption, has actively embraced blockchain technology to enhance business law practices. The Singaporean government has taken significant steps to create a supportive legal framework that promotes the use of blockchain technology, streamlines regulatory compliance, and facilitates efficient corporate transactions.

The legal framework in Singapore related to blockchain technology encompasses various laws and regulations. The Monetary Authority of Singapore (MAS), the country's central bank and financial regulatory authority, has been at the forefront of developing guidelines and regulations for blockchain adoption.

One notable initiative is the development of Project Ubin, a collaborative project between MAS and various financial institutions. Project Ubin explores the use of blockchain technology for the issuance, transfer, and settlement of digital securities. The project's successful trials have demonstrated the potential for blockchain to streamline administrative processes and reduce costs in securities transactions.

In addition to Project Ubin, Singapore has introduced the Payment Services Act (PSA), which regulates cryptocurrency exchanges and other payment service providers. The PSA ensures that these entities adhere to robust anti-money laundering (AML) and counter-terrorism financing (CTF) regulations, providing a secure and compliant environment for blockchain-based transactions.

Singapore's legal framework also recognizes the legal validity of electronic contracts and electronic signatures through the Electronic Transactions Act (ETA). This legislation facilitates the use of blockchain-based smart contracts, enabling automated and self-executing agreements in corporate transactions. It provides legal certainty for parties involved in blockchain-based business activities, promoting efficiency and reducing the need for intermediaries.

Furthermore, the Singaporean government has actively supported blockchain-focused initiatives and research. The National Research Foundation (NRF) has funded numerous projects in collaboration with academic institutions and industry partners, focusing on blockchain applications across various sectors, including finance, supply chain management, and healthcare.

In conclusion, Singapore's government has been proactive in embracing blockchain technology to enhance business law practices. The legal framework, supported by institutions like MAS and NRF, provides regulatory clarity and promotes the use of blockchain for streamlined regulatory compliance and efficient corporate transactions.

[3] Jai Singh Arun, J. Cuomo, *Blockchain for Business: A Practical Guide to Achieving Enterprise Value*, Pearson Publishing House, 2019, p. 33.

3.2. Advantages of Blockchain Technology in Company Law

Blockchain technology offers several advantages in the realm of company law, empowering businesses to overcome traditional challenges. The key advantages[4] include:

- Enhanced Security: Blockchain's decentralized nature and cryptographic algorithms make it highly secure, reducing the risk of data breaches and fraud. It provides a tamper-proof and transparent audit trail of transactions, ensuring accountability and mitigating the potential for corporate fraud.
- Improved Transparency and Accountability: Blockchain's transparency enables shareholders and stakeholders to access real-time information, facilitating trust and accountability. This increased visibility helps prevent conflicts of interest and provides an accurate record of corporate actions.
- Efficient Shareholder Management: Blockchain simplifies and automates shareholder management processes such as voting, dividend distribution, and share transfers. This streamlines corporate governance, reduces administrative costs, and enhances shareholder participation.
- Smart Contract Automation: Smart contracts on the blockchain enable the automation of routine corporate transactions, such as share transfers and contract enforcement. This eliminates the need for intermediaries, reduces processing time, and ensures accuracy.
- Streamlined Compliance: Blockchain technology simplifies regulatory compliance by providing an immutable and auditable record of transactions. This reduces the burden of manual record-keeping, streamlines reporting, and enhances regulatory oversight.
- Cost Reduction: By eliminating intermediaries, minimizing paperwork, and automating processes, blockchain technology can significantly reduce costs associated with corporate governance and transactions.

4. Conclusions

The exploration of blockchain technology's applications in business law has revealed several key outcomes. Firstly, blockchain enhances security and transparency in corporate transactions, mitigating the risks of fraud and data breaches. Secondly, it streamlines processes such as shareholder management, voting, and compliance, leading to increased efficiency and reduced costs. Additionally, blockchain facilitates the automation of contractual agreements through smart contracts, eliminating the need for intermediaries and enhancing accuracy. Overall, blockchain technology empowers businesses to improve corporate governance, accountability, and regulatory compliance.

Unfortunately, Romania's legal framework on blockchain in business law is currently underdeveloped as compared to jurisdictions like Estonia, Switzerland, Malta, and Singapore. These countries have recognized the potential of blockchain technology in transforming company law and have implemented favorable regulations to support its adoption.

However, in the future, by highlighting the usage and advantages of blockchain technology, businesses and legal professionals will gain a deeper understanding of its potential in transforming company law practices. The research outcomes will encourage the adoption of blockchain solutions, leading to enhanced security, transparency, and efficiency in corporate transactions. Moreover, the integration of blockchain technology can foster trust among stakeholders and strengthen corporate governance frameworks, ultimately driving innovation and competitiveness in the business landscape.

While this paper provides hopefully valuable insights into the applications of blockchain technology in business law, there are several areas that warrant further research[5]. Firstly, conducting comparative studies across jurisdictions that have implemented blockchain solutions in company law would provide a comprehensive understanding of best practices and regulatory considerations. Additionally, exploring the potential challenges and legal implications associated with the adoption of blockchain technology in company law would help address concerns and develop appropriate frameworks. Furthermore, investigating the long-term societal and economic impacts of blockchain integration in company law can shed light on its transformative potential beyond immediate business benefits. Finally, studying the scalability and interoperability of blockchain platforms in complex corporate environments would contribute to the practical implementation of blockchain solutions.

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[4] M. Swan, *Blockchain: Blueprint for a New Economy*, O'Reilly Media Publishing House, 2015.

[5] D. Tapscott, Al. Tapscott, *Blockchain Revolution: How the Technology Behind Bitcoin and Other Cryptocurrencies Is Changing the World*, Portfolio Publishing House, 2016.

To implement blockchain technology in business law in Romania, several key considerations should be taken into account. These include establishing a comprehensive regulatory framework, fostering collaboration and partnerships between stakeholders, investing in education and awareness programs, encouraging pilot projects and sandboxes, and developing a robust digital identity infrastructure.

By continuing to delve into these areas, researchers can deepen the understanding of blockchain's role in business law and pave the way for its widespread adoption, ultimately shaping a more secure, transparent, and efficient corporate landscape.

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THEORETICAL AND PRACTICAL ISSUES CONCERNING THE RECOGNITION OF THE RIGHT OF A LEGAL PERSON TO BRING A DIRECT CLAIM BASED ON ART. 1856 CC

Cristian-Răzvan CERCEL*

Abstract

A direct claim is a situation in which, according to the law, a person, called the plaintiff, sues another person, called the defendant, with whom he is not in a contractual relationship, the former being in a contractual relationship with another person, with whom the defendant is also in a contractual relationship. In other words, the right of direct claim recognizes, in those cases expressly and restrictively provided for by law, the possibility for the creditor to claim enforcement of his claim directly from a debtor of his debtor, even though the creditor was not a party to the contract concluded between his debtor and the debtor.

Direct claim is a remedy for unfair consequences arising from the rigidity of the principle of the relativity of contract effects.

This paper aims to point out the main arguments and to present the case law on the subject, for which the right of legal persons to a direct claim based on the provisions of art. 1856 CC is recognized. The case law interpretation of the article in question shows a modern vision applied to the current economic and social reality.

Keywords: *direct claim, public procurement, worker, enterprise, legal person, natural person.*

1. Introduction

A direct claim is a civil action, expressly provided for by law, by which the creditor is entitled to bring it, claiming enforcement of his claim directly from the debtor of his debtor, although the plaintiff is not a party to the contract concluded by his own debtor with the defendant.

In this paper we will focus our attention, firstly, on the general aspects of direct claims (*i.e.*, characterization, delimitation, scope, conditions, effects etc.), and, secondly, on one of these direct claims, namely the one regulated by the provisions of art. 1856 CC.

The direct claim based on the provisions of art. 1856 CC is specific to the contract of entrepreneurship (*i.e.*, works contract) and concerns the possibility for the „worker" to act directly against the beneficiary.

Even after the entry into force of the current Civil Code, doctrine and court practice interpreted the notion of „worker" in a restrictive sense, in the sense that subcontractors, legal persons, were not recognized as having the possibility of directly suing the beneficiary of the contract.

In relatively recent court practice, however, it has been rightly concluded that this right should also be recognized for legal persons.

We believe that this vision is a topical one, which corresponds to today's economic and social needs and represents an important step in facilitating commercial relations between the parties involved in the legal relationships governing the hypothesis set out above.

This paper sets out the main arguments for recognizing the sub-contractor's right to bring a direct claim against the beneficiary. At the same time, the analysis also considers the contacts of the contractor in the field of public procurement with the specific regulations on the subject.

2. Concept, delimitations, and rationale

As stated in the previous paragraphs, the direct claim recognizes the possibility for the creditor to take legal claim directly against the debtor of his debtor, without there being a contractual relationship between them.

Before proceeding to detail the mechanism of operation of the direct claim, it is necessary to recall the principles of the effects of the civil legal act. According to the doctrine[1] , the principles of the effects of a civil

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[1] See G. Boroi, C.A. Anghelescu, *Curs de drept civil. Partea Generală*, 3rd ed., revised and added, Hamangiu Publishing House, Bucharest, 2021, p. 225.

legal act are those rules of civil law which indicate how these effects are produced, *i.e.*, how, under what conditions and in relation to whom these effects are produced.

Although there is no unified point of view in the literature on the number of principles governing the effects of the legal act, we believe that there are three of them, namely: the principle of binding force [art. 1270 para. (1) CC], the principle of irrevocability [art. 1270 para. (2) CC] and the principle of the relativity of the effects of the legal act (art. 1280 CC).

For the purpose of this paper, the last principle stated, namely the principle of the relativity of the effects of the civil legal act, is of importance. This principle refers to the rule according to which a civil legal act produces effects only between the contracting parties or towards its author and without benefiting or harming third parties[2] .

From the principle of the relativity of the effects of the civil legal act, certain exceptions can be distinguished, some of which are genuine and others only apparent.

Two divergent views have emerged in the literature on the apparent or genuine nature of direct claim as an exception to the principle in question.

On the one hand, it has been argued that a direct claim is a genuine exception to the principle of the relativity of the effects of the civil legal act[3] , and on the other hand, some authors consider that a direct claim is only an apparent exception. In support of the latter view, it is stated that: *„(...) in the case of a direct claim, the plaintiff's possibility of claiming a subjective right, invoking a legal act to which he is not a party, does not arise from that legal act, but springs from the law, and the defendant does not owe the plaintiff a more onerous duty than that in the legal act to which he is a party (...) so that we are in the presence of an apparent exception to the principle of the relativity of the effects of the* civil *legal act"*[4].

As far as we are concerned, although this distinction is one of theory and principle, without much practical implication, we endorse the second view expressed.

In any case, three persons are involved in setting up the specific mechanism of the direct claim: (i) **the creditor**, who is also the holder of the direct claim; (ii) **his immediate** (direct) **debtor**, also called the **intermediate debtor**; and (iii) the **debtor of the intermediate debtor** (called the sub-debtor).

Two distinct legal relationships arise between these three persons, as follows:

- a legal relationship between the creditor and his direct debtor; and
- a legal relationship between the intermediary debtor and its debtor.

Accordingly, there is no direct legal relationship between the creditor (claimant) and the debtor of his debtor (defendant).

The direct-claim mechanism allows the creditor to take advantage of the binding force of the contract between the intermediary debtor and his co-contractor.

It has been held in the doctrine that „the *immediate effect of a direct claim is to immobilize in the assets of the intermediary debtor the claim he has against the sub-debtor, which thus becomes exclusively assigned for the payment of the direct creditor. The creditor - the holder of the direct claim - is thus able to avoid the other creditors of the intermediary debtor and obtain payment of his claim directly from the sub-debtor as debtor of* his *debtor"*[5].

Payment made directly to the creditor by the sub-debtor will have the effect of writing off the debt both to the intermediary debtor and to the creditor who sued him.

Therefore, the basis of the direct claim is conferred by the law as a result of the existence of the two distinct contracts, which create in the creditor's assets the subjective right to claim directly from the sub-debtor the performance of an obligation (*e.g.*, payment of a sum of money).

Finally, we stress that direct claim should not be confused with oblique claim, as regulated by art. 1560 CC, because, in the case of the latter, the creditor does not exercise his own subjective right, but the right of his debtor against a third party, restoring the integrity of his debtor's assets, which serves as security for the realization of his claim.

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[2] See G. Boroi, C.A. Anghelescu, *op. cit.*, p. 243.

[3] See G.T. Nicolescu, *New Civil Code. Direct Claims*, in Acta Universitatis George Bacovia, Juridica, vol. 5, issue 2/2016, *http://juridica.ugb.ro/*.

[4] See G. Boroi, C.A. Anghelescu, *op. cit.*, p. 252-253.

[5] See M. Bojincă, *Direct claim - a distinct legal mechanism for the enforcement of claims*, in Annals of „Constantin Brâncuși" University of Târgu Jiu, Legal Sciences Series, no. 1/2016, p. 8.

On the other hand, by means of a direct claim the creditor avoids the other creditors of the immediate debtor, because the claim is not realized in the latter's assets, but in the assets of the claimant.

3. Legal nature of the direct claim

The direct claim is clearly original in character and is distinguished from other apparent or genuine exceptions to the principle of the relativity of the effects of the civil legal act.

It has been rightly pointed out in the literature that in the case of a direct claim for payment, the possibility of bringing a direct claim is not transferred by contract but is expressly provided by law. Thus, the sub-debtor will incur a contractual liability because he will be liable as a result of the obligations assumed in the contract concluded with the intermediary debtor. However, the right to sue is extra-contractual, in which case the claim itself acquires a hybrid nature[6] .

4. Scope of application

In Romanian civil law, the scope of the direct claim is quite limited, because doctrine and jurisprudence have remained constant in the view of the traditionalist theory. There is currently a reluctance among legal practitioners and courts to promote and admit direct claims.

It is very likely that this reluctance also stems from the meaning of the old Civil Code, since it only covered two direct claims. However, the current Civil Code has taken a more modern and applied view of civil legal relationships and has borrowed the French model, thus adopting several types of direct claims.

To begin with, we will briefly review the direct claims currently recognized in the current configuration of positive law, and then turn our attention to the direct claim of workers in works contract.

For example, the Civil Code regulates, according to art. 1807, the direct claim of the landlord against the subtenant up to the amount of the rent that the tenant owes to the landlord.

Then, the Civil Code provides in art. 2023 CC for a direct claim by the principal against the sub-agent or the substituted agent - „*in all cases, the principal has a direct claim against the person whom the agent has substituted*”.

The principal is the creditor and holder of the direct claim, the trustee is the immediate debtor of the principal and has the status of intermediary debtor, and the substitute or sub-trustee is the debtor of the debtor of the principal.

Another situation which could be qualified as a direct claim is that provided for in art. 2224 CC. Under this article, the injured party has a direct claim against the insurer in the civil liability insurance.

The direct right of claim in this case consists in the possibility for the injured party (*e.g.*, the victim of a car accident) to take claim both against the tortfeasor and against the insurer, who is a third party vis-à-vis the victim.

However, it should be noted that in this case we are not talking about two distinct contractual legal relationships, but about a contractual legal relationship (between the insured/person guilty of the tort and the insurer) and a non-contractual legal relationship, a case of tort (between the injured party and the insured/person guilty of the tort).

Most often, the notion of direct claim is related to groups of contracts, and designates the hypothesis where the extreme parties of the group of contracts can act against each other. However, direct claim is not strictly related to groups of contracts, but is also found in other matters, such as the one above.[7] We therefore consider that the claim based on the provisions of art. 2224 CC is also a genuine direct claim.

5. Direct claim based on art. 1856 CC

Art. 1856 CC has the marginal title **Direct claim of workers** and provides that - „in so far as the contractor has not paid the persons who, under a contract concluded with it, have worked providing the services or carrying out the work contracted, these persons have direct action against the beneficiary, up to the payment of the amount which the latter owes the contractor when the action is filed”.

The interpretation of this article has raised some discussion both in case law and in the literature.

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[6] See D.A. Gidro, *Direct claims in civil contracts governed by the new Civil Code. Elements of comparative Law*, Universul Juridic Publishing House, Bucharest, 2018, p. 14.

[7] L. Pop, I-F. Popa, S.I. Vidu, *Civil Law Course. Obligations*, Universul Juridic Publishing House, Bucharest, 2015, p. 147.

One of these issues was whether this article opens the way for direct claim only to natural persons or also to legal persons such as subcontractors.

Two divergent views have emerged in doctrine and court practice. One part of the doctrine[8] and case law has stressed that this article only covers „workers" who are natural persons, while another part has resorted to an extensive interpretation of the provisions and considered that the notion of „persons" as rendered in the article also covers legal persons.

In concrete terms, starting from the marginal title of art. 1856 CC, it has been argued that the legislator's intention was to make direct claim available only to workers (including sub-contractors-workers), i.e., to those **natural persons** who actually carried out the activity for the provision of services or the execution of the contracted work, and, on the other hand, not to recognize the right to direct claim for certain legal persons.

This view is argued on the grounds that the text of art. 1856 CC refers to persons who have carried out an activity for the provision of services or the performance of work, so that it is not legal persons that carry out an activity (even if they have an object of activity, mentioned in the constitutive act), but people, legal persons being only some of the forms in which people carry out various activities, including economic ones, just as enterprises without legal personality are also such forms. So it is not the forms of activity that carry out the activity, but the people, so that in the area of natural persons the persons holding direct claim must be identified.

Similarly, case law[9] has also stated that the „persons" referred to in art. 1856 CC can only be the „workers" mentioned in the marginal designation of the article in question (natural persons).

In a second opinion, a contradiction was found between, on the one hand, the marginal designation and, on the other hand, the permissive wording of the article. Thus, it was held that the principle ubi lex non distinguit, nec nos distinguere debemus was applicable, as was art. 47 para. (5) of Law no. 24/2000 on the rules of legislative technique for the drafting of legislative acts, which states that: „in codes and laws of great scope, articles shall be provided with marginal names, expressing in summary form their subject matter, which have no significance of their own in the content of the regulation".

Thus, it was concluded that the concept used („persons") is of a general nature, unlike the formula used previously - in the old Civil Code, without introducing any criterion according to which it is necessary to distinguish between natural persons and legal persons who have concluded a contract with the contractor.

The subject of the discussion was the subject of analysis at the Meeting of the Presidents of the Specialized Chambers (formerly commercial) of the HCCJ and the Courts of Appeal in Constanța on 16-17 September 2021, where the two opinions were debated, with the opinion of the National Institute of Magistracy that art. 1856 CC also applies to legal persons being accepted by a majority (2 votes against, one abstention)[10] .

The relatively recent practice of the HCCJ[11] has held that „the provisions of art. 1856 CC do not distinguish between persons who, on the basis of a contract concluded with the contractor, have carried out an activity for

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[8] See V. Nemeș, G. Fierbințeanu, *Civil and Commercial Contract Law. Theory, jurisprudence, models*, 2nd ed., Hamangiu Publishing House, Bucharest, 2020, p. 238.

[9] See Bucharest CA, 5th civ. s., dec. no. 326/24.02.2021: *„(...) From the correlation of the two regulations of the direct claim of workers in the old and the current Civil Code, the Court notes that the notion of „worker", a notion specific to labour relations law, is diametrically opposed to that of professional. A worker is a person in a legal employment relationship concluded with an employer, on the basis of which the worker performs work for and under the direction of the employer in return for a fixed or variable monthly remuneration. On the other hand, the concept of professional [who operates an undertaking, according to art. 3 para. (2) CC] includes, according to art. 8 of Law no. 71/2011 implementing Law no. 287/2009 on the Civil Code, the categories of trader, entrepreneur, economic operator and any other person authorised to carry out economic or professional activities, as these concepts are provided for by law at the date of entry into force of the Civil Code (in practice, in the legislator's conception, it encompasses all these concepts listed). Thus, by definition, the worker is a natural person in a legal employment relationship with an employer (a legal person in the vast majority of cases, even a natural person in certain exceptional cases), whereas the professional is, as a rule, a legal person/corporation, subject to registration formalities in specific public registers and whose activity and internal regulation is subject to the provisions of Company Law no. 31/1990, supplemented by the specific provisions of the Civil Code or other legislation related to the professional's activity. It is true that, as the appellant claims, the legislature intended to adapt the rules governing civil legal relationships to the contemporary nature of current social relations. To that end, the current Civil Code (which entered into force on October 1, 2011) reflects the legislature's changed view of many of the civil law institutions which that Code governs. However, a change with regard to the institution of „direct claims" as regulated by art. 1856 CC cannot be observed. Given the exceptional nature of these claims from the principle of the relativity of the effects of contracts, as explained above, the interpretation of the normative hypotheses of „direct claims" must be restrictive. However, in such an interpretative context, the appellant's contentions that the hypothesis of application of art. 1856 CC also covers companies or professionals, as has been pointed out, cannot be accepted de lege lata»*.

[10] See *http://inm-lex.ro/poca/files/8_Minuta_Întâlnire%208%20(litigation%20with%20professionals%20and%20insolvency)%20Constanta%2016-17.09.2021.pdf*.

[11] See HCCJ, 2nd civ. s., dec. no. 837/07.04.2022: *„To restrict the scope of application of the provisions of art. 1856 CC, as proposed by the courts, only in the case of natural persons in a legal employment relationship with an employer, to the exclusion of any form of*

the provision of services or the execution of the contracted work and who have a direct claim against the beneficiary, depending on whether they are natural or legal persons. As such, the exclusion of sub-contractor legal persons from the possibility of bringing a direct claim against the beneficiary, pursuant to the provisions of art. 1856 CC, is contrary to the principle ubi lex non distinguit, nec nos distinguere debemus."[12]

As far as we are concerned, we are of the opinion that direct claim undoubtedly also belongs to subcontractors, i.e., those companies which have been subcontracted by the main contractor to carry out the work. Sub-contracting is a situation frequently encountered in public works procurement practice. Being won by a particular company, it in turn subcontracts certain works to which it has committed itself under the main contract to other companies.

In disputes concerning public procurement contracts, the provisions of art. 218 et seq. of Law no. 98/2016 on public procurement expressly provide for the possibility for the subcontractor to express its opinion to be paid directly by the contracting authority.

We are of the opinion that even if the sub-contractor waives his right to be paid directly by the contracting authority (beneficiary) under the sub-contract, he can still avail himself of the provisions of Article 1856 of the Civil Code.

This conclusion is a natural consequence of the fact that the sub-contractor waives the right to be paid on performance of the contract in favor of the main contractor and not as a result of the contractor's non-performance of its obligation to the sub-contractor.

Waiver of the right to be paid directly by the beneficiary does not implicitly imply waiver of the right to direct claim conferred by law.

Therefore, even in such a situation, the subcontractor (legal person) is entitled to bring a direct claim against the contracting authority.

6. Conclusions

In view of all the considerations set out above, we consider that the concept of „persons" referred to in art. 1856 CC does not distinguish between natural and legal persons and, in accordance with the principle *ubi lex non distinguit, nec nos distinguere debemus*, the right of direct claim must also be granted to the legal sub-contractor. Moreover, the current social and economic reality illustrates that, unlike when the Civil Code of 1864 was adopted, the activities of providing services or executing works specific to the contract of entrepreneurship are mainly carried out in an organized manner, with the resources and workforce for those activities being concentrated in specifically regulated legal forms.

A restrictive interpretation of these provisions would not be in line with economic reality and would unduly and unjustifiably make it more difficult for commercial relations and for any disputes arising from such situations to be resolved within an optimal and predictable timeframe.

Finally, in the case of public procurement contracts, whether the contract between the contractor and the subcontractor recognizes the subcontractor's right to be paid directly by the beneficiary, the subcontractor has a direct claim against the contracting authority under the provisions analyzed above.

It remains to be seen whether the courts will fully embrace the new view established by the HCCJ case law.

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professional, natural or legal person, is tantamount to a major limitation of the category of persons who may act directly against the beneficiary under this text, although the content of this article does not even suggest such a distinction. The only way in which the legislature intended to delineate the scope of the holders of this direct claim was that the persons must have carried out an activity for the provision of services or the execution of the work contracted for (under the contract of contract, s.n.) on the basis of a contract concluded with the contractor, without any differentiation with regard to certain categories of persons."

[12] See HCCJ, 2nd civ. s., civ. dec. no. 607/15.03.2022.

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MULTILATERAL TRADING FACILITIES (MTFS) ON ROMANIAN CAPITAL MARKET

Cristian GHEORGHE[*]

Abstract

The latest version of directive regarding markets in financial instruments, Directive 2014/65/EU of the European Parliament and of the Council of 15 may 2014, known as MiFID II, lists trading venues in EU jurisdictions as the regulated markets, multilateral trading facilities (MTFs) and organised trading facilities (OTFs). The differences between these three trading places are laying down through European secondary legislation.

European approach on markets do not follow the American model on trading markets: stock exchanges and alternative trading systems (ATS). Although the names differ, the essence has been preserved for alternative trading systems and multilateral trading facilities.

Trading venues include regulated markets and multilateral trading facilities. Both trading places involve a multilateral system „which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments". In both cases the pairing of orders is done in a way that results in a contract. In both cases the orders are issued in respect of the financial instruments admitted to trading under markets rules which is authorised by competent authority (Financial Supervisory Authority, FSA). Both places are operated regularly and in accordance with national and European law.

The difference between the types of trading places will be quantitative, not qualitative. MTF – multilateral trading facility, the alternative market – although it is not a regulated market in the strict sense, it looks very similar. Still, it differs from regulated market by the lack of regulated procedures for admission to the market, simplified authorization and more relaxed market operation. The difference is only about a level - missing or different - of regulation, not about the essence of the concepts. Fundamentally, although more relaxed, alternative markets create the same particular framework for the formation of legal acts and operations regarding the financial instruments accepted by the system (market).

Keywords: *capital market, stock exchange, regulated market, trading venue, multilateral trading facility MTF.*

1. Introduction

Usually, trading markets comprise stock exchanges and ATSs. The most preeminent market model offers this picture: an *exchange* is an organization of any kind which provides a market place or facilities for bringing together purchasers and sellers of securities.[1]

Similarly, an *alternative trading system* means an organization that provides a market place for bringing together purchasers and sellers of securities[2]. But such system doesn't imply advanced rules governing the conduct of users or punishment measures for them, other than exclusion from trading.

European market model does not follow the American model on trading markets (stock exchanges and alternative trading systems), but the essence has been preserved.

European trading venues include regulated markets and other trading systems: MTFs and OTFs.

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[1] *Securities Exchange Act 1934*, Section 3 a (1): The term „exchange" means any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange. See *https://www.govinfo.gov/content/pkg/COMPS-1885/pdf/COMPS-1885.pdf*.

[2] *Securities and Exhange Commission* (SEC), *Regulation ATS, Code of Federal Regulations*, Title 17, Section 242.300a: *Alternative trading system* means any organization, association, person, group of persons, or system: (1) That constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange (…); and (2) That does not: (i) Set rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such organization, association, person, group of persons, or system; or (ii) Discipline subscribers other than by exclusion from trading. See *https://www.law.cornell.edu/cfr/text/17/242.300*.

Regulated markets and MTFs involve a multilateral system „which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments”[3]. In both cases the pairing of orders is done in a way that results in a contract. In both cases the orders are issued in respect of the financial instruments admitted to trading under markets rules which are authorised by competent authority (FSA). Both places operate regularly and in accordance with national and European law.

Again, in line with the American market model, the differences rest in the lack of regulated procedures for admission to the market, simplified authorization and more relaxed market operation for MTFs.

2. Regulated market

European market model gave up the American name of „stock exchange”. European legislation and national one does not refer to stock exchange but to regulated market. Such market represents the most sophisticated market for financial instruments.

Regulated market means a multilateral system operated by a market operator, which „brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments”, in accordance with its non-discretionary rules, in a way that results in a contract. Furthermore, a regulated market operates financial instruments admitted to trading under its rules and which is authorized and functions regularly in accordance with Capital Market Law and FSA rules. These capital market laws lay down rules for issuers and financial instruments in order to be admitted cu regulated market[4].

These general rules are supplemented with particular codes of market operators which establish rules for admission and withdrawal from trading, dissemination of information and operations with financial instruments admitted to trading.

In particular, Romanian capital market knows the *Bucharest Stock Exchange* as a regulated market. Although the law no longer uses the name stock exchange, the name of the market keeps this traditional name: Bucharest Stock Exchange (BVB).

Along with the Capital Market Law and the regulations of the authority (FSA), the BVB code represents the „trading manual” for the regulated market operated by BVB SA[5].

3. Multilateral trading facilities (MTFs)

Along with the regulated market, the Capital Market legislation - European and Romanian - regulates the MTFs, a notion similar to the ATSs of American origin.

European trading venues include regulated markets and other trading systems (MTFs and OTFs). Both regulated market and multilateral trading facility involve a multilateral system „which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments”. In both cases the pairing of orders is done in a way that results in a contract and in both cases the orders are issued in respect of the financial instruments admitted to trading under markets rules which is authorised by competent authority (FSA). Both places are operated regularly in accordance with national and European law.

MTF – multilateral trading facility, the alternative market – although it is not a regulated market in the strict sense, it looks very similar. Still, it differs from regulated market by the lack of regulated procedures for admission to the market, simplified authorization and more relaxed market operation. The difference is only about a level - missing or different - of regulation, not about the essence of the concepts. Fundamentally, although more relaxed, alternative markets create the same particular framework for the formation of legal acts and operations regarding the financial instruments accepted by the market.

MTF can be operated by an investment firm or a market operator. This is a major difference compared to the regulated market.

Investment firms and market operators operating an MTF shall establish rules and procedures for fair and orderly trading and establish objective criteria for the efficient execution of orders. Capital Market Law shall require that investment firms and market operators operating an MTF to establish rules regarding the criteria for determining the financial instruments that can be traded under its systems. Still, these criteria do not match

[3] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.06.2014, p. 349).

[4] Art. 51, 55 of Law no. 24/2017 on issuers of financial instruments and market operations.

[5] BVB Rulebook – Market Operator, ***https://bvb.ro/Regulations/LegalFramework/BvbRegulations***.

with the procedures requested for admitted to a regulated market. These regulated markets implement a much-complicated procedure: admission of securities to official stock-exchange listing and information to be published on those securities (Directive 2001/34/EC of the European Parliament and of the Council) which requires a prospectus to be published when securities are offered to the public or admitted to trading on a regulated market [Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017].

Lack of „prospectus" procedure is an important relaxation in operating an MTF. However, investment firms and market operators operating an MTF should publish, maintain and implement transparent and non-discriminatory rules, based on objective criteria, governing access to its facility. The law shall require that investment firms and market operators operating an MTF provide that there is access to sufficient publicly available information to enable its users to form an investment judgement.

4. Romanian MTF *AeRO*

Romanian capital market knows a particular MTF. It is operated by BVB SA (market operator) and it is named *AeRO*. Rules laid down for its operation are approved by FSA[6].

To be admitted to trading on the Section Financial Instruments listed on MTF, the shares must fulfil the criteria provided in BVB Rulebook.[7] Thus for the admission of shares the requirements, that must be cumulatively fulfilled, are: to be registered in the FSA records; to be freely transferable, fully paid, issued in dematerialized form (evidenced by registration in the account); the free-float to represent at least 10% in the issued shares and the number of shareholders to be at least 30.

The requirements regarding the Issuers are: the foreseeable capitalization to be at least the equivalent in lei of EUR 250,000; to have a registry service supply agreement with the Central Depository or, to have the confirmation of the Central Depository regarding the fulfilment of conditions of clearing-settlement and registration necessary for the trading of the respective financial instruments; not be in procedure of bankruptcy nor in judicial reorganization; to request the trade within MTF; to sign the Contract between BVB and issuer provided in BVB Rulebook.

For the admission to trading on MTF, the issuer must send at BVB all the required documents and to pay the fees provided in the BVB Rulebook.

5. Withdrawal of the financial instruments

The withdrawal of the financial instruments from MTF shall be done: following a FSA decision issued in this sense; if the issuer does not comply maintenance requirements corresponding to the sector and the category in which the financial instruments were admitted to trading or the issuer does not comply with the provisions of the trading agreement concluded with BVB; if the issuer is in bankruptcy or judicial dissolution procedure or the issuer participates in a merger as an absorbed company or in other motivated situations.

Furthermore, the market operator, BVB SA, may withdraw from trading on the MTF a financial instrument, based on FSA's agreement, in the cases in which it finds serious violations of the incidental regulations or an orderly market of the respective financial instrument can no longer be maintained.

In conclusion, the withdrawal of the financial instruments from MTF can be done in much more affordable conditions than from regulated market. In principle in this last case the will of the issuer is not enough. Specific procedures must be involved[8]. Again, the MTF has more relaxed rules than the regulated market.

6. Reporting requirements for the issuers on MTF

The issuer whose financial instruments are listed on MTF will send to market operator (BVB SA), the *annual report* within no more than 4 months from the end of the reporting period[9]. The issuer whose financial instruments are traded in the Financial Instruments Section on MTF, shall transmit to market operator (BVB SA), the *half yearly report* within no more than 3 months from the end of the reporting period[10]. In the extent in which there are concluded *quarterly reports* for the first and the third quarter, the issuers of the financial

[6] BVB Rulebook - multilateral trading system, *https://bvb.ro/Juridic/files/EN_SMT%20Rulebook%2008042022_site.pdf*.

[7] *Idem*, art. 19, para. (2)-(3).

[8] Art. 44 of Law no. 24/2017, squeeze-out procedure.

[9] Art. 65 and art. 66 of Law no. 24/2017, corroborated with art. 126 and art. 127 of FSA Regulation no. 5/2018.

[10] Art. 67 of Law no. 24/2017, republished, corroborated with art. 128 of FSA Regulation no. 5/2018.

instruments traded on MTF will send these reports to be made known to the investors, within a reasonable period of time.

Also, the issuers will send to market operator (BVB SA) the current reports (continuous reporting)[11] without delay, but not later than 24 hours from the event's occurrence or from the date of receipt by the issuer. The market operator may decide the suspension from trading of the financial instruments of the issuer who refuses or forgets to send to it, in due time, the mandatory reports.

Reports submitted to market operator by the issuers whose financial instruments are listed on the MTF are made public through the operator official web page, in the MTF section. The market operator (BVB SA) will monitor the fulfilment of the periodic and continuous reporting of the issuer, under the provisions of its rulebook.

Issuers whose financial instruments are traded on MTF International Section do not have reporting obligations towards market operator (BVB SA).

7. Pre and Post Trading Transparency

Through the market operator website are provided, continuously throughout trading hours, the prices and quantities for sale and purchase of the financial instruments traded on MTF.

Market operator will make public, in real time and in reasonable commercial terms and in a non-discriminatory manner, the pre- and post-trading information regarding the transactions carried out within the MTF (this information is also available, free of charge, for data delayed 15 minutes from the time of publication).

Through the MTF Section web page there are provided statistics, information on issuers, and other information to investors. The operator issues daily, monthly and annual reports with information on trading activity (to reflect the types of operations performed, the financial instruments traded, information about trading prices and the trading values).

8. Market abuse

Rules regarding market abuse (market manipulation and trading based on inside information) shall apply to financial instruments admitted to trading on a regulated market and to financial instruments traded within a MTF, too. These rules, which are contained in European and Romanian law[12] are now applicable regardless of the trading places, regulated markets or MTFs.

Any claims or complaints relating to market abuse (activities related to market manipulation or trading based on inside information) that have been committed by participants during the trading on MTF will filled with FSA, communicating also the market operator (BVB SA) opinion on its.

9. Conclusions

A MTF is an European term for a relatively new trading venue. In essence, it is a self-regulated trading venue because its main rules are located in own rulebook than in Capital Market Law. These venues are alternatives to the traditional stock exchanges. The concept was introduced within the MiFID (Markets in Financial Instruments Directive), an European directive enacted to harmonise investors protection and allow investment firms to provide services throughout the European Union.

New trading venue, MTFs, have had a considerable impact on European share-trading markets because trading venues compete with one another**.**

The new MTFs were notable for low cost bases for issuers and for high trading speeds (using technology to make their platforms attractive to high frequency traders). All of these made the new venues highly attractive and existing venues were forced to discount heavily, significantly impacting revenues.

MTFs are a kind of simplified exchange because they provide similar or competing trading services and have similar structures, like rulebooks and market surveillance divisions.

Companies wishing to list upon a regulated market undergo a listing process and pay fees. This allows the market operator to ensure that only appropriate securities are available for trading. This involves requirements

[11] Art. 223 c) of FSA Regulation no. 5/2018.

[12] Art. 1 Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation), Art. 44 Law no 24/2017.

about the number of shares that are available, market capitalization and standards on how the accounts of the company are maintained and strict rules about how news is released to the market.

Whether or not a security has been „admitted to trading on a regulated market" is a key concept within European directive (MiFID), and determines the rules applying to trading in the security. By contrast, MTFs do not have a standard listing process and cannot attract the special status of a „regulated market security".

However, trading venues do not only imply a competition for trading shares. They also involve a hierarchy. The regulated market is the upper level due to the harsher listing conditions. In this logic, MTFs are just a step until reaching the „top league" of trading, the regulated market.

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LABOUR AND SOCIAL SECURITY IN THE THIRD MILLENNIUM – THE TOUCHSTONE OF THE KNOWLEDGE SOCIETY

Claudia-Ana MOARCĂȘ[*]

Abstract

The end of the world' has been predicted in many ways: one claimed the conscious robots would turn against the humans. 'The end of the world as we know it' is less murderous, yet worrying enough, because it means a radical change in one of man's defining features: labour, with the Fourth Industrial Revolution as one of its causes. Structural challenges to the labour environment and tools set the background for this development. Labour's fundamental components like who is performing it; how its results impact on the human being that performs it; and what laws must govern the interactions among labourers and society are all subject to change hereafter. The increasing role of technology, knowledge-based economy, and the continuous diversification of man's needs and aspirations to safeguard the paramount human dignity outline the mandatory demand of adapting the labour law and social security law to these developments. Automation and robotisation are unavoidable and are to be implemented by continuously observing said needs and aspirations. Competence and ever higher levels of professionalism are mandatory for present and future lawyers and legislators in this domain.

Keywords: *artificial intelligence, automation, globalization, labour law, social security, robots.*

1. Introduction

Several assumptions envisaged the Third Millennium as including the world's end to be caused by cosmic facts, like the alignment of planets, on May 5, 2000; or by technology faults like the infamous Y2K, also called 'the millennium bug', which was supposed to crash computers and any other electronic devices in the first seconds of the year 2000; or by the prophecy of the widely publicized, and equally widely misinterpreted, Mesoamerican Long Count calendar that on December 21, 2012 a worldwide change was to happen, either cataclysmic, or just transformative, so that a 'New Age' would begin. Moreover, the *„Rise of the Machines"* blockbuster, released in 2003, emphasized what the first instalment of *The Terminator* series had anticipated in 1984, with conscious robots murderously turning against the humans and establishing their domination over mankind, even if the end-goal of this struggle was far from being clear.

On a less cinematic plan, a cursory examination of how, and whether, the end of the world should happen, would reveal competing outlooks between religious interpretations like what many see in *The Book of Revelation* of the New Testament; and less faith-related writings of authors more concerned by the future of the world rather than by its termination. In modern times, this latter category of works exceeds the science-fiction genre as intellectual products based on proven data and trends strive to outline possible, and probable, courses of developments; it is no coincidence that these writings first appeared basically in the wake the First Industrial Revolution in the 18th century, even if examples may be found earlier[1].

Science and technology are unanimously recognized as major drivers for the progress of human society: ever since our ancient predecessors tied a roughly polished piece of flint to a stick in order to better dig the ground, or to hunt, even kill another being, man's life took a most important step towards a new stage. One is at pains nowadays to consider this a technological breakthrough; and even less a result of applied science. However, a long and slow string of events of similar nature recorded moments in the evolution of the hominis' brain cells that triggered a dramatic change in the size of the brain and, later, supposedly in its 'wiring', which was an even

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[1] Around 1771, Louis-Sébastien Mercier, a French author, wrote *L'An deux mille quatre cent quarante*, which depicts an Earth-based utopian society venerating science in the 25th century. It is considered among the first writings that placed a future society on Earth, not on some imaginary planets.

more consequential mutation for the human being's cognitive capacity[2]. All these happened some 300,000 years ago, apparently at roughly the same time when usage of fire became a daily habit.

Around 230,000 years had to pass until another development shaped 'the Cognitive Revolution' and marked 'the beginning of history'; and then, a 'shorter' period of 58,000 years was needed for the Agriculture Revolution to take place.[3] The record of the sequence of every and all epoch-making moments that followed reveals that the closer in time to the present day, the shorter the periods between them; truly, humankind seems to hurl itself at increasing speed on the time-flow, driven by the unescapable urge of gaining more knowledge in a seemingly geometrical ratio - and often without giving full consideration to what the consequences of this acquired knowledge are.

Ethics and morals deal with the causes of this questionable behaviour. History is witness to statements that highlight prescient warnings, and regrets, either explicit, or implicit, related to inventions that had been meant to be useful to humanity's progress, but turned to be key factors in jeopardizing it, to the extreme limit of ending its very existence. One only needs to remember Alfred Noble's remarks on his invention of the dynamite and Oppenheimer's quote of the Bhagavad Gita: '*Now I become Death, the destroyer of worlds.*' In both cases, what had made these brilliant scientists reconsider their breakthrough inventions and discoveries could do next to nothing from preventing their use to purposes and with results they tried to prevent from coming to pass. However, as it is well known, those dramatic developments did have positive effects, albeit less than perfect, with the partly successful attempts to reach international agreements on limiting, sometimes utterly banning, the misuse of the research results.

Man's quest for knowledge bears on deeper philosophical issues like Gaugin's masterpiece *Where do we come from? What are we? Where are we going?* presents in powerful, yet enigmatic and thought-provoking ways. It may be that the second and third questions are what makes humanity advance, the obsession of the end of the road notwithstanding; because it is the journey, i.e., what one does, that allows for the finding the answers to these questions. And it is the realization of this quest that makes humans strive for accomplishing their becoming dignified, respected beings, while simultaneously respecting others and fulfilling their destiny.

The lines above may seem hardly suited for a paper that addresses the relationship among labour, social security, and knowledge-based society. The explanation is to be found in the increasingly complex interactions among knowledge, which is the eternal foundation of human society, so much so that it has become its *defining* characteristic; labour, which is the means of both acquiring knowledge and putting it to use, irrespective of it being manual, or intellectual; and security, which is a *sine qua non* condition for progress and prosperity of the human society and which has itself developed to become the overall *social* feature, since humans are *social beings* by their very nature. All these components of the everyday life develop along the fourth dimension, which is time; and time is 'distributed' in sequences, which are more or less definite. When keeping in mind what Heraclitus said: '*panta rei*' ('everything flows', to be completed with 'and nothing stays'), and relating this constant to the ever more speeder ratio of change, one arrives at the conclusion that humans need to adapt ever faster to equally fast changing new circumstances throughout their existence to extents unbeknown so far.

2. Challenges of the advance of technology

The knowledge-based society as heralded by the Fourth Industrial Revolution is under the pressure of the unknow; it is not by chance the Future of Life Institute chose its mission to be *Steering transformative technology towards benefitting life and away from extreme large-scale risks*.[4] Last March, it released an open letter that read, *inter alia: 'Should we automate away all the jobs, including the fulfilling ones?'*[5]. An apparent prescient answer had been provided: '*Nobody knows for sure what sort of impact machine learning and automation will have on different professions in the future, and is extremely difficult to estimate the timetable of relevant*

[2] *** Various authors, *Human TKTL1 implies greater neurogenesis in frontal neocortex of modern humans than Neanderthals*, in Science, September 9, 2022, vol. 377, Issue 6611, *https://www.science.org/doi/10.1126/science.abl6422*. Quoted in C. Zimmer, *What Makes Your Brain Different From a Neanderthal's?*, The New York Times, September 8, 2022, *https://www.nytimes.com/2022/09/08/science/human-brain-neanderthal-gene.html*.

[3] Y. Noah Harari, *Sapiens – A Brief History of Humankind*, Vintage, 2015, pp. IX-X.

[4] The Future of Life Institute, https://futureoflife.org/, accessed on April 25, 2023.

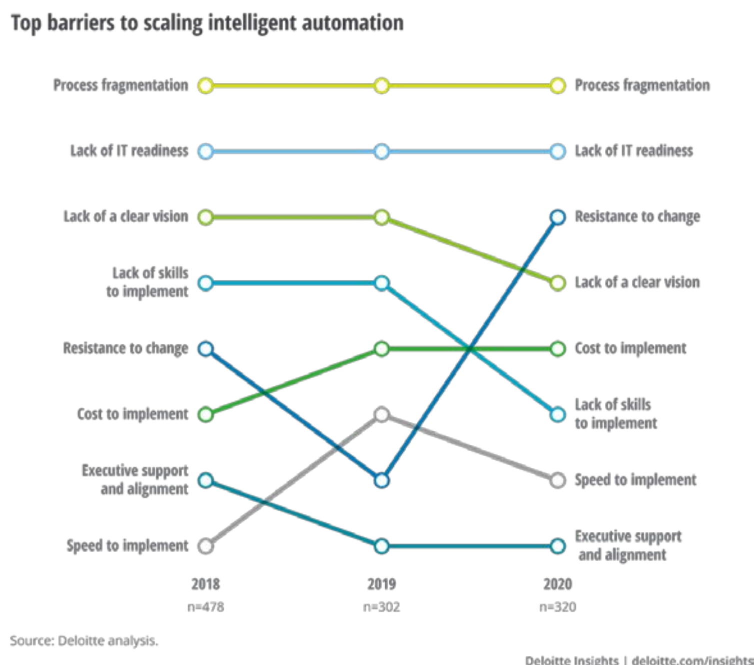
[5] Quoted in ****How to worry wisely about artificial intelligence*, The Economist, April 20, 2023, *https://www.economist.com/leaders/2023/04/20/how-to-worry-wisely-about-artificial-intelligence*.

developments, especially as they depend on political decisions and cultural traditions as much as on purely technological breakthroughs.'[6]

In 1959, a researcher published a paper widely considered to be the 'birth certificate' of '*machine learning*', which is '*the field of study that gives computers the ability to learn without explicitly being programmed*', and which, in time, became a field of the AI; both terms are now understood and used interchangeably and there is a general acceptance of their presence and impact in most, if not all, domains of human life – and this makes it mandatory to realize '*the social, societal, and ethical implications*' of machine learning and/or AI.[7]

Some implications are addressed later in this paper. At the same time, mapping those '*relevant developments*' would go far beyond its scope; suffice to note that the combined actions of the sides of the triangle made of '*political decisions, cultural traditions and technological breakthroughs*' focus on *professions*, which means basically the receiving parties of the impact of machine learning and automation. At this stage of the technological evolution, those parties are overwhelmingly represented by human beings, commonly known as 'employees', or 'labourers', or 'workers', largely irrespective of their hierarchical status in their organizations – for top managers themselves are not spared by this impact. Moreover, it is the decisions made by the latter group that play the decisive role in implementing the Robotic Process Automation (RPA), as the dedicated studies call it.

Indeed, the 2020 Deloitte's annual survey of executives[8], reveals that, of all respondents '*78 per cent are implementing Robotic Process Automation and 16 per cent plan to do so in the next three years*'. Integrating automation and Artificial Intelligence (AI) successfully and… intelligently calls for several conditions to be met – like acknowledging that transformation is needed and a comprehensive strategy to implement 'the art of the possible' and promote change across the board, to prevent the fragmentation of the process. It also listed obstacles to the process (*see the figure below*).



It is noteworthy that, out of eight obstacles the '*lack of IT readiness*' stayed on the same level, while '*resistance to change*' shot up between 2019 and 2020: it was the only hindrance to record this evolution. Meanwhile '*the clear vision*' seemed to have become 'clearer' and the '*lack of skills to implement*' was apparently lessened – perhaps due to appropriate training and/or hiring the necessary human resources. Be that as it may, half of the entries in that graph are directly human-related, meaning that employees and employers alike were the main 'builders' of those barriers.

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[6] Y. Noah Harari, *21 Lessons for the 21st Century*, Jonathan Cape, Penguin Random House, 2018, p. 33.

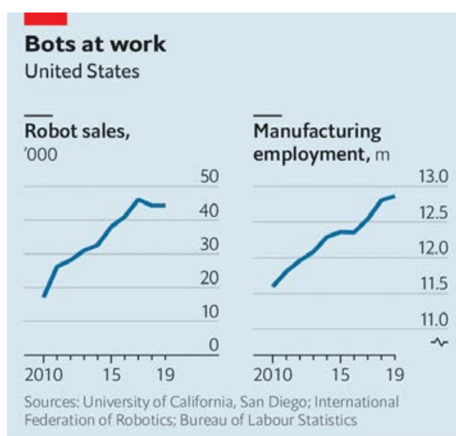
[7] S. Brown, *Machine learning, explained*, MIT, April 21, 2021, *https://mitsloan.mit.edu/ideas-made-to-matter/machine-learning-explained*. See also *What is machine learning?*, IBM, *https://www.ibm.com/topics/machine-learning*.

[8] Various authors, *Automation with intelligence*, Deloitte Insights, November 25, 2020, https://www2.deloitte.com/us/en/insights/focus/technology-and-the-future-of-work/intelligent-automation-2020-survey-results.html

The survey covered the period when the pandemic was raging, and one may easily suppose that implementing the RPA was regarded with a lot of suspicion, particularly by the employees who were already severely constrained by lockdowns, interdictions, and related burdens in many economies. One remembers the wide-raging debates on the immediate and medium-term consequences the pandemic on the overall status of labour, from the labour-place itself, with the impact of the 'remote labour' phenomenon, to the doubts haunting the fate of offices and the surge of 'gig-workers'[9]. In this respect, a McKinesy report identified three areas that *'not only emerge from the COVID-19 crisis but thrive in the post-pandemic world'* and enumerates: '*Temporary changes in response to crisis* […]*; Permanent changes to the day-to-day work* […]; *New types of work'*[10].

Automation and robotization have become every-day words and are increasingly perceived as an unavoidable, if inextricable, trend: quoted among the reasons are '*the covid-19* [that] *has created social changes which look likely to endure',* such as '*the „Great Resignation", in which millions around the world have quit their jobs, may in part be a consequence of lockdowns creating new opportunities for home working'* ; and *'that the bots are getting better. Instead of just moving goods in warehouses to human „pickers", who then put items into bags for home delivery, they are learning to do the picking and packing for themselves.'*[11]

However, it looks that the advent of a 'machine-ruled' world, which sometimes has a doomsday spin, is not that imminent, nor is its ominous feature unavoidable. Data published a little more than a year ago introduce a different picture[12]:



A recent study that covered over 800 companies with around 11.3 million employees found they 'will need new workers to help them implement and manage AI tools. Employment of data analysts and scientists, machine learning specialists and cybersecurity experts is forecast to grow 30% on average by 2027'; and among the domains that are expected to witness the highest growth-rates the report listed 'education, agriculture and digital commerce and trade'[13]. Likewise, the International Federation of Robotics noted that 'even South Korean firms, by far the world's keenest robot-adopters, employ ten manufacturing workers for every industrial robot […]. In America, China, Europe and Japan the figure is 25-40 to one.'[14]

… to all components of the human life

[9] See, *inter alia*, C.-A. Moarcăș, *The Contemporary Architecture of The Labour Relationship: Experiences and Challenges*, in AUBD no. 2/2022, pp. 41-56; C.-A. Moarcăș, *Impactul pandemiei asupra sănătății și securității lucrătorului. Viitorul muncii* (*The impact of the pandemic on the employee's security and health. The future of work*), in Romanian. Remarks at the Craiova conference on ,,Sistemul juridic între stabilitate și reformă" (The judicial system between stability and reform), October 15, 2021.

[10] M. Mugayar-Baldocchi, B. Schaninger, K. Sharma, *The future of work: Understanding what's temporary and what's transformative*, McKinsey & Company, May 17, 2021, *https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/the-organization-blog/the-future-of-work-whats-temporary-and-whats-transformative*.

[11] *** *Covid has reset relations between people and robots*, The Economist, February 25, 2022, https://www.economist.com/science-and-technology/covid-has-reset-relations-between-people-and-robots/21807815

[12] *Ibidem*.

[13] *** *The Future of Jobs Report 2023*, World Economic Forum, April 30, 2023 https://www.weforum.org/reports/the-future-of-jobs-report-2023/. See also the many-authored paper: *The AI Index 2023 Annual Report*, AI Index Steering Committee, Institute for Human-Centered AI, Stanford University, Stanford, CA, April 2023, *https://aiindex.stanford.edu/wp-content/uploads/2023/04/HAI_AI-Index-Report_2023.pdf*.

[14] *** *Don't fear an AI-induced jobs apocalypse just yet*, The Economist, March 3, 2023, *https://www.economist.com/business/2023/03/06/dont-fear-an-ai-induced-jobs-apocalypse-just-yet*.

As far back as some 40 years ago, Charles Handy noted 'new patterns of work […] on their way whether we like them or not' and added: „By early 1980s, the direction of some of those patterns of work was becoming clearer'; among them 'labour' and 'manual skills' were yielding to knowledge as the basis for new businesses and new work'; and 'the one-organization career was becoming rarer, job-mobility and career changes more fashionable".[15] This reference is meant to both reveal the relatively early beginning of the structural changes in the patterns of work, and their steady advancement as the progress of technology was increasingly influencing the very basics of human life. It may seem superfluous to emphasize that technological breakthroughs, in particular, and technological progress, in general, are indestructibly related to the human drive to well-being, prosperity, and safety; it is also difficult to ignore the relentless tidal wave of information, especially of the fake- and deep-fake kind, that has nurtured the post-truth concept to an almost unthinkable extent. Reality has never been a concept to be taken lightly, and thousands of years of philosophical thinking attest this elementary fact; however, the dignity and fulfilment of man's aspirations and ideals are crucial factors that determine this reality, the spectacular expansion of 'virtual reality' notwithstanding.

The pace of change of, and challenges to, this reality seems more often than not breath-taking. Only two years and several months ago the world was in turmoil because of the pandemic, and the brief above-mentioned reminders of what happened then point to the lasting, and yet, unfinished effects of those developments. The increasing demand for AI-related professional skills is one of them, while the general impact it is supposed to have on society is clearly more complex: according to the head of the New-York based Future Today Institute, 'artificial intelligence could go in one of two directions over the next 10 years: in an optimistic scenario, […] (t)he technology serves as a tool that makes life easier and more seamless, as AI features on consumer products can anticipate user needs and help accomplish virtually any task.'; whereas the 'catastrophic scenario involves less data privacy, more centralisation of power in a handful of companies and AI that anticipates user needs - and gets them wrong or, at least, stifles choices.' The scientist reckons the first scenario has only a 20% chance[16].

However, it would be wrong to be overwhelmed and subdued by the complexity of the challenges AI and automation rise in front of us. One should remember that there were times when the speed of trains traveling at some 20 km/h was deemed fatal for the passengers; and the Luddites movement seemed to threaten the course of the First Industrial Revolution. If history is any guide for the topic of this paper, the slim chances of the above-mentioned optimist scenario are likely to be wide of the mark. Answers to such concerns have been given already and the increasing number of studies bearing on the impact of the Fourth Revolution on society at large, and on business and growth is testimony to that.

3. New rules and updated ones

Initiatives and decisions aiming at regulating the use of technology in terms of addressing its disruptive effects on society are increasingly sought and efforts in this direction are neither easy, nor necessarily consistently structured. Harari's confession about the unknown impact of some basic components of technology on professions, as mentioned at the beginning of this paper, may be substantiated by recalling that there was no knowing of what Guttenberg's printing machine was to cause – just like it is only now, around three decades since the internet and the World Wide Web entered our daily life, that we begin to realize how deeply they have changed this life across the board. The Internet of Things is a continuously expanding reality, and trivial things like programming the coffee-maker to start working autonomously are simultaneous to labourers wondering whether the shift to robots at their working-place shall cause them lose their and their family's livelihood. To put it otherwise, it seems odd to dedicate no small amount of energy and intellectual efforts to address the consequence of such a deeply structural, all-encompassing transformation as caused by the expanding use of AI only; however, the option of 'wait-and-see' proves to be a hardly commendable, not least because said transformations occur at so wide a scale, in terms of sheer numbers of individuals that are exposed to their impact; and because their comprehensive scope in terms of domains of human activity. Moreover, the consequences taking shape already most probably belong to the category of long-term effects, which renders them a disquieting no-return feature.

[15] Ch.B. Handy, *The Future of Work: A Guide to a Changing Society*, B. Blackwell Publication, January 1, 1984 p. IX-X.

[16] Quoted in A. Zurcher, *AI: How 'freaked out' should we be?*, BBC, March 16, 2023, ***https://www.bbc.com/news/world-us-canada-64967627***.

It is well-known, if not necessarily usually observed, that new challenges can hardly be successfully addressed by resorting to old methods. The knowledge-based society might be considered a figment of one's intellectual imagination: society has *always* been based on knowledge, as even during the so-called Dark Ages there were those who *knew* how to organize their lives, even as they brutally took advantage of others. The obvious stark difference is provided by the width and contents of knowledge; and the quest for knowledge has been the defining feature of man's evolution since the very beginning. There is no natural barrier between human knowledge and human society and one cannot advance when the other regresses; one would surmise there is no way that society could ever be taken over by machines.

And yet, these statements seem less obvious when one considers, for instance, that the famous Three Laws of Robotics that Isaac Asimov posited in his fascinating books have never been seriously considered in real life; yet, even he felt the need to eventually add the Zero Law, which allowed his humanoid robots to pass judgments and choose between saving *one* human and protecting *humanity*. This literary sci-fi divagation aside, the mandatory requirement of issuing regulations to be implemented on the internet and AI is a high-profile exercise. Papers and books of respected authors have been multiplying of late in this respect and, in the wake of the spread of the ChatGPT-4 – the latest of generative AI-tools – Garry Marcus and Anka Reuel noted that '*One of the key issues with current AI systems is that they are primarily black boxes, often unreliable and hard to interpret, and at risk of getting out of control.*'; moreover, they argued: '*In the past year alone 37 regulations mentioning AI were passed around the globe; Italy went so far as to ban ChatGPT. But there is little global co-ordination. Even within some countries there is a hodge-podge, such as different state laws in America, or Britain's proposal to eschew a central regulator, leaving oversight split among several agencies. An uneven, loophole-ridden patchwork is to no one's benefit and safety.'* In their view, the foundation of an international agency for artificial intelligence is urgently needed, to the likes of the International Civil Aviation Organization '*in which member countries make their own laws but take counsel from a global agency.*'[17]

The relationship between the on-going transformative process of AI and of the implementation of AI-related tools in ever more domains, as well as the attempts to regulate their use are most visible in the communication sector, not least because of the intimate link between this technology and the cognitive component of our nature. This relationship is equally relevant in another defining domain for the human being, which is labour, in its entirety: *who* is performing it; *where* it is done; *how* it is developing; and *what rules* are to be followed when about its organization, its conditions, and, most important of all, the achievement of its ultimate goal in terms of human dignity, respect and prosperity.

4. Labour law and social security

In the 1960s, Herbert Simon, the 1978 Nobel-prize winner for economy, anticipated that machines shall develop to the extent that would enable them to perform whatever man would do in twenty years[18]; although this has not quite come to pass, the impact of AI on virtually anything is no longer imaginary, as briefly reviewed above; likewise, '*Many projections see this industry growing over the next ten years, from an estimated global market size of USD 2.4 billion in 2021 to over USD 11 billion by 2031*'[19].

The questions bearing on how labour and social security are influenced are increasingly intense, not least because there are instances when the use and, more gravely, abuse, of advanced technology and/or AI tools may lead to consequences that are most harmful to society and its members. Discrimination in hiring and salaries, disregard of suitable working conditions, lack of transparency and participation in the decision-making processes that are relevant to employees' rights, surveillance at the working-place, including under teleworking circumstances are several aspects where over-reliance on AI tools are conducive to predominantly negative consequences and call for appropriate regulations and rules to be conceived and implemented. Moreover, one of the most worrying possible developments that would harm the well-being and prosperity of labourers may be

[17] *The world needs an international agency for artificial intelligence, say two AI experts*, The Economist, April 18, 2023, *https://www.economist.com/by-invitation/2023/04/18/the-world-needs-an-international-agency-for-artificial-intelligence-say-two-ai-experts*.

[18] Quoted by Victor Storchan in introducing *Sam Altman: la loi fondamentale de l'ia*, Le Grand Contient, April 14, 2023, *https://legrandcontinent.eu/fr/2023/04/14/sam-altman-la-loi-fondamentale-de-lia./*. The sentence needs to be completed with his emphasis that this might be true technologically speaking only.

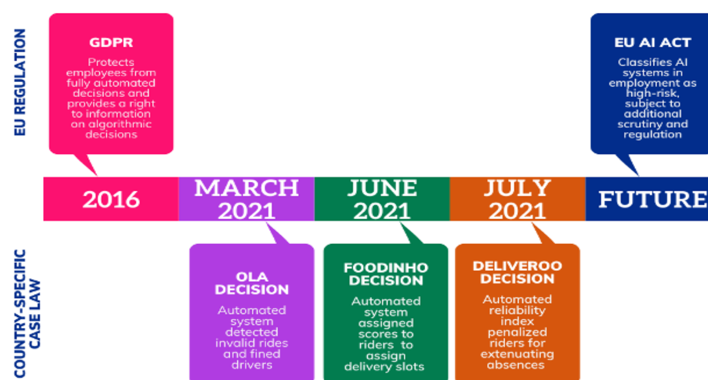
[19] K. Portillo Chavez, J. Bahr, T. Vartanian, *AI has made its way to the workplace. So how have laws kept pace?*, OECD.AI Policy Observatory, December 6, 2022, *https://oecd.ai/en/wonk/workplace-regulation-2022*.

found when resorting to AI and its tools with a view to obtaining increased profits at the expense of social security-related aspects of the employees, under the pretext of lowering production costs; in this respect, a working paper published by the International Labour Office (ILO) warned that '*even if a Universal Basic Income were introduced, the existence of managerial prerogatives would still warrant the existence of labour regulation since this regulation is about much more than protecting workers' income*'[20]

Awareness of these challenges resulted, *inter alia*, in a proposal the ILO Director-General had put forward in 2013, which paved the way to the 'Centenary Declaration on the Future of Work' that was adopted in 2019[21]. A year later, the European Trade Union Institute recalled '(the) *European Commission recently stating that 'artificial intelligence with a purpose can make Europe a world leader'. For this to happen, though, the EU needs to put in place the right ethical and legal framework […] that […] must be solidly founded on regulation – which can be achieved by updating existing legislation – and that it must pay specific attention to the protection of workers. Workers are in a subordinate position in relation to their employers, and in the EU's eagerness to win the AI race, their rights may be overlooked. This is why a protective and enforceable legal framework must be developed, with the participation of social partners.*'[22] In this respect, several domains ought to be considered[23]:

- safeguarding worker privacy and data protection;
- addressing surveillance, tracking and monitoring;
- making the purpose of AI algorithms transparent;
- ensuring the exercise of the 'right to explanation' regarding decisions made by algorithms or machine learning models;
- preserving the security and safety of workers in human–machine interactions;
- boosting workers' autonomy in human–machine interactions;
- enabling workers to become 'AI literate'.

Earlier, in 2016, the EU had adopted the GDPR[24] that is a most important legislation on privacy and a consistent implementation of human rights under the circumstances as created by the new technologies. (*see below an image of the process and components of this regulation*[25]).



The complexity of the unavoidable endeavour of building the knowledge-based economy and society is joined by the equally mandatory demand that relevant laws and regulations bearing on labour and social security be prepared and enforced under the new circumstances as sketched in previous pages. Like the general option of addressing both existing legislations, and updating it, the tasks of training and developing the intellectual capabilities of the present-day society to manage the emerging challenges of this reality need to find the right

[20] V. De Stefano, '*Negotiating the Algorithm: Automation, artificial intelligence and labour protection*, International Labour Office, Geneva, 2018, *https://www.ilo.org/employment/Whatwedo/Publications/working-papers/WCMS_634157/lang--en/index.htm*.

[21]See ILO: *The future of work, https://www.ilo.org/global/topics/future-of-work/lang--en/index.htm*.

[22] A. Ponce Del Castillo, *Labour in the Age of AI: why regulation is needed to protect workers*, The European Trade Union Institute, Foresight Brief #8, February 8, 2020, *https://www.etui. org/ publications/foresight-briefs/labour-in-the-age-of-ai-why-regulation-is-needed-to-protect-workers*.

[23] *** As listed in *Is specific labour protection needed in the digital age?* – Eurofound, 15 December 2021, *https://www.eurofound.europa.eu/data/digitalisation/policy-pointers/is-specific-labour-protection-needed-in-the-digital-age*.

[24] *https://gdpr-info.eu/*.

[25] K. Portillo Chavez, J. Bahr, T. Vartanian, *op. cit., loc. cit.*

course of action in universities and post-graduate education without any further delay. As mentioned in more than one occasion, this situation appears whenever an epoch-making change occurs, in whatever decisive domain: if it were to extrapolate Schumpeter's cycle of 'creative destruction' to training and education, it would follow that the expected Ai-generated radical transformation of labour should call for abandoning whatever legacies related to the 'old' circumstances and replace them with new rules, and law, and practices – sometime, even with little, or no regard at all to the historical and cultural heritage, in the name of the alleged 'unifying, levelling effect' of transborder integration and globalization.

A closer look at what society has achieved in its continuous drive to adapt to new circumstances that itself created unquestionably denies the soundness of this option. It is true that momentous transformations are most probably going to a radical impact on our life as we know it. No rocket-scientists are needed to realize the unparalleled communication leap that humanity took 20 years ago only – that means less than the time needed for obtaining a university degree – when the first smartphone was invented: and by November 2022, data read that around 6.84 billion smartphones were in use – *i.e.*, 85% of the 8 billion global population[26], albeit grossly unevenly distributed all over the world; and similar developments may be found elsewhere. However, there is a continuum in this process that underpins the human nature itself and cannot undo the values of dignity and mutual respect unless society embarks heedlessly on the way to chaos and self-destruction – and therefore questions the very supreme goal, and right, of finding happiness and accomplishment.

Returning to the specific domains of labour and social security, it is to be expected that their normative framework be aimed first and foremost at strengthening their structural roles of being the touchstones of the knowledge-based society, rather than weakening, even voiding them of this mission, whatever the alleged reasons. Multidisciplinary dialogues among experts in labour law, social security, AI, management, human resources, education and training would be welcome to address these issues *sine ira et studio.*

5. Instead of conclusions

The present and the future of the labour law are not only linked, they are also complementary to each other. This seems to be a common, self-evident assertion, very much like the statements that the present is the result of the past and that whoever ignores one's own history would risk to have no future. However, it is generally agreed that self-evident findings are not less relevant: like Schumpeter warned, '*nothing is so treacherous as the obvious*'[27].

In the interconnected world of labour, jobs and qualifications that shall be characteristic to the post-pandemic age, a mix of professional abilities are needed, because new technologies lead to new jobs that differ from classic ones, as they are to rely on knowledgeably operating electronic means. At the same time with the division of labour between man and Artificial Intelligence the transition to future occupations and the image of future professions shall raise significant challenges to labourers, employers, and governments alike.

The post-pandemic age shall need to put forward a legal framework for digitalization, and mainly for platform labour and cross-border workers. The ILO Global Commission on the Future of Work calls member states to set up an international system to govern digital platforms. The initiative focuses on: (i) remuneration, labour conditions, data protections and intimacy; (ii) fair and transparent, not 'masked' contracts; (iii) social protection, mainly paid leaves and pensions; and (iv) the freedom of association, representation of employees, and consultations. We posit that the bi- and/or tri-partite social dialogue should play a major role in reaching an agreement on this issue.

Under these circumstances, the impact of the normative process on labour relations, that is to say of labour law on economic life, cannot be contested, nor can it be ignored. Labour legislation is a fundamental tool of economic policy including the amount of salaries, the possible income redistribution by possible social security means (mainly pensions and unemployment benefits), stimulating labour force to get involved in production, the overall benefits of the labour market, securing and operation of employment services, immigration policies and so on.

The modern economy is more reliant on the cognitive component than on materials and physical labour. In order to cope with challenges issuing from the new forms and organisation of economy, employers have to

[26] *** *Number of smartphone mobile network subscriptions worldwide from 2016 to 2022, with forecasts from 2023 to 2028*, Statista, *https://www.statista.com/statistics/330695/number-of-smartphone-users-worldwide/*.

[27] J.A. Schumpeter, *Capitalism, Socialism and Democracy*, Routledge, 2010, p. 272.

create jobs as needed in a dynamic society that is based on knowledge and progress of production means and goods. This calls for substantial investments in education and science, as well as in employment policies. Results of research, in general, and of technological advancement, in particular, are ever more rapidly associated with growing crisis phenomena in all directions and with ever wider enlargement of their scope, because of deepening globalization-stimulated interaction. Indeed, to some extent, one may talk about the butterfly effect being turned into an everyday reality.

To conclude, present-day society facing unprecedented diversification of challenges in the labour domain and, implicitly, in social life, makes it mandatory to be creative, flexible, and open to conceptual and institutional, and equally teaching, innovation; and this attitude, which is itself a challenge, needs to be built even as it focuses on the Man's personality and becoming with a view to reaching full accomplishment in all the fields of this social life. The school, in the high sense that is provided by the functional and semantic coincidence with the *academia* of the ancient Greeks, is called to fulfil the noble and not-at-all simple task of permanently preparing the members of human society for the future – as well as for its present: as Pope John Paul II said: '*the future starts today, not tomorrow*'.

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CONSIDERATIONS REGARDING CLASSIFICATION AS JOBS PERFORMED IN SPECIAL WORKING CONDITIONS OF THE JOBS CARRIED OUT BY THE STAFF OF THE ANATOMIC PATHOLOGY AND FORENSIC DEPARTMENTS WITHIN LEGAL MEDICINE INSTITUTIONS

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Abstract

This paper focuses on issues dealing with inclusion under the difficult working conditions regime of the jobs carried out by the staff of the Anatomic Pathology and Forensic Departments within legal medicine institutions, following adjudication as unconstitutional of the legislative solution referred to in art. 22 of Law no. 104/2003 on the handling of human corpses and the harvesting of organs and tissues from corpses for transplantation purposes, republished, under CCR dec. no. 53/2020. Analyzing the tortuous evolution of the laws and regulations applicable in the matter under consideration, this paper seeks to clarify the issue of bringing under the difficult working conditions regime the jobs done by the personnel working in the anatomical pathology and forensic departments of the legal medicine institutions, in comparison with the personnel carrying out identical jobs within hospitals and with the staff of the Cellular Biology, Anatomy, Histology and Pathological Anatomy departments within universities. We do not intend to cover all of the topics that make up this overarching theme, but to simply focus on the current legal status of the staff who work in the anatomic pathology and forensic departments of the legal medicine institutions, highlighting, at the same time, the legislative shortcomings of the Romanian medical system. We then conclude this paper with a few considerations on the practice of the courts and with formulation of proposals aimed at mending what we consider to be a failure of the lawmaker in regulating a legal issue which, although it originates from employment relationships, has legal effects in terms of employees' pension rights.

Keywords: *special working conditions, pension right, unconstitutional, legal medicine institutions, pathological anatomy and forensic (prosection) services.*

1. Introduction

This paper examines the main aspects related to inclusion under the special working conditions regime of the jobs carried out by the staff of the pathological anatomy and forensic departments within legal medicine institutions. With regard to the legal issue that is the subject matter of this paper, it should be noted that, although the issue of job classification originates from employment relationships, the seat of the matter is the social insurance legislation. Such a classification generates legal effects on the employee's pension rights plan - materializing in the granting of additional periods to their length of service, which represents contribution periods, the decrease in the retirement age in relation to the length of service in difficult working conditions, as well as the increase of the monthly scores achieved in the respective periods – subject to a condition which must be fulfilled during the contribution period, namely that of withholding and paying social insurance contributions that are differentiated on a percentage basis depending on the type of working conditions.

The issue dealt with in this paper is of utmost importance, given the inconsistent interpretation and application of *Law no. 104/2003 regarding the handling of human corpses and the harvesting of organs and tissues from corpses for transplantation purposes*, republished (hereinafter referred to as Law no. 104/2003), a mishap that was generated by a regulatory omission, be it intentional or not. More specifically, the legislative

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solution referred to in art. 22[1] of Law no. 104/2003 was seen, on the one hand, as a privilege granted by the lawmaker to a certain category of personnel, namely the staff working in the pathological anatomy and autopsy departments of the hospitals, as well as the staff of the Anatomy, Histology, Pathological Anatomy and Cellular Biology Departments within universities, and, on the other hand, as a completely unjustified disadvantage in the case of the staff who carry out identical activities within the forensic medicine institutions.

In other words, Law no. 104/2003 has established a special regulation, derogating from the common law in the matter of public pension system – *i.e.*, Law no. 19/2000 regarding the public pension scheme and other social security rights, in force at that time, and Law no. 263/2010 on the unitary public pension scheme, in force at the date of this paper – regarding classification of certain jobs under the special working conditions regime, in the sense that Law no. 104/2003 classifies *ope legis* these jobs as jobs performed under special working conditions, without any preliminary evaluation procedures, based on the degree of occupational hazards the personnel carrying out jobs in the pathological anatomy and autopsy departments of hospitals are exposed to, compared to the staff of the Anatomy, Histology, Pathological Anatomy and Cellular Biology departments in universities.

Despite the fact that the lawmaker has intended to regulate in favor a certain category of employees – based on obvious data, in the sense that, no matter what steps are taken to reduce or eliminate the risks factors associated with handling human corpses, such risks cannot possibly be completely eliminated – in disregard of the principle of equal rights[2], the lawmaker has in fact managed to create a discrimination between the category of employees nominated by the law and the employees of the legal medicine institutions, who carry out activities that are identical with those referred to in art. 22 of Law no. 104/2003.

(Un)fortunately, this situation has ultimately called for examination by the Constitutional Court of Romania of the constitutionality of the legal provision concerned, with the Court holding, by its dec. no. 53/04.02.2020[3] (hereinafter referred to as CCR dec. no. 53/2020), para. 34, that *„the criticized legal provisions are discriminatory, creating an unreasonable divide in legal treatment, in terms of the legal measures regarding the security and health of employees, between the personnel who carry out their jobs under similar working conditions, for which reasons the legal provisions concerned are adjudicated as unconstitutional*."

Until present, there has been no specialized literature addressing the legal issues related to inclusion under the special working conditions regime of the jobs performed by the staff of the pathological anatomy and forensic departments of the legal medicine institutions, or dealing, at least, with the current legal standing of the staff referred to in art. 22 of Law no. 104/2003, in a situation where, although more than three years have passed since the publication of CCR dec. no. 53/2020, the lawmaker has not bothered to review the criticized legal provisions and make them compliant with the CCR decision, fact that has led to inconsistencies in the interpretation and application of Law no. 104/2003, including the provisions regarding the personnel referred to by the law under consideration.

2. Legislative evolution

It is worth noting that there has been a tortuous evolution of the applicable legal norms in the matter under consideration, marked by the transition from an approach whereby the task of job classification was left with the employers (with a potential fault of the employer affecting directly the employees) to the *ex lege* classification of jobs under the special working conditions regime in the case of staff carrying out pathological anatomy and forensic activities within hospital settings, within legal medicine institutions and within the Anatomy, Histology, Anatomic Pathology and Cellular Biology Departments of universities.

2.1. Regulations applicable between April 1, 2001 and April 3, 2003

From the historical and teleological interpretation of the legal texts that are incident in this field, it should be noted that, after April 1, 2001, when Law no. 19/2000 regarding the public pension scheme and other social

[1] Art. 22 of Law no. 104/2023 reads as follows: „jobs performed by the staff working in the pathological anatomy and autopsy departments of hospitals, as well as the staff of the Anatomy, Histology, Pathological Anatomy and Cellular Biology Departments within universities fall under the category of jobs performed in special working conditions".

[2] Under incidence of art. 16 (1) of the Constitution, which reads as follows: „All citizens are equal before the law and public authorities and are entitled without any privileges or discrimination to the protection of the law".

[3] Published in the Official Gazette of Romania, Part I, no. 199/12.03.2020.

insurance rights (hereinafter referred to as Law no. 19/2000) came into force, the former system, according to which jobs had been classified under work groups I, II and III on the basis of a procedure that was the employer's responsibility, was abandoned. Under the new regulation, jobs were defined and classified as follows: jobs performed under difficult conditions, jobs performed under special conditions and jobs performed under normal conditions, based on criteria established by the law.

In essence, the correspondence between the former special work groups and the difficult working conditions was established under art. 15 of GD no. 261/2001 regarding the criteria and methodology for classification of jobs performed under difficult conditions (hereinafter referred to as GD no. 261/2001)[4], according to which jobs, activities and professional categories that had been classified under the work groups I and II until the entry into force of the new normative act were considered activities carried out under difficult conditions, except for those that, according to the provisions of Law no. 19/2000, were classified as activities carried out in working environments characterized as special working conditions.

Thus, the activity that had previously been performed in a higher work group was a necessary yet not a sufficient condition for its classification under the category of job performed in difficult conditions, since, from the corroborated interpretation of the provisions of art. 19 para. (2) and (5) of Law no. 19/2000 and art. 16 of GD no. 261/2001, it follows that the classification of jobs under the special working conditions regime could be carried out by the employer provided only that, following application of the methodologies established by the aforementioned decision, the employer managed to obtain approval by the administrative body, and only for the jobs expressly specified in the approval.

The approval for classification of jobs as jobs performed under difficult (special) conditions had to include a set of relevant information and was granted on the basis of the documents expressly provided for in art. 4 para. (1) of GD no. 261/2001: determinations of occupational health hazards carried out by the authorized laboratories listed in Annex no. 1 of the Decision in the presence of labor inspectors, findings of the territorial labor inspectorates and copies of the list of occupational diseases or the summary of medical analyzes and the evaluation sheet referred to in Annex no. 2 or 3 to the said Decision.

Although it is beyond the scope of our analysis, it is worth noting that GD no. 260/2001 was in force until its repeal by GD no. 246/2007 establishing the methodology for renewing the approvals for job classification under the special working conditions regime (hereinafter referred to as GD no. 246/2007)[5], a normative act that established the methodology for renewing the approvals regarding classification of jobs under the special working conditions regime, whose scope covered the employers who were holding valid approvals at the time, because, after the entry into force of GD no. 246/2007, the granting of new approvals was no longer possible, so the only procedure allowed was the renewal of approvals that had already been issued.

2.2. Regulations applicable after April 3, 2003

On April 3, 2003, Law no. 104/2003, republished in 2014, was enacted, which is the general legal framework that regulates on the handling of human corpses and the harvesting (procurement) of organs and tissues from corpses, and in particular on the specialized activity carried out in hospital settings, though specific legislation was in place at the time in the forensic medicine field.

Examining the content of art. 22, one may notice that the lawmaker classifies under the special working conditions regime the jobs carried out by the personnel working in the pathological anatomy and morgue departments of hospitals, as well as the personnel of the Anatomy, Histology, Pathological Anatomy and Biology departments of universities, while ignoring the jobs of the anatomic pathologists and forensic specialists working with legal medicine institutions, despite the fact that the activities carried out by forensic institutions are identical or at least comparable to the similar activities carried out in hospital settings, though the occupational hazards associated with handling human corpses and examining biological samples are present in both cases.

By dec. no. 24/2019[6] of HCCJ, the Panel dealing with the review for the uniform interpretation of the law, the Court held that „for *a uniform interpretation and application of the provisions of art. 22 of Law no. 104/2003 regarding the handling of human corpses and the harvesting of organs and tissues from corpses for transplantation purposes, republished, the jobs of the staff working in the pathological anatomy and morgue*

[4] Currently repealed.

[5] Currently repealed.

[6] Published in the Official Gazette of Romania, Part I no. 1001/12.12.2019.

departments of hospitals, as well as the staff working in the Anatomy, Histology, Pathological Anatomy and Cellular Biology departments of universities shall be treated ex lege as jobs performed under special working conditions, without the obligation to apply the methodology established by GD no. 261/2001 regarding the criteria and methodology for classification of jobs as jobs performed in special working conditions, with subsequent amendments and additions, and, by GD no. 246/2007, respectively, regarding the methodology for renewing the approvals for classification of jobs as jobs performed under special working conditions, with subsequent amendments and additions, as regard the criteria and methodology for such classification".

Therefore, in view of the rulings by the HCCJ, after the entry into force of Law no. 104/2003, the employer is required to pay to the state budget the social insurance contributions corresponding to the special working conditions, to the knowledge of the territorial pension houses, without having to go through formalities for obtaining approvals from the territorial labor inspectorate, as we have shown above.

The same decision has also shown that, when drafting Law no. 104/2003, account was taken of the need to regulate the pathological anatomy and forensic activities carried out in hospitals and to protect the doctors and the patients during performance of the medical acts, as well as of the need to regulate on the legal and ethical conditions for performing necropsies and collection of corpses by the higher medical education institutions, for teaching or scientific purposes.

HCCJ also held that the phrase „*special working conditions*" should be interpreted in a consistent manner, both from the perspective of the fact that the lawmaker had automatically eliminated by law the possibility that the jobs concerned be classified as jobs performed in normal working conditions, as well as from the perspective of the rights and obligations of the employees and of the employer, with practical consequences on salary level and on the amount of contributions payable to the public pension scheme. As a matter of fact, one of the reasons why the employer was required, according to Law no. 19/2000 (until the entry into force of Law no. 104/2003), to obtain approval for placing jobs under the special working conditions regime, was the fact that the decision-makers involved in this procedure were constantly looking for an improvement, a normalization of the working conditions, so as to prevent work accidents and occupational diseases, a goal that is actually impossible to achieve when it comes to the specialized personnel referred to in art. 22 of Law no. 104/2003.

It should also be noted that the activities of forensic and anatomic pathology autopsies are carried out only in hospitals or within forensic medicine institutions, according to art. 7 of Law no. 104/2003, so the law has emphasized the special nature of the working conditions associated with the performance of the jobs of the specialized personnel specified under art. 22 of the aforesaid normative act.

Insofar as the GO no. 1/2000 regarding the organization of the activity and the functioning of legal medicine institutions, republished, does not grant forensic doctors the same rights that art. 22 of Law no. 104/2003 grants to the personnel working in the pathological anatomy and autopsy departments of hospitals and to the staff of the Anatomy, Histology, Pathological anatomy and Biology departments of universities, the establishment of a different legal treatment for forensic doctors is unsubstantiated.

Moreover, this lawmaking method is hard to understand, given that, as HCCJ dec. no. 24/2019 itself has stated, there should be a correlative compensation for the efforts and occupational hazards to which the people working in pathological anatomy and forensic departments are exposed to, such compensation to also include the granting of benefits upon exercising their pension rights.

This discriminating regulation has generated disputes among the medical staff, as well as labor conflicts between the staff working in the pathological anatomy and forensic departments within legal medicine institutions and their employers and has eventually led to a review of the constitutionality of the legal provision concerned by CCR, with the Court holding in its dec. no. 53/2020 that the legislative solution referred to in art. 22 of Law no. 104/2003 is unconstitutional.

In its considerations, CCR has shown that „*medical and educational activities involving the handling of human corpses and the harvesting of organs and tissues from corpses for transplantation purposes are benefiting from a special regulation, which establishes specific rights for the personnel who carry out these type of activities, such as, for example, the right to inclusion of their jobs in the category of jobs performed under special working conditions. These jobs are also a part of the duties of the legal medicine institutions. However, considering the specifics of these institutions, namely their contribution to the administration of justice by establishing the truth in criminal, civil or other matters, forensic medicine is covered by a separate regulation, i.e., by GO no. 1/2000. However, the Court considers that the pathological anatomy and forensic activities carried out within these institutions are exposed to the same occupational hazards as the similar activities carried out in hospitals.*

Therefore, application of a distinct legal treatment to the staff of legal medicine institutions that carry out activities of this kind, by precluding them from enjoying the benefits associated with classification of their jobs as jobs performed in special working conditions, appears to lack any objective and reasonable grounds. The fact that the activity of forensic medicine institutions contributes to the administration of justice cannot be regarded as an objective and by no means as a reasonable ground for enactment of a distinct set of rules, with discriminatory consequences, given that the occupational hazards based on which such jobs are classified as jobs performed under special working conditions are identical with the hazards attached to the jobs performed by the forensic staff within the legal medicine institutions, such risk deriving from the very nature of this specific type of activities, as we have held above. Therefore, the Court considers that the criticized legal provisions are discriminatory and create an unfounded divide in legal treatment, in terms of the legal measures concerning the health and safety of employees, between the different types of personnel carrying out jobs in similar working conditions, which is why the criticized provisions are adjudicated as unconstitutional."

By CCR dec. no. 53/2020, the Court did not find the provisions of art. 22 of Law no. 104/2003 to be unconstitutional in their entirety, nor did the Court held that some of the provisions concerned should be eliminated from the text of law, but the Court limited its judgment to adjudicating as unconstitutional the legislative solution of excluding the staff from legal medicine institutions, who carry out medical activities involving handling of human corpses, from the category of personnel performing jobs that are classified as jobs performed in special working conditions.

Obviously, the manner in which the CCR has understood to settle the plea of constitutional challenge of the legal provisions under considerations has an impact also on the legal effects that the admission of the plea generates in terms of application of the provisions of art. 22 of Law no. 104/2003, such effects to be analyzed by taking into account, on the one hand, the fact that we are in the presence of an *a posteriori* review of constitutionality and, on the other hand, the fact that the decision is of an interpretative nature.

The specialized literature has shown that interpretive decisions are decisions which, while they do not expressly establish that a given piece of legislation is unconstitutional, they nevertheless attach a certain meaning to the criticized norms, in an attempt to make those norms compatible with the Romanian Constitution by the way the norms are interpreted and in consideration of the grounds presented. An interpretive decision, as the author emphasizes, does not adjudicate a piece of legislation as absolutely constitutional or unconstitutional; instead, it leaves room for interpretation by using the wording „*to the extent that*", with the legal norm following to be interpreted as the CCR may decide[7].

We will not embark here on an elaborate analysis of the typology of CCR dec. no. 53/2020, which would rather be more appropriate for a monograph. Instead, we will emphasize the fact that, as the case law has consistently held[8], from the analysis of the considerations of the aforesaid decision, it does not appear that the constitutional court considered a solution in the sense that, given the existence of an unjustified discrepancy in legal treatment between the category of staff expressly mentioned in art. 22 of Law no. 104/2003 and the staff carrying out similar jobs within forensic medicine institutions, the legal provisions concerned should no longer apply. Instead, the constitutional court has attached to the legal norm concerned a meaning that is in accordance with the Fundamental Law.

In fact, the Constitutional Court ruled that, regardless of the interpretations that may be given to a text of law, when the Court decides that only a certain interpretation is in accordance with the Romanian Constitution, thereby maintaining the presumption of constitutionality of the text in its interpretation, then the law courts and the administrative bodies must comply with the Court's decision and apply it as such.

This being said, it follows that, although art. 147 para. (1) of the Constitution establishes that the provisions of the laws, orders and regulations in force, which are found to be unconstitutional, should cease to produce legal effects 45 days after publication of the CCR decision, unless the parliament or the government, as the case may be, does not reconcile within the said timeframe the unconstitutional provisions with the provisions of the Constitution, in the present case, the text of law under consideration cannot be considered to have been removed from the legislation insofar as it is still applied in the interpretation established by CCR.

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[7] C. Ionescu, I. Chelaru, *Considerations on the Decisions of the Constitutional Court and Their Legal Effects*, in Dreptul no. 9/2015.

[8] See, in this regard: Bucharest CA, VIIth section in cases dealing with labor disputes and social insurance, dec. no. 3947/03.11.2020; Bucharest CA, VIIth section in cases dealing with labor disputes and social insurance, dec. no. 2578/19.04.2022; Bucharest CA, VIIth section in cases dealing with labor disputes and social insurance, dec. no. 3704/09.06.2022; Bucharest CA, VIIth section in cases dealing with labor disputes and social insurance, dec. no. 5415/17.10.2022.

On the other hand, like any other decision of the Court, interpretative decisions are generally binding, according to the provisions of art. 147 para. (4) of the Constitution [9]. As a matter of fact, the specialized literature says that it is precisely the constitutional enshrining of the general binding nature of the Court's decisions which establishes that they should be imposed on all the subjects of law, in the exact same manner as a normative act, unlike the decisions of the law courts, which are binding only *inter partes litigants*[10].

3. Conclusions

At least at first glance, the intervention of the Constitutional Court seems to be intended to put an end to the disputes regarding interpretation of the provisions of art. 22 of Law no. 104/2003, in the sense that the jobs of the staff working in the pathological anatomy and forensic departments of legal medicine institutions should be included *ex lege* in the category of jobs performed in special working conditions, without the need to apply the methodology established by GD no. 261/2001 and GD no. 246/2007, respectively, and should benefit from the same treatment applicable to the personnel carrying out their jobs in the pathological anatomy and morgue departments of hospitals.

However, the confrontation of the legal norm with the reality has revealed that certain aspects related to the inclusion under the special working conditions regime of the activity of the staff of legal medicine institutions carrying out medical activities involving the handling of human corpses call for improvement or additions, such aspects being presented in this paper as *de lege ferenda* propositions.

Thus, even if the constitutional court has decided how to interpret the provisions of art. 22 of Law no. 104/2003 in accordance with the rules of the Fundamental Law, we believe that the choice of the Romanian lawmaker to not expressly provide under art. 22 of Law no. 104/2003 that the jobs performed by the staff working in the pathological anatomy and forensic departments of the legal medicine institutions are included *ex lege* in the category of jobs performed under special working conditions, should be amended by expressly regulating on this matter accordingly.

In fact, it has happened quite often in practice that the requests for establishing the classification of such jobs as jobs performed in special working conditions, as well as the request for the payment of social insurance contributions in relation to the special working conditions, formulated by the staff working in the pathological anatomy and morgue departments of medical institutions to be rejected by employers, relying on lack of an express legal regulation in this field, with employees being thus forced to turn to justice.

A more serious ground for concern is the fact that, validating the idea according to which art. 22 of Law no. 104/2003 ceased to produce legal effects as of April 26, 2020 because the lawmaker had not amended the challenged provisions, we might expect to witness to some bizarre situations, to say the least, where the jobs carried out by the personnel working in pathological anatomy and autopsy departments of hospitals and the jobs of the staff working in the Anatomy, Histology, Pathological Anatomy and Biology departments of universities are excluded from the category of jobs classified as jobs performed in special working conditions.

On the other hand, we appreciate the fact that the lawmaker has left out of the scope of art. 22 of Law no. 104/2003 the personnel who carry out medical activities involving the handling of human corpses, but who are assigned to other divisions/departments within forensic medicine institutions, such as the toxicology laboratory personnel. Given that they carry out activities under working conditions similar to those referred to in art. 22 of the aforementioned normative act, we propose that, *de lege ferenda,* the lawmaker should consider the fact that equal rights should be granted to this latter category of personnel as well.

References

- C. Ionescu, I. Chelaru, Considerations on the Decisions of the Constitutional Court and Their Legal Effects, in Dreptul no. 9/2015;
- Romanian Constitution;
- Law no. 104/2003 on the handling of human corpses and the harvesting of organs and tissues from corpses for transplantation purposes, republished;
- Law no. 19/2000 regarding the public pension scheme and other social security rights;

[9] Art. 147 para. (4) of the Constitution reads as follows: „Decisions of the Constitutional Court are published in the Official Gazette of Romania." From the date of publication, the decisions are generally binding and are effective only for the future".

[10] C. Ionescu, I. Chelaru, *op. cit.*, *loc. cit.*

- Law no. 263/2010 on the unitary public pension scheme:
- CCR dec. no. 53/2020;
- GD no. 261/2001 regarding the criteria and methodology for classification of jobs performed under difficult conditions;
- GD no. 246/2007 establishing the methodology for renewing the approvals for job classification under the special working conditions regime;
- HCCJ dec. no. 24/2019, the Panel dealing with the review for the uniform interpretation of the law;
- GO no. 1/2000 regarding the organization of the activity and the functioning of legal medicine institutions.

PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AMENDING DIRECTIVES 2009/102/EC AND (EU) 2017/1132 AS REGARDS FURTHER EXPANDING AND UPGRADING THE USE OF DIGITAL TOOLS AND PROCESSES IN COMPANY LAW – TRUST, TRANSPARENCY AND EASIER CROSS-BORDER EXPANSION FOR COMPANIES

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Abstract

Digital tools are essential to ensure the continuity of business operations and of companies' interactions with business registers and authorities. The need to enhance trust and transparency in the business environment and to facilitate the operations of companies, in particular micro, small and medium-sized enterprises (SMEs) in the single market , was underlined since 2003 in Commission Recommendation 2003/361/EC[1]*. As a consequence, in this digital era it is crucial to ensure access for companies, authorities and other stakeholders to reliable company information that can be used without burdensome formalities in a cross-border context. In response to developments in the digital environment, Directive (EU) 2017/1132*[2] *was amended by Directive (EU) 2019/1151 of the European Parliament and of the Council*[3] *introducing rules for carrying out the following operations entirely online: incorporation of public limited liability companies, registration of cross-border branches and submission of documents to business registers. A new step is taken now with the Proposal for a Directive of the European Parliament and of the Council amending Directives 2009/102/EC and (EU) 2017/1132 as regards further expanding and upgrading the use of digital tools and processes in company law*[4]*. The new initiative complements Directive (EU) 2019/1151 focusing on additional segments where digitalisation could improve EU company law, by addressing the availability and reliability of company information in business registers and BRIS, and its use in cross-border situations.*

Keywords: *digitalization of EU company law, trust, availability of company information, interconnection of registers, transparency on companies, once only principle*

1. Introduction in the context of the proposal

On 29 March 2023, the European Commission proposed a new legislative intervention in the area of company law, namely the Proposal for a Directive amending Directive 2009/102/EC and Directive (EU) 2017/1132 as regards further extending and modernising the use of digital tools and processes in company law.

As announced in the Commission's Work programme for 2023, the initiative is one of the key actions under the policy priority „Europe fit for the digital age”. The proposal will directly contribute to the objectives for the implementation of digital processes set out in the 2021 Commission Communication „2030 Digital Compass: Europe's way to the digital decade”[5], which stressed the importance of delivering key solutions for online public services to European citizens and businesses (with the objective of making 100% of these services available online by 2030) and of creating connected public administrations, including through the application of the "once only" principle. In addition, it will support the achievement of the 2020 Communication on the digitalisation of justice

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[1] Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (text with EEA relevance) (notified under document number C(2003) 1422), OJ L 124, 20.05.2003, p. 36-41.

[2] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification), OJ L 169, 30.06.2017, p. 46-127.

[3] Directive (EU) 2019/1151 of the European Parliament and of the Council of 20.06.2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law, OJ L 186, 11.07.2019, p. 80-104.

[4] COM/2023/177 final available at *EUR-Lex - 52023PC0177 - EN - EUR-Lex (europa.eu)*.

[5] COM(2021) 118 final.

in the European Union,[6] which stressed the importance of introducing appropriate tools for judicial authorities and professionals to facilitate the cross-border exchange of documents. Last but not least, it will respond to the directions set out in the 2020 „SME Strategy for a sustainable and digital Europe"[7] and the Communication „Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery"[8], the latter policy document envisaging the Commission's assessment of the need to introduce additional corporate measures to facilitate cross-border expansion of SMEs. The proposal builds on BRIS (Business Register Interconnection System) and extends its use without changing its functioning or infrastructure. It will also link BRIS with other register interconnection systems at EU level.

2. Impact assessment considerations

The impact assessment identified the following problems requiring legislative intervention: low volume of available company data provided by national registers/BRIS; difficulties in using existing data directly for cross-border activities (including in administrative and judicial proceedings and in the process of setting up cross-border subsidiaries or branches). The causes of these dysfunctions can be grouped into several categories: some company data are not available due to different policies applied by Member States in providing them; the control procedures set up by Member States for the verification of information recorded in business registers differ, making the data subsequently provided to the public unreliable; the maintenance of excessive formalities (legalisation, translations, apostille); insufficient application of the *once only* principle. The objectives of the proposal are therefore to improve transparency and confidence in the business environment in the single market; to increase the level of digitisation of cross-border public services for businesses; to reduce the administrative burden for businesses operating across borders, especially SMEs.

3. Summary of the architecture of the legislative proposal

It should be pointed out *ab initio* that, in order to achieve the objectives pursued, the legal basis of the proposal combines art. 50 para. (1) and (2) TFEU, already enshrined by the European legislator for interventions in the field of company law, with art. 114 para. (1) TFEU, which is specific to the establishment and functioning of the internal market.

In terms of tackling the administrative burden faced by companies across borders, the legislative intervention is noteworthy, by proposing:

- the application of the „once only" principle, so that companies do not have to provide information/documents again when setting up a branch or a subsidiary in another Member States (an important role in the exchange of information foreseen by the proposal will be played by BRIS);
- the introduction of an EU company certificate (will include a basic set of information and will be available in all EU languages);
- the establishment of a standard multilingual EU digital power of attorney which will allow the company to be represented in all Member States (it should be clarified that this power of attorney is drawn up/revoked according to national law);
- elimination of additional formalities such as the requirement to have documents legalised or translated.

In order to increase the transparency of information, it is proposed:

- ensuring that important information on companies (*e.g.*, on groups of companies) is made publicly available, in particular at EU level, through BRIS;
- facilitating searches for information on EU companies, through access to BRIS and, at the same time, through two other EU systems that would be interconnected, namely national registers of beneficial owners and insolvency registers;
- ensuring that data on companies in business registers are accurate, reliable and up-to-date (the provisions of the proposal foresee the introduction at Member States level of a mechanism for preventive administrative or judicial control of instruments of incorporation and amending acts, respectively, prior to entry

[6] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Digitalisation of justice in the European Union A toolbox of opportunities, COM/2020/710 final, available at *EUR-Lex - 52020DC0710 - EN - EUR-Lex (europa.eu)*.

[7] COM (2020) 103 final, available at *EUR-Lex - 52020DC0103 - EN - EUR-Lex (europa.eu)*.

[8] COM/2021/350 final, available at *EUR-Lex - 52021DC0350 - EN - EUR-Lex (europa.eu)*.

in the registers).

We also note the introduction of Annex IIB to Directive (EU) 2017/1132 (in the case of Romania, the annex includes general partnerships and limited partnerships).

This proposal complements the rules of Directive (EU) 2017/1132 (Codification) by extending its provisions. It is recalled that Directive (EU) 2019/1151 („the Digitalisation Directive") enshrined the first steps to ensure that the procedures for registration and amendment of documents registered in the commercial register are carried out entirely online for certain types of companies and their branches. The text launched complements that Directive, but also focuses on other aspects of EU company law where digitalisation is needed, in particular by addressing the availability and reliability of company information in business registers and BRIS and its use in cross-border situations. The initiative is also complementary to other EU rules aimed at increasing transparency in relation to companies. These include the Anti-Money Laundering Directive, which focuses on beneficial ownership information, or the Insolvency Regulation, which focuses on information about entities available in insolvency registers, the initiative aiming to link BRIS with the system of interconnection of registers of beneficial owners (BORIS) and the system of interconnection of insolvency registers (IRI), without changing or circumventing the rules on access to information available in those interconnections and the limits of such access.

4. Preliminary point-by-point analysis of the proposal

It should be noted at the outset of the analysis that most of the new provisions amend or add to the provisions of Directive (EU) 2017/1132 (Codification), with all references in the present presentation being made to the latter text (with an exception concerning the amendment regarding art. 3 of Directive 2009/102/EC[9]). As indicated in the section on the summary presentation of the legislative proposal, the initiative aims to retain new obligations that will ensure a higher level of transparency of the information available through national registers. Recital 15 of the proposal emphasises, in detailing the operative part of the rule, the need to facilitate access to partnerships, with the disclosure requirements applicable to companies in which the members/shareholders are liable up to the limit of the share capital being adapted to the specific characteristics of this type of company (art. 14a, 18, 19a). The initiative also introduces new sets of information to be published in commercial registers and made available through BRIS (place of central administration and principal place of business, where these are established in other Member State than that in which the registered office of the company is registered - Art.14(l) and (m); data concerning the group of companies - art. 14b). It also replaces art. 3 of the Directive 2009/102/EC in order to apply higher transparency requirements to single-member companies. According to the new text, where a company becomes a single-member company because all its shares are acquired by a single person, an indication of this fact and the identity of the sole member must be recorded in the file or register referred to in art. 3 para. (1) and (2) of Directive 68/151/EEC[10] and made available to the public through the system of interconnection of registers referred to in art. 16 para. (1) of Directive (EU) 2017/1132. According to the new architecture of art. 18 para. (3) of Directive (EU) 2017/1132, Member States shall ensure that the forenames, surnames and date of birth of the persons referred to in art. 3 of Directive 2009/102/EC are made available to the public through the system of interconnection of business registers. It is considered in the context of the new transparency obligations that BRIS should be linked to the EU BORIS established by Directive (EU) 2015/849 as amended by Directive (EU) 2018/843[11], which connects national central registers containing information on beneficial owners of companies and other legal entities, trusts and other legal arrangements, as well as to the EU IRI established in accordance with Regulation (EU) 2015/848[12]. The EUID should be used to link information on a particular company between these systems. As stated in the preamble of the proposal, such

[9] Directive 2009/102/EC of the European Parliament and of the Council of 16.09.2009 in the area of company law on single-member private limited liability companies (Codified version), OJ L 258, 01.10.2009, p. 20-25.

[10] First Council Directive 68/151/EEC of 09.03.1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of art. 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, repealed by the Directive 2009/101/EC of the European Parliament and of the Council of 16.09.2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of art. 48 of the Treaty, repealed by the Directive (EU) 2017/1132.

[11] Directive (EU) 2018/843 of the European Parliament and of the Council of 30.05.2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, OJ L 156, 19.06.2018.

[12] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20.05.2015 on insolvency proceedings (recast), OJ L 141, 5.6.2015, p. 19-72.

linking of information between systems should not affect the rules and requirements on access to information laid down in the relevant frameworks establishing these registers and interconnections. The clarification is welcomed in the light of CJEU case law which found the provision in the Anti-Money Laundering Directive, which requires Member States to ensure that information on the beneficial ownership of corporate and other legal entities registered in their territory is accessible in all cases to any member of the general public in relation to the Charter, to be invalid (Judgment of the Court of 22.11.2022 in Joined Cases *C-37/20 WM and C-601/20 Sovim SA v. Luxembourg Business Registers*[13]).

Another strand of the proposal is designed to ensure reliable and trustworthy data on which businesses, stakeholders and authorities can rely when they need it for commercial purposes or in administrative or judicial proceedings. To achieve this, it is proposed to ensure at Union level a preventive judicial or administrative control by checking the legality of the company's instrument of incorporation, of the company statutes, if they are contained in a separate document, and of any amendment to such instruments and statutes. The new art. 10 of Directive (EU) 2017/1132 provides in para. (2) that the legality check shall at least verify that: a) the formal requirements for the instrument of incorporation (and for the statutes, if they are included in a separate document) are met, and that the forms referred to in art. 13h are used correctly, b) the minimum mandatory content is included, c) there are no obvious material legal irregularities, and d) the contribution required under national law has been paid, whether in cash or in kind. Beyond the common standards that will characterise this ex-ante verification, it is imperative, in order to achieve the proposed objective, that the information on companies in business registers is accurate. This objective is not a new element, as the Financial Action Task Force Recommendation no. 24 on „Transparency and Beneficial Ownership of Legal Entities”[14], as revised in March 2022, includes requirements that the information on companies in business registers should be accurate and up-to-date. As a consequence, the new text of art. 15 para. (1) requires Member States to put in place procedures to ensure that the information on companies listed in Annexes II and IIB stored in the registers referred to in art. 16 is kept up to date. According to para. (2), these procedures must provide, as a minimum, for the filing with the register of amendments to documents and particulars within a period not exceeding 15 working days from the date on which the amendments were made (by way of exception this provision does not apply to groups of companies and accounting documents) and that any amendment to documents and particulars relating to companies listed in Annexes II and IIB to be entered in the register and published, in accordance with art. 16 para. (3), within 5 working days of the date on which all the formalities required for filing are completed. Companies listed in the Annexes will be required to confirm annually that the information in the register relating to those companies is up to date.

A final direction of legislative intervention, building on the results of the previous directions, is the possibility of direct cross-border use of company data from business registers in cross-border situations. The preferred policy option, as also stated in the explanatory memorandum of the proposal, consolidates three actions, namely the use of the 'once only' principle for the establishment of subsidiaries or branches in another Member State, the provision of a harmonised extract of companies in the EU and, last but not least, ensuring mutual recognition of certain company data by eliminating certain formalities (apostille). As regards the harmonised extract concerning a company (company certificate), it will be possible to use it at EU level, including in administrative procedures applied by national authorities and in judicial procedures carried out in other Member States or applied by EU institutions and bodies. The document will also be issued in electronic format and will be authenticated using the trust services referred to in Regulation (EU) no. 910/2014[15] and will also be compatible with the European digital identity wallet referred to in the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) no. 910/2014 as regards the establishment of a framework for the European digital identity[16] (art. 16). According to art. 16b(1), the EU company certificate must be accepted in all Member States as conclusive evidence of the establishment of the company concerned and of the information contained therein which is held by the register in which that company is registered at the date of issue of the certificate. Concerning the application of the „once only” principle (according to which companies should not be required to submit the same information more than once), we will not insist in particular, as the

[13] ECLI:EU:C:2022:912, *https://curia.europa.eu*.

[14] FATF Guidance on Beneficial Ownership Recommendation 24 - Public Consultation (*fatf-gafi.org*).

[15] Regulation (EU) no. 910/2014 of the European Parliament and of the Council of 23.07.2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, OJ L 257, 28.8.2014, p. 73-114.

[16] COM/2021/281 final, available at *EUR-Lex - 52021PC0281 - EN - EUR-Lex (europa.eu)*.

aim of reducing in cross-border situations the overall administrative burden for companies and other stakeholders is obvious (art. 13g is amended to include this principle).A final action of this policy option is indicated as reducing the formalities that hinder the use of documents in cross-border cases. In this respect, the new art. 16d requires Member States to ensure that copies and extracts of documents or information supplied and certified copies supplied by business registers, as well as notarial and administrative documents and certified copies thereof, and certified translations thereof, are exempt from any form of legalisation or other similar formality, as long as they meet certain minimum requirements as to the origin of the document.The legal requirements for certified translations of the instrument of incorporation and similarly of other documents supplied by the business register, according to Recital 28 and art. 16f, should be limited to what is strictly necessary and the obligation to have such a translation should be allowed only in specific cases, such as where the certified translation is required in the context of court proceedings. Of course, the proposal also enshrines safeguards in the event of reasonable doubts on the part of the authorities of another Member State as to the origin and authenticity of documents, including as to the identity of the seal or stamp, or in cases where they have reason to believe that the document has been forged or fraudulently manipulated (art. 16). In such cases, these authorities may send a request for information to the register which supplied these copies and extracts of documents or to the register of the Member State of the authority to which the copies and extracts of documents and information have been submitted (verification will be carried out through the register interconnection system).

A particular element in the context of the proposed Directive is the Union-wide power of attorney (art. 16c), usable in cross-border proceedings in the context of Directive 2017/1132. The power of attorney is drawn up and revoked in accordance with national law (according to art. 16c para. 1 subpara. 2, national requirements include at least verification of identity, legal capacity and power to represent the company in the case of the person granting the power of attorney), but will have a standard multilingual template and a minimum mandatory content. It will be filed with the commercial register where the company is registered, and third parties with a legitimate interest will have access to it. The power of attorney will only work in digital format and will be authenticated using trust services as defined by Regulation (EU) no. 910/2014. As clarified in recital 26, in order to overcome language barriers and facilitate use, a model Union company certificate and a standard digital power of attorney template will be available on the e-Justice Portal in all official EU languages.

A special provision, to which we reserve a special place, is art. 14b, which is devoted to information on groups of companies. According to recital 17, this type of information promotes transparency, increases confidence in the business environment and has the potential to help identify fraudulent or abusive schemes that could affect public revenues and the credibility of the single market. Therefore, as outlined in the preamble, information on group structures should be published in business registers for both national and cross-border groups and made available through the BRIS system (recital 21 refers also the need for a visual representation of the group structure based on the chain of custody to be made available through the interlinked registers system. The technical details and the detailed list of data for the visual representation of the group structure referred to in art. 14b(10) are to be established by implementing acts as specified in the new text of art. 24. Article 14b sets out in detail the procedure for the publication of this type of information in the registers, with the publication requirement to be met by both the ultimate parent company established in the EU and the subsidiary. If the ultimate parent company is established outside the EU, then the EU intermediate parent company should meet the relevant disclosure requirement. If no intermediate parent company is subject to the law of a Member State, the subsidiary which is subject to the law of a Member State will publish the information. The ultimate EU parent or EU intermediate parent or subsidiary must disclose information on the EU and non-EU subsidiaries of the group. According to art. 14b(1), the set of information on the group will include: (a) the name and legal form of each subsidiary; (b) the Member State or third country in which each subsidiary is registered and its registration number; (c) the EUID of each subsidiary undertaking governed by the law of a Member State; (d) the name of the group, if different from the name of the ultimate parent company; (e) the position of each subsidiary undertaking in the group structure, determined on the basis of control. In order to facilitate rapid communication between registers, paragraph 5 of that rule requires Member States to ensure that, where the ultimate parent company governed by the law of a Member State or, where applicable, the intermediate parent company is registered in a Member State other than any of the subsidiaries, the register in which the ultimate parent company or, where applicable, the intermediate parent company is registered shall send the necessary information to the register corresponding to each subsidiary registered in another Member State via the system

of interconnection of registers. According to the definitions introduced by the proposal in art. 13a (points 9 and 10), 'ultimate parent company' means a parent company which controls, directly or indirectly, in accordance with the criteria laid down in art. 22 para. (1) to (5) of Directive 2013/34/EU one or more subsidiaries and which is not controlled by another company, 'intermediate parent company' being a parent company governed by the law of a Member State and which is not controlled by another company governed by the law of a Member State.

5. Conclusions

The legislative proposal represents an ambitious step in the modernisation of EU company law, and the objectives pursued are, at least in theory, to be welcomed. As positive aspects with unproblematic potential to be achieved, one can note the newly introduced requirements regarding the improvement of transparency of company data and implicitly the extension of the data available in BRIS. Also, the interconnection of registers (BORIS, IRI, BRIS) is a logical sequential step, after their creation and stabilisation, being useful to facilitate the correlation of information on the evolution of the company during its operation. In addition, the possibility of cross-border use of company information (introduction of the *once only* principle for setting up cross-border subsidiaries and branches, establishment of a common company register and abolition of legalisation formalities) will undoubtedly facilitate cross-border economic activities and the access to the markets of other Member States.

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- Judgment of the Court, 22.11.2022, Joined Cases WM (C-37/20) and Sovim SA (C-601/20) at *https://curia.europa.eu*.

ENGAGEMENT - „COMMITMENT TO MARRY” OR „MARRIAGE COVENANT”?

Ciprian Raul ROMIŢAN*

Abstract

According to the provisions of the Civil Code in force, engagement is the mutual promise to conclude the marriage. As it will emerge at the end of our study, in order to be in the presence of an engagement, the promise to conclude the marriage must be mutual, i.e. bilateral, concordant of both parties, man and woman.

In the course of our study we will also make a brief history of the main legal regulations of this institution and also, given that over the ages various opinions have been expressed, we will analyze and find out what is the legal nature of engagement and its legal characters. At the same time, we will find out how to prove that two people, a man and a woman, are engaged and what are the substantive and formal conditions for the conclusion of the engagement, as well as the impediments to the conclusion of the engagement.

Finally, we will analyze the effects of breaking off the engagement, the obligation to return the gifts and who is liable for the wrongful breaking of the engagement.

Keywords: *engagement, family law, promise, marriage, breaking of engagement, restitution of gifts, wrongful breaking of engagement.*

1. A short history of engagement

Engagement, this transition from celibacy to marriage, is thousands of years old and is also mentioned in the Old Testament where it was referred to by the Hebrew term „*aras*” meaning „*marriage commitment*” or „*marriage covenant*”[1].

In our land, in Moldavia, the ruler Scarlat Callimachi (1773-1821), promulgated, in 1817, a „Civil Code of the Principality of Moldavia”, also called the „Calimah Code” or the „Civil Code of Moldavia”, in which engagement was considered "a compulsory legal state, prior to marriage", and for engagement to be legal, the man had to be at least 14 years old and the woman 12 years old, a condition that was also valid for marriage at that time[2].

In Walachia, Caragea's Code (Legiuirea Caragea), which came into force on 01.09.1818, regulated the engagement, in Chapter XIV, as a legal state prior to marriage (first marriage agreement) and established the cases in which the engagement could be broken[3].

In our first Civil Code, adopted in 1864, all provisions relating to the institution of engagement were repealed and the Family Code of 1864 did not have any regulations on this matter.

Currently, the Romanian Civil Code in force regulates engagement in Chapter I, art. 266-270 of Book II (About family), Title II (Marriage) and is defined as „*the mutual promise to enter into marriage*” [art. 266 para. (1) CC][4].

2. Concept of engagement in the Civil Code in force

In the specialized literature prior to the Civil Code in force, but also after its adoption, engagement was defined as „*a mutual promise of marriage, usually made in a festive setting*”[5], „*a mutual agreement between two*

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[1] D. Lupașcu, R. Gâlea, *Unele considerații privind reglementarea logodnei în noul Cod civil român şi în unele legislații străine,* in Lex et Scientia International Journal no. XVII, vol. 1/2010, pp. 177.

[2] A. Rădulescu (coord.), *Codul lui Calimach,* critical ed., Academia Republicii Populare Române Publishing House, 1958, Bucharest, p. 5, 91.

[3] A.R. Motica, *Considerații privind instituția logodnei în Codul civil român,* în Analele Universității de Vest, Seria Drept no. 2/2013, pp. 120.

[4] The Civil Code was adopted by Law no. 287/2009 on the Civil Code, published in the Official Gazette of Romania no. 511/24.07.2009 and entered into force on 01.10.2011, according to Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code, published in the Official Gazette of Romania no. 409/10.06.2011, which also introduced a number of amendments. The Civil Code was republished in the Official Gazette of Romania no. 505/15.07.2011.

[5] M. Avram, *Drept civil. Familia,* 3rd ed., revised and supplemented, Hamangiu Publishing House, Bucharest, 2022, p. 73.

persons to marry"[6], *„a mutual promise given by the future spouses, man and woman, to enter into marriage*"[7], *„an optional legal state, prior to marriage, arising from a mutual promise made by a man and a woman, according to the law, to enter into marriage*"[8] or *„an optional pre-nuptial mutual commitment of the future spouses, agreed upon precisely with a view to entering into marriage*"[9]. In another opinion[10], it was pointed out that *„engagement is nothing more than an empty shell, a legal act without its own content of specific rights and obligations, but which brings together particular rules of civil liability or unjust enrichment, for the hypothesis of unfinished promises of marriage*".

3. Legal nature of the engagement

In order to establish the legal nature of the engagement, we must start from the provisions of art. 266 para. (1) CC, which states that *„Engagement is the mutual promise to enter into marriage*". Therefore, the lawmaker provided for that, in order to be in the presence of an engagement, the promise to conclude the marriage must be mutual, *i.e.*, bilateral, concordant of both parties.

Different opinions have been expressed in the literature on the legal nature of engagement. Thus, while some authors[11] qualify engagement as a *„legal act, a bilateral convention*", other authors[12] consider engagement as *„a mere legal fact*".

There are also authors[13] who argue that engagement is *„a sui generis bilateral civil legal act*", a view we endorse. The legal act of engagement is characterized as *sui generis* by the authors mentioned, because it does not make the conclusion of the marriage mandatory, the freedom of marriage is not limited at all and can lead to the dissolution of the couple's relationship by breaking it.

It should be stressed that the conclusion of marriage *is not conditional on* the prior conclusion of an engagement, and if an engagement has been concluded beforehand it does not automatically become a marriage. In other words, the *conclusion of the engagement does not create an obligation to conclude the marriage*, which is also clear from the provisions of art. 266 para. (4) CC, according to which *„The conclusion of the marriage is not conditional on the conclusion of the engagement*". In a case[14], the court held that *„the conclusion of an engagement does not create a family, but only a possible prerequisite for its birth, but on the basis of a mutual promise made by the parties to conclude the marriage*".

As has been pointed out in the literature[15], engagement does not imply that the two fiancés, man and woman, are obliged to live together in fact, but neither does it exclude it.

Proof of the engagement may be furnished by written documents, witnesses, presumptions, the confession of one of the parties made on his or her own initiative or obtained on cross-examination, or by any other means provided for by law. Specifically, according to the art. 266 para. (3) final sentence CC, *the engagement can be proved by any means of evidence,* including by mentions made by both fiancés on social networks (Facebook,

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[6] C-tin Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Tratat de drept civil,* vol. I (Restitutio), All Beck Publishing House, Bucharest, 1996, p. 188.

[7] T. Bodoașcă, A. Csakany, *Opinii privind reglementarea logodnei în Codul civil român*, in Dreptul no. 5/2015, p. 9.

[8] D. Lupașcu, C.M. Crăciunescu, *Dreptul familiei,* 4th ed., amended and updated, Universul Juridic Publishing House, Bucharest, 2021, p. 50.

[9] M.A. Oprescu, *Logodna în noul Cod civil,* in Revista Română de Jurisprudență no. 4/2012, p. 251.

[10] M. Floare, *Privire istorică, în spațiul dreptului privat european, asupra rolului logodnei și al formalităților prenupțiale în economia reglementărilor privind căsătoria*, in Revista Română de Drept Privat no. 3/2018, p. 116.

[11] E. Florian, *Considerații asupra logodnei reglementată de noul Cod civil,* in Curierul Judiciar no. 11/2009, p. 632; C. Hageanu, *Logodna în noul Cod civil*, in Curierul Judiciar no. 10/2011, p. 529; C.a Roșu, A.F. Moca, *Reglementarea logodnei în noul Cod civil*, in Dreptul no. 1/2012, p. 81.

[12] A. Gherghe, *Noul Cod civil. Studii și comentarii,* vol. I, collective coordinated by Marilena Uliescu, Universul Juridic Publishing House, Bucharest, 2012, p. 609; I. Albu, *Căsătoria în dreptul român*, Dacia Publishing House, Cluj-Napoca, 1988, pp. 28-32.

[13] T. Bodoașcă, *Dreptul familiei*, 5th ed., revised and added, Universul Juridic Publishing House, Bucharest, 2021, pp. 54-56; D. Lupașcu, C.M. Crăciunescu, *op. cit.*, p. 50; B.D. Moloman, C. Ureche Lazăr, *Codul civil. Cartea a doua. Despre familie. Art. 258-534, Comentarii, explicații și jurisprudență,* 2nd ed., revised and supplemented by B.D. Moloman, Universul Juridic Publishing House, Bucharest, 2022, p. 92.

[14] Bucharest County Court, 5th civ. s., civ. dec. no. 455/A/07.02.2018, available at *www.rolii.ro* (accessed on 03.05.2020).

[15] E. Florian, *Dreptul familiei. Căsătoria. Regimuri matrimoniale. Filația*, 8th ed., C.H. Beck Publishing House, Bucharest, 2022, p. 26.

Twitter etc.)[16]. It should also be pointed out that according to the provisions of art. 249 CPC, *the burden of proof lies with the complainant*[17].

For example, in a dispute[18], the court pointed out that „*the giving of a ring engraved with her name does not prove the fact of engagement, since, on the one hand, it was the defendant's birthday when the ring was given and, on the other hand, the law does not make the conclusion of the engagement conditional on this fact*". In another dispute[19], the court stated that „*as regards the conditions required by law for the valid conclusion of an engagement, it is not necessary and not required that the parties sign a legal document containing a mutual promise, since the mere acceptance of the engagement can be proved by any means of evidence*". In this regard, the court emphasized that „*the conclusion of the engagement may also be proved by photographs or documents taken on the occasion of the marriage feast or by the engagement certificate issued by the priest*".

4. Legal characteristics of engagement

From the interpretation of the legal definition of engagement, governed by art. 266 para. (1) CC, this institution has the following legal characteristics[20]:

- an *engagement is concluded between a man and a woman*, their declared and common purpose being to enter into a marriage in the future, by their mutual promise to each other. Art. 266 para. (5) CC expressly and imperatively states that „an engagement may only be concluded between a man and a woman". In other words, *people of the same sex cannot get engaged*;
- the *engagement is freely consented*, that is, in order to be validly entered into, the consent expressed by the promise made must be *freely given* and *non-vitiated.* This expression of will, it was pointed out in a case[21], which concerned the restitution of gifts received during the engagement, „*cannot be vitiated by the existence of divorce proceedings, since both parties knew that it was made under a suspensive condition, pursuant to art. 1400 CC.*"[22];
- the *engagement is consensual*. Thus, according to art. 266 para. (3) CC (1st sentence), „the conclusion of the engagement is not subject to any formality", the fiancés being free to choose the manner of expressing their consent, and not being obliged to comply with any formality;
- *the engagement does not have a time limit*, the law in force does not set a deadline for the marriage[23]. As a rule, the engagement lasts until the conclusion of the marriage. We say as a rule because at any time prior to marriage, the engagement can be broken by either of the fiancés;
- *engagement is based on the principle of equality between man and woman, i.e. between fiancés.* The principle of equality between men and women is enshrined in art. 16 para. (1) of the Romanian Constitution, which states that „citizens are equal before the law and public authorities, without privileges or discriminations";
- the *engagement is concluded for the purpose of concluding the marriage,* in other words, the conclusion of the engagement does not establish a family, but only a possible family can be "born". As a reminder, an engagement is the mutual promise to enter into marriage;
- *engagement is optional*, meaning that engagement is *not compulsory* for the conclusion of a marriage. Art. 266 para. (4) CC provides that „*the conclusion of marriage is not conditional on the conclusion of the engagement"*;
- *engagement is monogamous*, which means that none of the fiancés can be engaged to more than one person at the same time, since in such cases the engagement would be null and void for violation of the

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[16] With the ancient Greeks and Romans, the consent for engagement could be given verbally or in writing on tablets on which the dowry was inscribed (Carmen Oana Mihăilă, *Călătorie prin trecut și prezent: căsătoria și regimurile matrimoniale,* in Studia Universitatis Babeș Bolyai no. 4/2020, p. 578, footnote 35.

[17] According to art. 249 CPC, „he who makes a plea in the course of the proceedings must prove it, except in cases specifically provided for by law".

[18] Mehedinți county court, 1st civ. s., civ. dec. no. 25/F/12.03.2013, available at *www.rolii.ro* (accessed on 22.09.2019).

[19] Bucharest Court of district 1, civ. s., civ. sent. no. 17.717/23.11.2016, available at *www.rolii.ro* (accessed on 13.01.2020).

[20] For details, see Al. Bacaci, V.C. Dumitrache, C.C. Hageanu, *Dreptul familiei,* 7th ed., C.H. Beck Publishing House, Bucharest, 2012, pp. 17-18; C.C. Hageanu, *Dreptul familiei și actele de stare civilă*, Hamangiu Publishing House, Bucharest, 2012, p. 16; D. Lupașcu, C.M. Crăciunescu, *op. cit*., (2021), pp. 51-52; L. Irinescu, *Instituția logodnei – între tradiție și inovație*, in "Revista de științe juridice" no.2/2014, pp.47-53.

[21] Reșița county court, 1st civ. s., civ. dec. no. 145/A/21.03.2019, available at *www.rolii.ro* (accessed on 22.09.2019).

[22] According to art. 1400 CC, „the condition is suspensive when its fulfillment depends on the effectiveness of the obligation".

[23] Art. 83 and 85 of the Code of Calimach stipulated that „engagement must be followed by wedding within 2 or 4 years at the most" (See C-tin Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *op. cit*., p. 188).

substantive conditions required by law for its valid conclusion, according to art. 266 para. (2) CC[24].

5. Substantive and formal conditions for the conclusion of the engagement

5.1. Substantive conditions for the conclusion of the engagement

The substantive conditions for the conclusion of the engagement are, according to art. 266 para. (2) CC, identical to those for the conclusion of marriage, with the exception of the medical opinion and the authorization of the guardianship court. Therefore, the basic conditions for the conclusion of the engagement are:

- *consent* to the conclusion of the engagement must be: *personal, freely expressed, mutual* and *full*. In other words, consent *cannot be expressed by an attorney*, even if the mandate is in authentic form, cannot be affected by any defect, cannot be affected by any term or condition;
- *age of the future fiancés.* Given the reference that the legislator makes to the provisions of art. 272 CC, the age at which an engagement can be concluded is, as a rule, 18 years for both women and men. However, art. 272 para. (2)-(5) CC also provides for an *exception* to this rule, an exception which is applied according to the art. 266 para. (2) CC, *i.e.*, for *good cause*, a minor who has reached the age of 16 may become engaged with the consent of his/her parents or, where applicable, his/her guardian. If there is no unanimity between the parents on whether to agree to the engagement, the disagreement between them will be submitted to the court, which will resolve it in the best interests of the child. If one parent is deceased or unable to express his or her will, the consent of the other parent is sufficient. If there are no parents or guardian who can consent to the engagement, the consent of the person or authority who has been empowered to exercise parental rights is required.

The legislator has not defined the phrase *„for good cause*" so that the analysis of the existence of good cause will be carried out on a case-by-case basis by the parents, the guardian or those entitled to exercise parental rights, and in case of disagreement between parents the existence of good cause will be examined by the guardianship court. Minors who have been granted full capacity by the guardianship court according to the art. 40 CC[25] may also validly enter into an engagement. In a case[26], the court held *„that according to art. 266 CC in conjunction with art. 272 CC, the substantive conditions for the conclusion of an engagement by a minor over 16 years of age refer only to the freely expressed consent of the minor and the consent of his/her parents, given that art. 266 para. (2) CC expressly states that the provisions on the conclusion of marriage, with reference to medical opinion and the authorization of the guardianship court, are not applicable. In those circumstances, the court of first instance wrongly held that the defendant was not old enough to enter into an engagement, since the evidence produced in the case shows that her parents agreed to the engagement and even received money for their daughter from the plaintiff by way of a transfer*';

- *sex difference*. Art. 266 para. (5) CC states that *„an engagement may only be concluded between a man and a woman*". So, like marriage, engagement is forbidden between people of the same sex. We consider the express regulation in art. 266 para. (5) CC that an engagement can only be concluded between a man and a woman since, in para. (2) of the same article states that the provisions on the substantive conditions for the conclusion of marriage also apply to engagement. However, one of the basic conditions of marriage is the prohibition of same-sex marriage;
- *people who get engaged not to be married or engaged*. A person who is married or already engaged cannot validly enter into an engagement or a new engagement. This condition derives from bigamy, which is a negative substantive condition for marriage. It is true that, in the case of engagement, one cannot speak of bigamy, which is the marriage of a person who is already married. Therefore, if a married person becomes engaged to another person, we are not in the presence of bigamy, but we are in the presence of a failure to fulfill a substantive condition necessary for the valid conclusion of the engagement, the condition represented by the prohibition to become engaged to persons who are married or already engaged;
- *non-existence of natural kinship*. Future fiancés (man and woman) must not be related in the direct or collateral line up to and including the fourth degree. For *„good cause*", collateral relatives of the fourth degree

[24] Caransebeș district Court, civ. sent. no. 1435/01.11.2012, available at *www.rolii.ro* (accessed on 22.09.2019).

[25] Art. 40 CC, with the margin „Anticipated capacity of exercise", provides that „For justified reasons, the guardianship court may recognize the full capacity of exercise to a minor who has reached the age of 16. To this end, the minor's parents or guardian will also be heard, and, where appropriate, the opinion of the family council will also be sought."

[26] Botoșani county court, civ. dec. no. 700/02.12.2020, available at *www.rolii.ro* (accessed on 10.02.2021).

(first cousins) may be engaged to be married to each other [art. 274 CC in relation to art. 266 para. (2) CC];

- *the non-existence of civil kinship (adoption)*. Since adoption creates a filiation link between the adopter and the adopted person, as well as a kinship link between the adopted person and the adopter's relatives, the engagement cannot take place between the adopted person and those who have become relatives through adoption. The prohibitions and exceptions laid down with regard to natural family kinship also apply in the case of adoption;
- *non-existence of guardianship*. This prohibition results from the proper application under art. 266 para. (2) CC, of the provisions of art. 275 CC, according to which the guardian and the person who benefits from his/her protection may not marry.[27]

5.2. Formal conditions for the conclusion of the engagement

In accordance with the provisions of art. 266 para. (3) CC, engagement is not subject to any formality and may be proved by any means of evidence. In a case[28], our supreme court held, with regard to the conclusion of an engagement, „*that in accordance with the principle of consensualism, it may be concluded by simple agreement of the parties and may be proved by any means of evidence. Therefore, there is no need for the parties to present a document certified by a state authority to justify the conclusion of the engagement*". In the same dispute, with regard to the proof of engagement, it was held that «*the appellant-plaintiff has proved that there were mutual promises to marry between him and the respondent, in this regard he has submitted messages sent to each other by e-mail, in which both parties addressed each other as „future husband". It also appears from the content of the e-mails sent by the two to each other that they had planned to get married and live together, with the appellant-plaintiff informing the respondent on 28.10.2011 that on 22.12., when he was going to meet her, he was going to put the engagement ring he had bought on her finger*».

But, as has been pointed out in the specialized literature[29], in order to help them in the future in proving their engagement, the fiancés can opt to conclude the engagement in written form or by a notarized deed.

We also consider that, although the law does not require any formalities to be carried out for the conclusion of the engagement, there is nothing to prevent the fiancés from formalizing the conclusion of the engagement by concluding a deed.

6. Effects of engagement

As already mentioned, engagement is *optional* and therefore not a necessary precondition for marriage. In other words, the marriage can be concluded without the prior existence of the engagement, and the existence of the engagement does not oblige to the conclusion of the marriage.

With the conclusion of the engagement, the two parties, the man and the woman, obtain the status of *fiancés,* which in itself constitutes an[30] *effect* of the conclusion of the engagement. The status of fiancés results from the provisions of Article 267 para. (1) and (2) of the Civil Code.[31] and Art. 268 para. (1) and (3) Civil Code[32].

An analysis of the legal provisions governing the institution of engagement shows that fiancés have a number of *rights* and *obligations*, namely:

- the right of the fiancés to break off the engagement [art.267 para. (1) Civil Code];
- the right or, as the case may be, the obligation of the fiancés to return, in the event of the break-up of the engagement, the gifts they have received in consideration of the engagement, with the exception of ordinary gifts (art. 268 Civil Code);
- the right of fiancés to be compensated (art.269 Civil Code);
- the obligation to compensate for wrongful breaking off the engagement (art.269 Civil Code)[33].

[27] According to art. 275 CC, „marriage is stopped between the guardian and the person benefiting from his/her guardianship".

[28] HCCJ, 1st civ. s., dec. no. 3084/11.11.2014, available at *www.csj.ro* (accessed on 21.09.2019).

[29] L. Irinescu, *op. cit.,* p. 51.

[30] T. Bodoașcă, *op. cit.,* (2015), p. 49.

[31] According to art. 267 para. (1), (2) CC: „(1) A fiancé who breaks the engagement cannot be forced to conclude the marriage. (2) The penal clause stipulated for the breaking of the engagement is considered unwritten".

[32] According to art. 268 para. (1), (3) CC: „(1) In the event of the breakdown of the engagement, the gifts that the fiancés received in consideration of the engagement or, during the engagement, for the purpose of marriage, are subject to restitution, with the exception of ordinary gifts. (...) (3) The obligation of restitution does not exist if the engagement has ceased by the death of one of the fiancés".

[33] According to art. 269 CC: „(1) A party who wrongfully breaks off an engagement may be required to pay compensation for expenses incurred or contracted for the purpose of the marriage, insofar as they were appropriate to the circumstances, and for any other damage

It should be noted that, according to the provisions of Article 270 of the Civil Code, "The right of action based on the provisions of Articles 268 and 269 *shall be subject to statute of limitation one year after the breaking off the engagement*".

As pointed out in the literature[34], the fiancés may also agree, verbally or in writing, on certain rights and obligations that are compatible with the engagement, such as: setting the date and place of the wedding, the place of the wedding, the list of guests, the material contribution of each to support the event, the conditions under which the engagement is broken, the manner in which the gifts will be returned[35] etc.

Children born in a engagement relationship have the status of children out of marriage, following the respective legal regime[36]. In this case, the presumption of filiation with respect to the alleged father, governed by Art. 426 para. (1) of the Civil Code, according to which "Paternity is presumed if it is proved that the alleged father has cohabited with the child's mother during the legal time of conception".

The fiancés can choose the matrimonial property regime, but such an agreement will only take effect from the moment of the marriage[37].

With regard to property acquired by the fiancés during the period of the engagement, we would point out that this is subject to the rules of co-ownership (joint ownership in shares).

7. Conclusions

Now, at the end of our study, we can conclude that engagement, although not a formality prior to marriage, is, along with it and other aspects of people's family life, *a fundamental component of our lives*.

In order to be in the presence of an engagement, as provided by the legislator, *the promise to enter into an engagement must be mutual,* i.e. bilateral, concordant of both parties (man and woman).

The conclusion of a marriage is not conditional on the prior conclusion of an engagement, and if an engagement has been concluded beforehand it does not automatically become a marriage. In other words, the *conclusion of the engagement does not create an obligation to conclude the marriage*. In the same sense, the courts in our country have also ruled that *the conclusion of the engagement does not create a family, but only a possible premise for its birth, but on the basis of the mutual promise that the parties make to each other to conclude the marriage*.

Finally, engagement is *a sui generis bilateral civil legal act* because it does not make the conclusion of marriage mandatory, the freedom of marriage is not limited at all and can lead to the dissolution of the couple's relationship by breaking it off.

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caused. (2) A party who has culpably caused the other party to break off the engagement may be liable to pay damages under paragraph (1)".

[34] D. Lupașcu, C.M. Crăciunescu, *op. cit*., (2021), pp. 60-61.

[35] Art. 268 CC, with the marginal „*Return of gifts*", regulates the manner in which gifts are returned: „(1) In the event of the breakdown of an engagement, gifts which the fiancés have received in consideration of the engagement or, during the engagement, in view of the marriage, with the exception of customary gifts, shall be subject to restitution. (2) Gifts shall be returned in kind or, if this is no longer possible, to the extent of enrichment. (3) The obligation of restitution does not exist if the engagement has ceased by the death of one of the fiancés."

[36] B.D. Moloman, C. Ureche Lazăr, *op. cit.,* (2022), p. 95.

[37] N.C. Aniței, *Convenția matrimonială potrivit noului Cod civil*, Hamangiu Publishing House, Bucharest, 2012, p. 24.

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ARTIFICIAL INTELLIGENCE IN EUROPEAN LAW

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Abstract

The emergence of Artificial Intelligence (AI) is a topic still fresh and new to law scholars. The aim of the Regulation regarding artificial intelligence is to present a unified and harmonised core legislation, from which the EU Commission and member states to tackle the growing aspects concerning this new sector of economic market, social and administration. As it will be seen in the present article, the EU legislator is still fixed on the existing AI, known to us until now, governing strict rules as response to some countries in Asia having made use of facial, biometric and location recognition AI to control their people and also to award behavioural points and keep score of the „perfect citizen".

The draft Regulation is followed by an EU Commissions Directive regarding the liability of all aspects regarding AI development, usage and participants. But the core principles, neccesary for such a new matter are laid down in the present Regulation. The document is divided into chapters, addressing mainly the definitions of the main notions used, including one for artificial intelligence system, the types of AI that are considered inacceptable and major-risk in respect to fundamental rights and values of the EU, special regulations regarding transparency, registration of AI systems and the necessity to have a special European authority, baked by national authorities, in charge of validating the usage of AI systems.

Keywords: *artificial intelligence, European law, proposal, regulation, control, registration.*

1. Introduction

European Parliament and Council have laid down a draft proposition of, to be voted and included in the European Union's (EU) legislation. It resulted in the draft proposition of Regulation of the European Parliament and of the Council harmonised rules on Artificial Intelligence (Artificial Intelligence Act)[1]. The same draft is set to amending certain other EU legislative acts.

In the current political context, the EU Commission is looking to present a unified regulation regarding AI, having these specific objectives:

i) ensure that AI systems placed on the Union market and used are safe and respect existing law on fundamental rights and Union values;

ii) ensure legal certainty to facilitate investment and innovation in AI;

iii) enhance governance and effective enforcement of existing law on fundamental rights and safety requirements applicable to AI systems;

iv) facilitate the development of a single market for lawful, safe and trustworthy AI applications and prevent market fragmentation.

In light of these objectives, the draft Regulation whites to approach all matters in a balanced manner, but also to tackle some or all the risks that might arise. This must be done as to not hinder any technological development, nor to increase expenditures unreasonably. A juridical and economic framework must be created, adapted to the necessities of modernity, progress and future challenges. This can be achieved by having a strong set of principles, unified in matters of AI.

The scope of this paper follows the scope of the Regulation, is to present a summary of the provisions introduced by this draft proposal, in order to scrutinise aspects that will definitely have an impact, should it be voted in current form. Aspects like risk management, that does not create unnecessary restrictions for commerce, but also addresses general concerns regarding AI, those which are justified, are subject to this presentation.

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[1] For all EU languages see *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0206*, consulted on 04.05.2023.

The draft Regulation is not against introducing AI, but looks to set forth private and safe places for testing, rules for creating and using AI and introduction on the market, balanced by a careful risk management. A unified definition is a premiere, and also the forbiddance of certain AI practices that are broadly considered dangerous.

In corelation with other EU law, the draft Regulation is drafted in accordance with the EU Charter for Human Rights, bun also consumers, data protection[2], non-discrimination, equality and other core legislation. Romanian legislation is few, but we indicate the forming of the Romanian Committee for Artificial Intelligence[3], by the Ministry of education, under the patronage of the Romanian Government.

At the same time as this draft Regulation, the EU Commission has advanced a draft for a Directive[4], whit purpose to bring under regulation aspects of liability regarding AI developing, marketing and use.

2. Presentation of the main provisions of regulations

Regarding the content of the draft Regulation, it's expected to improve and to facilitate good market functioning, by setting forth a unified juridical frame, necessary for creating, developing, marketing and use of AI in conformance whit EU policies. It is also worth mentioning that the possibility of a member state to limit these freedoms regarding AI shall be limited. AI systems are free to be implemented in all sectors of economic, private life and society. Because certain member states have already implemented restrictions, they may remain if their goal is to ensure the safe us of AI and general laws and human rights. The free trade principal, at the core of EU law and philosophy, is met by this approach. It also prevents the fragmentation of the single market, by having various legislation for each member state.

2.1. Scope and definitions (Title I)

The general objectives of the draft Regulation are harmonising the single market with the putting into service and use of AI, to enjoin certain practices considered dangerous, to assure transparency for AI created to interact with people and overall to monitor the market for this new merchandise.

The provisions of the draft Regulation shall apply non discriminatory to all AI providers, regardless of them being from EU or tertiary. Given the nature of AI, all systems that are introduces to EU must obey the principles of the Regulation and EU law. However, military developed special AI is excluded from the domain of the draft Regulation, being subject only to foreign policies of the EU and common security[5].

The different terms used by the draft Regulation are given a definition in art. 3. The most important definition is the one given to the notion of „artificial intelligence system" (AI system) meaning software that is developed with one or more of the techniques and approaches listed in the Regulation and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with. The approaches referred to are[6]:

(a) Machine learning approaches, including supervised, unsupervised and reinforcement learning, using a wide variety of methods including deep learning;

(b) Logic- and knowledge-based approaches, including knowledge representation, inductive (logic) programming, knowledge bases, inference and deductive engines, (symbolic) reasoning and expert systems;

(c) Statistical approaches, Bayesian estimation, search and optimization methods.

AI is basically a software, that should follow the rules of intellectual property. Thus, the draft Regulation gives definitions for „market introduction", meaning the first release of a system on the UE market, „making available on the market" meaning any supply of an AI system for distribution or use on the Union market in the course of a commercial activity, whether in return for payment or free of charge, and „putting into service" means the supply of an AI system for first use directly to the user or for own use on the Union market for its

[2] Regulation regarding data protection [Regulation (UE) 2016/679] and Directive on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data [Directive (UE) 2016/680].

[3] Order no. 20484/2023 regarding the setting up, organization and function of the Romanian Committee for Artificial Intelligence, issued by the Ministry of Education, Innovation and Digitalisation, published in Official Gazette of Romania, Part I, no. 382/04.05.2023.

[4] See proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive), *https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0496*, consulted on 04.05.2023.

[5] Foreign policy and security are regulated under Title V of the Treaty on the European Union (TEU).

[6] See Annex I of Regulation regarding artificial intelligence (AI), as mentioned in footnote 1.

intended purpose. Alongside it defines „reasonably foreseeable misuse” meaning the use of an A.I. system in a way that is not in accordance with its intended purpose, but which may result from reasonably foreseeable human behaviour or interaction with other systems.

2.2. Forbidden artificial intelligence practices (Title II)

This title lists practices that are considered dangerous. The draft Regulation ranks them into three categories, based on risk, resulting in inacceptable risks, high risk and low risk AI products.

Deriving from this, unacceptable risks are considered forbidden, due to their potential harm to EU values. All practices that may, in any way, influence people without them being aware or that exploit vulnerabilities of specific categories of people, in order to materially distort their behaviour in a manner that is likely to cause them or another person psychological or physical harm, are listed in this category. Also, any social behaviour evaluation, made by private or public entities and using biometric identification in real time and in public places, even for the purpose of law enforcement, are forbidden, with only specific exceptions strictly regulated. The notion of „real-time remote biometric identification system” is defined in the previous title and means a remote biometric identification system whereby the capturing of biometric data, the comparison and the identification all occur without a significant delay.

Not last, AI cannot be used to evaluate a person’s credibility, over a specific time frame, based on behaviour, personal preferences or known personality statistics, known or suggested, nor to create scores of one’s demeanour.

In respect to where an adult person might have a choice, to use or benefit or allow to be used regarding him/her any aspect set forth by AI, these practices are forbidden only if they fall under the before mentioned examples and are not regulated by other EU law, such as data privacy.

2.3. Major-risk AI systems (Title III)

The second category, as mentioned before, of risk evaluated AI are major/high risk products/software. They are considered such due to their big potential risk to the safety, health or rights of natural persons. Thus, they are permitted to be used only after careful evaluation of conformity with the laws and values of UE. This evaluation is based not only on the intended scope of the AI system, but also on the function and the means by which these are used.

The draft Regulation splits into two categories the major risk AI:

- AI destined to be used as components of products, subject to conformity verification by third parties;
- other AI autonomy programs that may have implications in fundamental rights[7], such as biometric identification, operation of critical infrastructure, education and training, employment, private life, freedom, law enforcement, public administration etc.

In order to implement and manage these risks the draft Regulation sets forth a system for documenting and administer them. This will be a continuous process, at the fist introduction to market and spanned over the entire usage of an AI systems, including verification regarding known and possible associated risks derived from miss usage, growing data collections and adaptability of the AI. High-risk AI systems shall be tested for the purposes of identifying the most appropriate risk management measures. Testing shall ensure that major-risk AI systems perform consistently for their intended purpose and they are in compliance with the requirements set out in the Regulation. For this, all major-risk AI must have technical documentation, in which to prove that the program abides by the necessary requirements and norms, also facilitating public organism set for verification all aspects needed to evaluate them at all time. These must be placed in records that must pe kept for specific period of time. Not last, all AI must be supervised by humas during creation and implementation, including cybernetic security.

These are the first of many distinct obligations that the draft Regulation ageists to providers. Chapter 3 sets these responsibilities, which expand to importers, distributors and all traders that deal in AI. One of the main obligations of providers is to ensure that AI functions in law abiding, that they provide usage manual to users and that they obtain EU conformity certificates (CE conformity). Another obligation is to monitor ant take immediate measures, should the AI not perform in allowed parameters.

[7] See Annex III of Regulation regarding artificial intelligence (AI), as mentioned in footnote 1.

Creators of AI system special ensure that their product is ready to be released to market and that it pre-obtained authorisation and necessary conformity certificates. If a provider or creator does not have an official agent in EU or merchandises the product without a designated importer, it must name an authorised agent in EU. Agents or importers will be held liable for obtaining and holding conformity certificates, issuing of technical documentations and usage instructions for consumers. Collaboration with public authorities is mandatory for all.

Users of AI also have obligations, to read and abide by the user instruction manual or rules provided by provider, to not bring or render any harm to other users and to not use it abusively or in such manner as to restrict right or liberties. Users of an AI system that generates or manipulates image, audio or video content that appreciably resembles existing persons, objects, places or other entities or events and would falsely appear to a person to be authentic or truthful ('deep fake'), shall disclose that the content has been artificially generated or manipulated.

The same title, in chapter 4 institutes how and when competent public authorities must be informed in order to evaluate the conformity of AI systems. In continuation, in chapter 5 a detailed evaluation procedure can be found, to be followed by all AI systems catalogued as high-risk. The approach tens to reduce the work load on both the parties involved and the public authorities. However, for AI destined to be used as components of products shall be verified before and after release to ensure their conformity with special laws from their area of implementation and the provisions of the draft Regulation.

After verifications had been concluded and a conformity certificate is to be released, the providers must register their AI systems into a common data base, managed by the EU Commission. Its purpose is to ensure the transparency and to facilitate on-going verifications by authorities. Any modifications, transformations, updates etc. to an AI must be reflected in this data-base.

2.4. Transparency and innovation (Titles IV and V)

Transparency is a very important part of the rules that should stop all derail of any AI system. As innovation develops, because of the sensitive aspects of the matter, transparency and constant control of the systems must be at the highest priority. Some risks that some AI incur may degenerate in manipulation. Transparency obligations shall apply foreground to systems interacting with people, those that are used to detect emotions and/or may render certain associations with social categories or use biometrical data and those that create fake and deepfake information. Regarding the last, as mentioned before, it is considered a violation of rights as may lead to the obligation to disclose that the info was fake.

Transparency means that whenever a user interacts with an AI it must be made aware of this situation and, if any aspect their behaviour is recognised, analysed and stored, by automatic means, it must be under the same awareness. All these allow a possible victim of manipulation by an AI to take a step back and reassess.

Interesting to see is that the draft Regulation managed to expresses necessary balance needed to exist between innovation and human rights. Innovation is a part of human nature and the scope of the draft Regulation is to provide a safe and legal manner in which to be expressed. So the draft Regulation is in favour of innovation, adapted to the future needs and resistant to possible deviations. For this purpose, member states are encouraged to develop safe spaces for testing and verifying AI. Also, because, the present Regulation cannot include all aspects, national competent authorities should set up regulatory sandboxes and sets a basic framework in terms of governance, supervision and liability.

2.5. Governance, implementation and code of conducts (Titles VI, VII, VIII and IX)

In respect to governance of the entire aspects regarding AI, as regulated by the draft Regulation, proposals are made towards both European and national levels. At EU level, there is the proposition to constitute a European Committee for AI governing, having participants from all member states. This committee should facilitate a harmonised introduction and verification of all AI, contributing to the on-going cooperation between the national AI surveillance authorities and the EU Commission. Separately, at national level, the draft Regulation suggests that all member states create national public authorities, entrusted to authorise, survey and implement the directions set by present Regulation and other special laws in topic.

Having mentioned before that a common data base is required, in order to keep track of major-risk AI systems at European level, because of their potential implications regarding fundamental rights, this will be created by the EU Commission and shall be supplied with data from providers of AI systems, which are required

to register their products before releasing them onto market, or in any way making them usable. This data base will be similar and have the same purpose as, for example, the trade registry of companies.

Creating such a data base is not the only step, its role is to assure transparency and to aid the public authorities in their on-going verification and release of conformity certificates. Providers must feed information regarding all aspects and allow to be examined by public authorities, after the release of a product or system. Investigating potential incidents and dysfunctionalities are o core component. The competent authorities, fist the national ones, must control the market and investigate the obedience of the participants obligations and their conformity with present Regulation and other EU and national laws. This mainly refers to major-risk AI systems, but will include the evidence of all systems.

In other words, the draft regulation specifically mentions that public authorities should be granted the funds and the tools necessary for them to be able to intervene in the event that a system generates unforeseen risks and/or damages. A quick and prompt response is highly necessary.

All this does not affect the existing system and the distribution of powers for the ex-post application of fundamental rights obligations in the member states. Where necessary for the performance of their mandate, the existing supervisory and compliance authorities shall also have the power to request and access any documentation kept in accordance with this Regulation and, if necessary, to require market surveillance authorities to organize high-risk AI system testing by technical means.

As it can be observed, the draft Regulation implements different sets of codes of conduct for the three categories of AI systems, ranked by risk. If regarding major-risk category the dispositions are mandatory, it is also firmly suggested that even low risk providers to abide by the same principles. Although it is presumed that their impact is minimal, we are dealing with new and in permanent developing systems, making need for awareness from both sides, the main actors in the market and the public authorities.

3. Conclusions

The importance of the AI sector is immense, the importance of having a unified law is greater and the importance of regulating, at least the main aspects that concern the entire EU, is the up most importance. The present paper did not include the sister legal act, the directive regarding liability deriving from AI implementation and usage, because of its size and complexity.

De lege ferenda one might suggest that an even more detailed approach should be made, as we are sure that due to the inevitable development of this sector of technology, all regulations shall be extended from the current one.

The impact cannot be denied, any attempt to banning the use of AI will be a fail attempt form the very beginning, as showed by the case of Italy regarding the famous Chat GPT. The solution is to acknowledge, monitor, register, control and educate people to this new domain which, even more than the invention of the calculus machine, alone brings a new industrial revolution.

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SOME CONSIDERATIONS ON THE PAYMENT ORDER REGULATION

Dan VELICU[*]

Abstract

The delay of payments, or sometimes even their absence, has particularly negative effects on the activity of a company. Debt recovery is an activity that requires a lot of time, involves costs and causes lack of liquidity. In particular, small and medium-sized companies are deeply affected. They are obliged to resort to bank loans which increases operational costs or to delay payments which can bring them into insolvency.

Debt recovery is thus an important goal for the current legislator who should create an encouraging legal framework for the development of businesses.

The difference between the rules at national level had negative effects on the commercial relations within the European Union.

Therefore, the regulation of this framework was carried out in the last decades at the level of the European Union. The different approaches in the practice of the national courts led to the reform of this legislation.

This article aims to analyze the way in which the European regulation was transposed into the Romanian legislation and the possible problems or aspects worthy of being emphasized that appeared during this period.

Keywords: *commercial debts, delay of payments, EU law, civil procedure code, debt collection.*

1. Introduction

As the vast majority of contracts are known – civil or commercial – involve the obligation of one party to pay a sum of money to the other in return for the performance of an obligation which usually characterises the essence of that contract.

At the same time, most contracts are consensual acts in the sense that the law does not condition the appearance of legal effects on the realization of any special form or the execution of any material act.

Often, buyers or other contractors delay the payment of the sums of money corresponding to the purchased goods or services rendered. Non-payment has a severe impact on the trading partner.

In practice, two major hypotheses emerge that mark the cleavage between purely civil contracts or those concluded with consumers and those concluded between entrepreneurs.

In most of the states, the legislator intervened by adopting a special procedure for the debt collection[1]. As a rule, the procedure is found in the Code of Civil Procedure (art. 1405 *et seq.* from the French *Code de procédure civile* or art. 688 from German *Zivilprozessordnung*).

The difference between the rules at national level had negative effects on the commercial relations within the European Union.

2. The EU Regulation on late payments

Therefore, one of the most well-known regulations in the field of combating contractual non-performance was the Directive 2000/35/EC of the European Parliament and of the Council of June 29, 2000, on combating late payment in commercial transactions[2].

The issuance of the directive was motivated by the following arguments:

- Late payment is in reality a breach of contract which has been made financially attractive to debtors in most EU states by low interest rates on late payments and/or slow procedures for redress. A decisive change is essential to reverse this trend and to ensure that the costs of late payments are such as to discourage or, at least, to limit the late payment.
- Substantial administrative and financial burdens are placed on businesses as an outcome of excessive

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[1] See, on this topic, G. Boroi, M. Stancu, *Drept procesual civil*, Hamangiu Publishing House, Bucharest, 2020, p. 1034 *et seq*.

[2] See OJ L 200, 08.08.2000, 35-38.

payment periods and late payment. These difficulties constitute a major source of insolvencies threatening the survival of businesses especially the small and medium-sized enterprises.

- In this field, the regulation is very diverse in the European Union.
- As a major consequence the differences between payment rules and practices in the EU states can be considered as an impediment to the good functioning of the internal market (we must analyse by observing the art. 26 TFEU).

Therefore, the main goal of the Directive 2000/35/EC is to limit the abuse of freedom of contract to the „disadvantage of the creditor".

Two main hypotheses were taken into account:

- an agreement mainly serves the purpose of procuring the debtor additional liquidity at the expense of the creditor,
- the main contractor imposes on his suppliers and subcontractors terms of payment which are not justified on the grounds of the terms granted to himself.

Despite the good intentions of the authors of that directive some problems emerged.

One of this was related to the legal aspects regarding the recovery of the amount of money.

According to art. 5 para. (1) „member States shall ensure that an enforceable title can be obtained, irrespective of the amount of the debt, normally within 90 calendar days of the lodging of the creditor's action or application at the court or other competent authority, *provided that the debt or aspects of the procedure are not disputed*".

The same article permitted to the EU states that duty shall be carried out in conformity with their respective national legislation, regulations and administrative provisions.

Practically, the debtor could raise objections concerning the legal grounds of the claims and that attitude blocked the entire procedure.

The Directive 2000/35/EC was, therefore, a failure. The regulation had to be improved.

Finally, a new regulation was enacted and that is the Directive 2011/7/EU of the European Parliament and of the Council of February 16, 2011 on combating late payment in commercial transactions[3].

At this moment, the preamble was considerably extended in order to explain better the goals of the new directive.

The economic context was largely described.

According to the second point of the preamble „most goods and services are supplied within the internal market by economic operators to other economic operators and to public authorities on a deferred payment basis whereby the supplier gives its client time to pay the invoice, as agreed between parties, as set out in the supplier's invoice or as laid down by law".

Given that situation we became aware that „many payments in commercial transactions between economic operators or between economic operators and public authorities are made later than agreed in the contract or laid down in the general commercial conditions. Although the goods are delivered or the services performed, many corresponding invoices are paid well after the deadline. Such late payment negatively affects liquidity and complicates the financial management of undertakings. It also affects their competitiveness and profitability when the creditor needs to obtain external financing because of late payment. The risk of such negative effects strongly increases in periods of economic downturn when access to financing is more difficult".

On the other hand, in its Communication of June 25, 2008 entitled „Think Small First" - A „Small Business Act" for Europe', the Commission highlighted that small and medium-sized enterprises' (SMEs) access to finance should be simplified and that a legal and business environment supportive of timely payments in commercial transactions should be settled.

It should be retained that public authorities have a special duty in this field. The criteria for the definition of SMEs are set out in Commission Recommendation 2003/361/EC of May 6, 2003 concerning the definition of micro, small and medium-sized enterprises.

The goal of the Directive 2011/7/EU was mainly the same. This does not regulate transactions with consumers, interest in connection with other payments, for instance payments under the laws on cheques and bills of exchange, or payments made as compensation for damages including payments from insurance

[3] See OJ L 48, 23.02.2011, 1-10.

companies. More, the EU states can eliminate the debts that are subject to insolvency proceedings, including proceedings aimed at debt restructuring.

However, the Directive 2011/7/EU regulate „all commercial transactions irrespective of whether they are carried out between private or public undertakings or between undertakings and public authorities, given that public authorities handle a considerable volume of payments to undertakings". The commercial transactions between main contractors and their suppliers and subcontractors are not exclude from the field of its application.

As the Directive 2000/35/EC did the Directive 2011/7/EU considers – we wonder if that would be necessary – that „late payment constitutes a breach of contract which has been made financially attractive to debtors in most Member States by low or no interest rates charged on late payments and/or slow procedures for redress. A decisive shift to a culture of prompt payment, including one in which the exclusion of the right to charge interest should always be considered to be a grossly unfair contractual term or practice, is necessary to reverse this trend and to discourage late payment. Such a shift should also include the introduction of specific provisions on payment periods and on the compensation of creditors for the costs incurred, and, inter alia, that the exclusion of the right to compensation for recovery costs should be presumed to be grossly unfair" (Preamble, point 12).

As a consequence, contractual payment periods have to be limited, as a general rule, to 60 calendar days. Of course, there may be situations in which undertakings need more extensive payment periods, especially when undertakings wish to grant trade credit to their clients. Therefore, the parties have to agree in an explicit manner on payment periods longer than 60 calendar days. Such extension must not be totally unfair to the creditor.

On one hand, it must be mentioned that the Directive did not oblige a creditor to claim interest for late payment. In that specific case, the Directive should permit a creditor to resort to charging interest for late payment without giving any prior notice of non-performance or other similar notice reminding the debtor of his obligation to pay.

On the other hand, according to the Preamble, the debtor's payment should be regarded as late, for the purposes of entitlement to interest for late payment, where the creditor does not have the sum owed at his disposal on the due date provided that he has fulfilled his legal and contractual obligations. In the case of the implementation of the directive into the Romanian legislation, as we will see below, the Romanian legislator did not consider as a condition the creditor's execution of his obligations for the running of the procedure[4].

As we can suppose the invoices trigger requests for payment and constitutes the most important documents in the chain of transactions for the supply of goods and services, *inter alia*, for determining payment deadlines.

The Directive purpose was that fair compensation of creditors for the recovery costs incurred due to late payment is essential to discourage late payment or, in other words the payment that delay at the debtor's will.

Creditors are entitled to reimbursement of the other recovery costs they incur as a result of late payment by a debtor. Such costs may include those incurred by creditors in instructing a lawyer or employing a debt collection agency.

It must be noticed that the EU States are able to provide for fixed sums for compensation of recovery costs which are higher and therefore more favourable to the creditor, or to increase those sums, among other things, in order to keep pace with inflation.

As we can imagine the Directive has no impact on the payments by instalments or staggered payments. The parties can freely settle different methods of payment. Nevertheless, each instalment or payment has to be paid on the agreed terms and should be subject to the rules for late payment.

An interesting situation is, obviously, that of the public authorities. As, it is recognized by the Directive Preamble, these have generally more *secure, predictable* and *continuous* revenue streams than undertakings. All this let the public authorities to get financing at more attractive conditions than undertakings. These also depend less than undertakings on building stable commercial relationships for the achievement of their goals. These are, in fact, supplementary reasons in order not to exclude from the application sphere of the directive the public authorities.

Of course, as we can imagine, late payment by public authorities for goods and services lead to unjustified costs for undertakings. That's why it became essential to impose specific rules as regards commercial transactions for the supply of goods or services by undertakings to public authorities, which should provide in

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[4] See art. 1014-1025 CPC.

particular for payment periods normally not exceeding 30 calendar days, unless otherwise expressly agreed in the contract and provided it is objectively justified in the light of the particular nature or features of the contract, and in any event not exceeding 60 calendar days.

On a whole, the EU states had to implement the Directive in a way that in commercial transactions the maximum duration of a procedure of acceptance or verification will not exceed, as a general rule, 30 calendar days. However, as an exception a verification procedure can surpass 30 calendar days, especially in the situation of complex contracts, when expressly settled in the contract and in any tender documents and if it is not grossly unfair to the creditor.

The commercial agreements are made on the ground of the freedom choice of the parties. However, a limit was identified by the Directive authors. They support the idea that the Directive sense is to limit the abuse of freedom of contract „to the disadvantage of the creditor”. As a result, where a term in a contract or a practice relating to the date or period for payment, the rate of interest for late payment or the compensation for recovery costs is not justified on the grounds of the terms granted to the debtor, or it mainly serves the purpose of procuring the debtor additional liquidity at the expense of the creditor, it may be regarded as constituting such an abuse.

The Directive has to have no impact on the national provisions relating to the way contracts are concluded or regulating the validity of contractual terms which are unfair to the debtor (it seems probably that the Directive authors were considering the agreements with consumers).

One of the most important provisions of the Directive is art. 10 - *Recovery procedures for unchallenged claims*.

According to first paragraph the EU states shall ensure „that an enforceable title can be obtained, including through an expedited procedure and irrespective of the amount of the debt, normally within 90 calendar days of the lodging of the creditor’s action or application at the court or other competent authority, provided that the debt or aspects of the procedure are not disputed”. The EU states shall carry out this duty in accordance with their respective national laws, regulations and administrative provisions.

Of course, national laws, regulations and administrative provisions shall apply the same conditions for all creditors who are established in the Union.

3. Civil Procedure Code Regulation

The Directive 2011/7/EU was transposed mainly by the Law no. 76/2012 for the implementation of Law no. 134/2010 on the Civil Procedure Code (CPC)[5].

The Code contains a special section under the title „Payment Order”.

According to art. 1014 para. (1) CPC the provisions of this title „shall apply to *certain, liquid and due claims* consisting of obligations to pay sums of money resulting from a civil contract, including those concluded between a professional and a contracting authority, established by a document or determined according to a statute, regulation or other document, appropriated by the parties by signature or in another way permitted by law”.

However, any claim related to the insolvency proceedings remains out of the sphere of application of these provisions.

According to art. 1014 para. (1) CPC the request for an order for payment shall contain:

- the surname and forenames, as well as the domicile or, where appropriate, the name and registered office of the creditor;
- the name and surname, the personal identification number, if known, and the domicile of the debtor, natural person, and in the case of the debtor who is a legal person, the name and registered office, as well as, where appropriate, if known, the unique registration code or the tax identification code, the registration number in the Trade Register or of entry in the register of legal entities and the bank account;
- the amount representing the object of the claim, the factual and legal basis of the obligation to pay, the period to which they relate, the period to which payment had to be made and any element necessary to determine the debt;
- the amount representing the related interest or other damages due to the creditor, according to the

[5] See Official Gazette of Romania, Part I, no. 365/30.03.2012. See on topic A. Rădoi, *Procedura ordonanței de plată*, în *Noul Cod de procedura civilă comentat și adnotat*, Universul Juridic Publishing House, Bucharest, 2016, vol. II, 1492 *et seq*; G. Boroi, M. Stancu, *op. cit.*, p. 1035.

law;

- the creditor's signature.

The request shall be accompanied by the documents certifying the amount of the sum due and any other documents proving it.

According to art. 1019 CPC, in order to settle the application, the judge shall order the summoning of the parties, in accordance with the provisions on urgent cases, for explanations and clarifications, as well as to insist on the payment of the amount owed by the debtor or in order to reach an agreement of the parties on the methods of payment. The summons will be handed over to the party 10 days before the hearing date.

The summons for the debtor shall be attached, in copy, to the creditor's application and the documents submitted by him in proving the claims.

The summons shall specify that the debtor is obliged to file a statement of defence at least 3 days before the trial term, noting that, in case of non-submission of the defence, the court, in view of the circumstances of the case, may consider it as a recognition of the creditor's claims.

The statement of defence shall not be communicated to the applicant, who shall take cognizance of its content from the case file.

If the creditor asserts that he has received payment of the sum due, the court shall take note of that fact by means of a final decision ordering the closure of the file.

When the creditor and the debtor reach an agreement on the payment, the court shall take note of it, issuing an expedient decision, in accordance with art. 438 CPC.

The expedient decision shall be final and shall constitute an enforceable title.

The rules regarding the possibility to contest the claim are, in our opinion, of great relief. According to art. 1021 para. (1) CPC if the debtor contests the claim, the court shall verify that the objection is well founded, on the basis of the documents in the file and the explanations and clarifications of the parties. If the debtor's defence is well founded, the court will reject the creditor's application by way of order.

If the substantive defences formulated by the debtor involve the taking of evidence other than those referred to in para. (1), and they would be admissible, according to the law, in the ordinary law procedure, the court shall reject the creditor's application for the payment order by way of conclusion.

In the cases referred to in para. (1) and (2), the creditor may bring an application for summons under the ordinary law.

Finally, according to art. 1022 CPC, if the court, following the verification of the application on the basis of the documents submitted, as well as the statements of the parties, finds that the creditor's claims are well founded, it shall issue a payment order, which shall specify the amount and the time limit for payment. If the court, examining the evidence of the case, finds that only a part of the creditor's claims is well founded, it shall issue the payment order only for this party, setting the payment deadline. In this case, the creditor may file a claim in accordance with the ordinary law in order to obtain the debtor's order to pay the rest of the debt.

4. Conclusions

At first appearance, we could conclude that the European and respectful national regulation has achieved the objective pursued, namely that of protecting the creditor against the debtor's delay.

It is likely that the number of unpaid debts and their amount has decreased significantly.

On the other hand, just as likely the debtors were forced to change their attitude towards the payment obligations assumed by the contracts.

However, a few aspects are worth remembering in my opinion.

First of all, through the regulation within the Code of Civil Procedure, a significant prejudice was made to the Civil Code regarding the possibility of executing an obligation without the other party being able to resort to *exceptio non adimpleti contractus*.

This exception is not a derogatory norm with short applicability.

On the other hand, if the debtor manages to convince the court that his allegations constitute substantive legal problems and as such the judge will reject the request because it is not possible to rule on the merits, the creditor will have to resort to the ordinary procedure in order to obtain the recovery of his debt.

This outcome represents significant costs and a period of time lost with significant consequences on the economic activity of the creditor.

The creditor does not have at this time the possibility to request the requalification of his extraordinary action in an ordinary request.

Last but not least, the protection of the creditor cannot be done only by resorting to an extraordinary procedure but together with other measures such as raising the requirements for the creation and functioning of commercial companies (*e.g.*, increase of the legal minimum capital).

As a final conclusion, national legislation must be improved so that bad faith behaviours are limited by effective means and not necessarily by exceptional procedures.

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VOICE OF THE CHILD IN 1980 HAGUE RETURN CASES

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Abstract

The voice of the child is a broad and largely discussed concept relevant for family life, and referred to both in different juridical instruments belonging to national and international areas, and also doctrinal opinions.

The purpose of the article is to analyse the voice of the child in the particular situation of international child abduction, in the framework of the ever-increasing number of transnational families on the move, within and outside the EU.

As the general principle stipulates that an abducted child shall promptly be returned to the state of habitual residence, children's welfare is to be considered only within the exceptions to the return mechanism.

One of these exceptions is represented by the child's objection to being returned, which nevertheless remains highly controversial: if we accept it is generally in children's best interests to be returned, then how can children's rights to express their views be accommodated?

Hence, the objectives of the present study are to identify the legal context in which the child's opinion can be expressed and valued in the context of different juridical instruments, with a subsequent focus on the situation of international child abduction (procedural and substantial).

Furthermore, the paper will examine the extent to which judicial assessments of child's views in child abduction procedures are conducted in a way that corresponds with a children's rights-based approach, acknowledging their autonomy and right to be heard.

Keywords: *international abduction, prompt return, voice of the child, children's rights, family life.*

1. Introduction

There is a general consensus that children should have a voice in all litigations involving measures concerning them (including international abduction disputes, ever more frequent nowadays).

The issue of children objecting to their return to the state of habitual residence in proceedings under 1980 Hague Convention[1] is nevertheless particularly intense and disputed in the area of family justice.

The subject has great importance, as this is an area where „there are as many practices on how to hear the voice of the child as there are legal cultures and traditions"[2] and where the HCCH[3] has not yet published a Guide to Good Practice.

Moreover, an order of return to the state of habitual residence, although applying the prompt return principle, would directly disregard the child's expressed voice.

There is therefore the question of how the prompt return principle and the exception regarding the child's refusal to return can be accommodated in practice, in the wider context of the importance attached to the child's voice outside the framework of the 1980 Hague Convention.

To reach this aim, the study will concentrate in identifying means in which the child's opinion can be expressed and valued in the context of different juridical instruments.

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[1] Intergovernmental agreement concluded at The Hague on October 25, 1980, during the 14th Session of the Hague Conference on Private International Law, entered into force on December 1, 1983.

[2] Ph. Lortie, Fr. Breger, *Foreword,* in The Judges' Newsletter on International Child Protection - vol. XXII / Summer - Fall 2018, available online at the following link: *https://assets.hcch.net/docs/a8621431-c92c-4d01-a73cacdb38a7fde5.pdf*, last accession on 04.02.2023, 12:04, pp. 3-5, p. 3, last accession on 21.03.2023, 18:25.

[3] The Hague Conference on Private International Law (HCCH) is an intergovernmental organisation the mandate of which is „the progressive unification of the rules of private international law" (art. 1 of the Statute). To this end, HCCH elaborated different Guides to Good Practice, Explanatory Reports, Practical Handbooks or Brochures, in order to facilitate the application of different juridical instruments belonging to the area of private international law.

Having established the general outset, the analysis will further focus on particularities of the child's voice in case of international child abductions, given the tension already pointed-out between the principle of prompt return and the exception related to the child's objection.

Doctrinal opinions and case-law will also be identified and presented, with the necessary note that preponderence goes to studies from abroad, as in Romanian juridical literature the subject has scarcely been approached.

2. Content

2.1. Legal context

Although the subject of the article considers the child's voice in the special situation of international abductions, identifying a wider framework is useful not only for a broader perspective, but also due to the interconnection of different juridical instruments.

These legal instruments may be divided in three main categories, belonging to the area of international private law, EU law, respectively national law (only the most relevant will be mentioned, in a chronological order).

2.1.1. Private international law

The **Hague Convention of October 25, 1980 on the Civil Aspects of International Child Abduction** (to which Romania is a member state[4]) is one of the most important juridical instruments of private international law, which seeks to protect children from the harmful effects of wrongful removal and/or retention across international boundaries by providing a procedure to bring about their prompt return in the state of origin.

The 1980 Hague Convention indirectly empowers the voice of the child by means of art. 13 para. (2), consacrating one of the exceptions to the above-mentioned principle of prompt return, namely the situation when the child objects and has attained the appropriate *age* and *degree of maturity* [5].

Another significant private international law instrument is the **1989 Convention on the Rights of the Child**[6] (Romania is a member state[7]), which directly underlines the importance of the voice of the child, stating the principle that children have the *right* to express their views in procedures affecting them, either directly or through a representative/an appropriate body, and their opinions are to be given due weight in accordance with the age and maturity [8].

Convention of October 19, 1996 on parental responsibility and measures for the protection of children[9], adopted later in the framework of HCCH (and to which Romania is also a member state[10]), aimed to establish common provisions taking into account the previous UN Convention on the Rights of the Child.

In particular, this convention values indirectly the voice of the child, providing grounds for non-recognition of judicial or administrative measures taken without the child having been provided the opportunity to be heard.

None of these conventions deals with *substantial and procedural measures related to hearing children*, which were thus left for the contracting states to establish.

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[4] Law no. 100/1992 for Romania's accession to 1980 Hague Convention on the Civil Aspects of International Child Abduction, published in the Official Gazette of Romania no. 243/30.09.1992.

[5] According to art. 13 para. (2): „The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views".

[6] Adopted by UN General Assembly, signed in New York on November 20, 1989, entered into force on September 2nd, 1990.

[7] Law no. 18/1990 for the ratification of the Convention on the Rights of the Child was published in the Official Gazette of Romania no. 109/28.09.1990 and republished in the Official Gazette of Romania no. 314/13.06.2001.

[8] According to art. 12: „1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law".

[9] Concluded at The Hague, October 19, 1996 and entered into force on January 1st, 2002.

[10] Law no. 361/2007 for the ratification of the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, published in the Official Gazette of Romania no. 895/28.12.2007.

2.1.2. EU law

Council Regulation (EC) no. 2201/27.11.2003[11], in preamble considerations 19 and 20, respectively art. 11, 23, 41 and 42 considered the voice of the child by incorporating the principle stipulated in art. 12 of the Convention on the Rights of the Child, with a similar reference regarding the age or degree of maturity [12].

Recognising that hearing of the child plays an important role in the application of the regulation, consideration 19 indicates that this instrument is not intended to modify national procedures applicable to this respect.

The present **Council Regulation (EU) 2019/1111**[13] on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction dedicates art. 21 to the right of the child to express his or her views, with the well-known mention by now related to age and degree of maturity[14].

Again, it was left to national law and procedure to determine subsequent aspects related to hearing of the child.

2.1.3. National law

It results that, in the absence of a uniform reglementation in private international law or EU law, domestic legislations play an important role in hearing children, both substantively and procedurally[15].

In Romanian law, references to the voice of the child appear in the general framework provided by **Romanian Civil Code (CC)**[16].

Art. 264 CC stipulates: „ (1) In administrative or judicial procedures concerning her/him, the *hearing of the child who has reached the age of 10 is mandatory*. However, *the child who has not reached the age of 10 may also be heard, if the competent authority considers that this is necessary* for the resolution of the case. (2) The right to be heard implies the possibility of the child to ask for and receive any information, according to her/his age, to express her/his opinion and to be informed about the consequences that this may have, if respected, such as and on the consequences of any decision that concerns him. (3) *Any child may ask to be heard*, according to provisions of para. (1) and (2). The *rejection of the application by the competent authority must be motivated*. (4) The opinions of the heard child will be taken into account in relation to his *age and degree of maturity*"[17] (s.n.).

Also, the special provisions of art. 10 from **Law no. 369/2004** on the enforcement of the Hague Convention[18] take over the general arrangements for hearing minors for the special situation of international child abductions.

Romanian legislation therefore complies with the general requirements previously established in the sense of granting the possibility for the minor to express an opinion, which will be evaluated in relation to the age and degree of maturity.

[11] Council Regulation (EC) no. 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) no. 1347/2000, published in the OJ L 338/1/23.12.2003.

[12] Art. 11 para. (2) applicable in abduction cases: „it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regarded his or her age or degree of maturity".

[13] Council Regulation (EU) 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), published in the OJ L 178/1/02.07.2019.

[14] Art. 21 of Council Regulation (EU) 2019/1111: „1. When exercising their jurisdiction under Section 2 of this Chapter, the courts of the Member States shall, in accordance with national law and procedure, provide the child who is capable of forming his or her own views with a genuine and effective opportunity to express his or her views, either directly, or through a representative or an appropriate body. 2. Where the court, in accordance with national law and procedure, gives a child an opportunity to express his or her views in accordance with this Article, the court shall give due weight to the views of the child in accordance with his or her age and maturity."

[15] For an extensive presentation of national laws in hearing children in EU and states members to 1980 Hague Convention, see The Judges' Newsletter on International Child Protection, vol. VI, Autumn 2003, available online at the following link: *https://assets.hcch.net/docs/8e10ad94-9f28-41e0-9233-5f79cf99af75.pdf*, last accession on 26.03.2023, 10:57.

[16] Law no. 287/2009 concerning Romanian Civil Code, published in the Official Gazette of Romania no. 511/24.07.2009, subsequently modified and republished, in force from 01.10.2011.

[17] Similar provisions are found in the Civil Code of Quebec (opportunity for the child to be heard if age and power of discernment allow it).

[18] Law no. 369/2004 on the application of 1980 Hague Convention on the Civil Aspects of International Child Abduction, published in the Official Gazette of Romania no. 888/29.09.2004 and republished successively, last time in the Official Gazette of Romania no. 144/21.02.2023.

In addition, the child's age of 10 is indicated as a benchmark for the mandatory hearing, at the same time being left to the judge the possibility to hear children even under this age, if appreciated as necessary.

No other reference is made to practical aspects related to hearing (the place, the time, who takes part, recording etc.), which gives rise to various practices[19].

2.2. Juridical consequences of the child's view depending on legal context

We will further on briefly examine the concrete ways in which disregard of the child's voice operates in the context of the different above-mentioned international instruments.

All the examples to follow represent but concrete manifestations of the principle that enshrines the child's right to be heard, and the sanctions accompanying its breach fully demonstrates the importance attached.

Under art. 23 para. (2) (b) of the 1996 Convention, **recognition of measures of protection for children may be refused** „if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, *without the child having been provided the opportunity to be heard*, in violation of fundamental principles of procedure of the requested State" (s.n.).

There are also **non-recognition grounds in parental responsibility** cases, linked to children's hearings in an unappropriated way, as stipulated in art. 39 para. (2) of Regulation 1111/2019[20]: „The recognition of a decision in matters of parental responsibility may be refused if it was given *without the child who is capable of forming his or her own views having been given an opportunity to express his or her views* in accordance with art. 21." (s.n.).

Art. 13 para. (2) of the 1980 Hague Convention states that a court hearing an abduction application may **refuse to order return** when abducted children object to being returned and have attained an age and degree of maturity at which it is appropriate to take their views into account.

There is a divergence in the approach of family law professionals towards the way this article should be interpreted, „raging from a minority who thought the exception was overused and abused, to the majority who felt it was appropriate to listen to the child's views in the context of the exception"[21].

In the first orientation, the weight attached to the child's views is balanced against the objectives of the Convention.

Indeed, the objection of the child to being returned to the state of origin is in conflict with the principle of prompt return stipulated by art. 1 of the 1980 Hague Convention, and there is a fear that it might indirectly decide on issues foreign to international abductions (parental rights or domicile of the child).

Followers of this orientation give precedence *a priori* to the prompt return principle, arguing that the „return judge has no reason to hear the child. It is only if the judge decides not to order the return of the child, thus becoming competent on the organization of the life of the child (…) proceed with hearing the child"[22].

In the second orientation, application of the defence provided by art. 13 para. (2) is viewed from a children's rights perspective. According to this opinion, the principle of prompt return may be countered, under certain conditions, by capitalizing on the child's opinion.

Supporters of the second approach also argue this exception was conceived as „an escape route for mature adolescents", given that there are children below 16 years (age limit for application of the 1980 Hague

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[19] The child is heard either in the courtroom, or in council chambers, or sometimes in specially arranged rooms (if they exist). In addition to the judge, the clerk, the prosecutor, the psychologist may participate in the hearing. Time of hearing may be in court session day or another day (there are different practices, taking into account the timetable of the child and the workload of the court). Related to proceedings stage when the child is heard (at the beginning of the proceedings or after all other evidence has been taken), in practice, hearing is generally at the end, so as to be able to verify the claims of the parties and the information provided by the evidence. Hearing minutes (with or without the hearing recording) are drafted and it is recommended to be attached to the case file only at the end of the proceedings, when the enforceable decision is ruled out (so that the child should be protected from parental pressure during the process).

[20] „The recognition of a decision in matters of parental responsibility may be refused if it was given without the child who is capable of forming his or her own views having been given an opportunity to express his or her views in accordance with art. 21, except where (…)".

[21] N. Taylor, M. Freeman, *Outcomes for Objecting Children under the 1980 Convention,* in The Judges' Newsletter on International Child Protection, vol. XXII, Summer-Fall 2018, available online at the following link: *https://assets.hcch.net/docs/a8621431-c92c-4d01-a73cacdb38a7fde5.pdf*, last accession 21.03.2023, 18:53, pp. 8-13, p. 11.

[22] M.-C. Celeyron-Bouillot, *The voice of the child in Hague Proceedings: a French perspective,* in The Judges' Newsletter on International Child Protection, vol. VI, Autumn 2003, available online at the following link: *https://assets.hcch.net/docs/8e10ad94-9f28-41e0-9233-5f79cf99af75.pdf*, last accession on 24.03.2023, 17:27, pp. 18-20, p. 19-20.

Convention) who „may attain an age and degree of maturity at which it is appropriate to take account of their opinions”[23].

Statistics show that, in practice, pleading application of the child's defence has not reached high positive scores and also that results present considerable regional variations[24].

The low incidence of art. 13 para. (2) should nevertheless be analyzed not only in the context of divergent juridical opinions, but also related to practical aspects.

Research revealed that approximately 78% of international kidnapping cases involve children under 10 years old[25], whose opinion generally is not taken into account for reasons related to age and degree of maturity (to be discussed later).

2.3. Special focus on the 1980 Hague Convention

We make the prior specification that, in our opinion, children should be given the opportunity to be heard in *any* return proceedings under the 1980 Convention, and not only in proceedings limited to a defence under art. 13 para. (2).

1980 Hague Convention indeed makes reference to the opinion of the child only when addressing the exception based on the child's objection.

Nevertheless, art. 26 of Council Regulation (EU) 2019/1111 stipulates that the child has the right to express her/his opinion in return proceedings according to the already mentioned art. 21, without any limitations related to the child's objection defence[26] (argumentation applicable in case of abductions from one MS to another MS).

As for abductions involving non-EU states, we appreciate that the principle enshrined in art. 12 of the Convention on the Rights of the Child applies also in the framework of 1980 Hague Convention, noting the case-law[27] and the Conclusions and Recommendations of the Hague Conference[28], according to which there is no conflict between these two conventions.

Finally, it would undermine the importance of the voice of the child to restrict the incidence of the child’s opinion to particular situations, rather than recognizing a wider right to express his or her views.

2.3.1. Procedural exception or substantive defense

There is no doubt in our appreciation on the substantial nature of the defence related to the child's objection.

If it were to consider the procedural option, it would clearly diminish the importance and even the incidence of this defence, as it would totally depend on procedural national legislations.

2.3.2. Procedural evidence or substantial right of the child

In many countries, there is a discussion related to juridical nature of the voice of the child, starting from the fact that the child in question generally is not made a party to the proceedings[29].

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[23] Ph. Lortie, Fr. Breger, *op. cit.,* p. 4.

[24] N. Taylor, M. Freeman, *op. cit.,* p. 13: „There were some interesting regional differences inasmuch as 31% of all refusals in Latin American and Caribbean States were based upon the child’s objections as against 13% in States governed by the revised Brussels II Regulation (...). So far as individual States were concerned, Mexico had the highest proportion (45%, 5 out 11 refusals) of refusals based solely or in part upon the child’s objections ground. Germany had the second highest number (4) but this amounted to 19% of all refusals. Many States had no refusals based either solely or in part on this ground.”

[25] A.O. Bennett, *A better place for the child in return proceedings under the 1980 Convention – A perspective from Australia*, in The Judges’ Newsletter on International Child Protection, vol. XXII, Summer-Fall 2018, available online at the following link: *https://assets.hcch.net/docs/a8621431-c92c-4d01-a73c-acdb38a7fde5.pdf*, last accession on 25.03.2023, 15:46, pp. 20-24, p. 20.

[26] Art. 96 of Council Regulation (EU) 2019/1111 regulates the relation with the 1980 Hague Convention as follows: „the provisions of the 1980 Hague Convention shall continue to apply as complemented by the provisions of Chapters III and VI of this Regulation”.

[27] Supreme Court of Canada, case *Balev*, dec. from 20.04.2018, case no. 2018 SCC 16, available online at the following link: *https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17064/index.do*, last accession on 25.04.2023, 13:08.

[28] See Ph. Lortie, Fr. Breger, *op. cit.,* p. 4.

[29] In exceptional circumstances, children were granted the permission to join the proceedings as a party and separate legal representation. For a presentation of English case-law in this respect, see N. Wall, *The voice of the child in Hague Proceedings: a English perspective,* in The Judges’ Newsletter on International Child Protection, vol. VI, Autumn 2003, available online at the following link: *https://assets.hcch.net/docs/8e10ad94-9f28-41e0-9233-5f79cf99af75.pdf*, last accession on 24.03.2023, 17:38, pp. 20-23.

If regarded as procedural evidence, it will be connected to contradictory procedural principles, and this necessarily leads to persons allowed to participate in the hearing[30]. In some states following this orientation, the child is heard as a witness[31].

If conceived as substantial right of the child, contradictoriality does not apply and judicial proceedings will be aimed at satisfying a child's right.

Along with other opinions expressed in juridical literature, we also appreciate that hearing children is not for gathering evidence in order to reach a decision on the merits, but rather to give effect to their substantial right to be involved in decisions affecting them. Further on, their opinion is to be evaluated in the context of the overall evidence taken in the case.

In this context, we consider important the mention that, even hearings of children are not evidence, matters arising from such hearings cannot simply be banished for procedural reasons, or otherwise there would be no point in hearing children. Therefore, such aspects should subsequently be checked upon in the context of the evidence taken in the case.

2.3.3. Judicial or extrajudicial hearing of the child

Practices of states related to hearing of children vary considerably depending on domestic laws and procedures.

Judicial interviews with children should the first option[32], as face to face interaction is beneficial both for the judge, and also for the children[33].

The judge may personally observe the attitude and body language of the child which, beyond words, may often reveal more about genuine wishes, pressures or influences. Direct hearing also forms an impression of the child and allows the judge to verify whether child's opinion consists (or not) to views advanced by the parents.

Although preferable, judicial hearings are not by far the only option, and there are many jurisdictions where hearing children involves independent experts/intermediaries between the child and the court[34].

In general, this approach is justified arguing that what the child tells the judge in private cannot be tested in court by cross-examination[35] and also that an expert hearing the child has better training and experience and may be called as a witness in court[36].

A common line is clear: whether a judge, independent expert or any other person, the interviewer the child should have appropriate training.

2.3.4. Criteria to be fulfilled

As juridical literature articulated, criteria to be fulfilled for incidence of the child's objection defence present as a "two-stage test"[37].

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[30] *E.g.*, in Spain, in children's hearings in the context of international abductions, the Public Prosecutor should always be present (F.J. Forcada Miranda, *The voice of the child from a continental-Spanish perspective,* in The Judges' Newsletter on International Child Protection, vol. XXIII, Winter 2018-Spring 2019, available online at the following link: *https://assets.hcch.net/docs/dff2cb7c-ed66-4408-a892-2af15c664d58.pdf*, pp. 25-28, p. 27, last accession 21.03.2023, 18:53).

[31] In Quebec, the child may be heard as a witness, and it is up to the judge to decide the way of hearing (with/without presence of the parents and lawyers, in chambers or in the courtroom) – for a detailed presentation, see Marie-Christine Laberge, *The Child's Voice in Quebec,* in The Judges' Newsletter on International Child Protection, vol. VI, Autumn 2003, available online at the following link: *https://assets.hcch.net/docs/8e10ad94-9f28-41e0-9233-5f79cf99af75.pdf*, last accession on 24.03.2023, 18:29, pp. 27-31, p. 28-29.

[32] *E.g.*, such is the case of Romania, Italy, Greece, Spain, Germany, United States.

[33] „The children (…) interviewed were pleased to be able to talk to the judge without interruption and to use their own voices rather than having someone relay what they had said" (N. Taylor, M. Freeman, *Outcomes for Objecting Children under the 1980 Convention, op. cit.,* p. 11).

[34] According to F.J. Forcada Miranda, *op. cit.,* p. 25: „17 different types of specialists were identified". Such is the case in Canada, Japan, United Kingdom.

[35] *E.g.*, in England and Wales, where the child is interviewed by a reporting officer from the Children and Families Court Advisory and Support Service. For more details, see N. Wall, *op. cit.*, p. 20: „After the interview, the CAFCASS officer reports orally to the court on the views of the child, and gives an assessment of the child's degree of maturity. The officer is then cross-examined by the parties' lawyers".

[36] R. Moglove Diamond, *The voice of the Child in Hague Proceedings: a Canadian Perspective from Manitoba (a common law province) and from Québec (a civil law province). Ascertaining a Child's Voice in Inter-Jurisdictional Cases of Parental Abduction,* in The Judges' Newsletter on International Child Protection, vol. VI, Autumn 2003, available online at the following link: *https://assets.hcch.net/docs/8e10ad94-9f28-41e0-9233-5f79cf99af75.pdf*, last accession on 24.03.2023, 18:17, pp. 23-26, p. 24.

[37] J. MacDonald, *What is the Evidential Status on the Child's Voice,* in The Judges' Newsletter on International Child Protection, vol. XXIII, Winter 2018-Spring 2019, available online at the following link: *https://assets.hcch.net/docs/dff2cb7c-ed66-4408-a892-2af15c664d58.pdf*, pp. 14-16, p. 14, last accession on 04.02.2023, 13:41.

First, there is a "gateway stage" (an examination of whether, as a matter of fact, the child objects to being returned).

Secondly, there is a "discretion stage", where the court must consider not only the objection to being returned, but a much wider range of considerations (*e.g.*, whether the objection of the child is authentic - or eventually only the product of influence by the abducting parent; whether the objection coincides with - or is at odds with the child's genuine welfare).

A. Objection of the child

Whether a child objects is a question of fact, and it is to be verified *in concreto* in each case; however, this aspect raises some practical problems.

Unless the abducting parent invokes art. 13 para. (2), it is unlikely that the court will find out that the minor actually opposes the return.

The only possible way for the court to be aware of the child's objection in this situation is when the child has reached the age for mandatory hearing (and the court shares the opinion that hearing children is a right of the child in all return cases, and not only when the child's objection defence is raised).

This of course depends on national legislations, and there is still the problem that not all domestic legislations stipulate a minimum age of hearing.[38]

B. Age and degree of maturity

As already pointed out, art. 13 para. (2) of the 1980 Convention is rather a general provision, as there is no minimum age, nor any guidelines for assessing the child's maturity indicated.

The Explanatory Report on the 1980 Hague Child Abduction Convention[39] explains in para. 30 that „all efforts to agree on a minimum age at which the views of the child could be taken into account failed, since all the ages suggested seemed artificial, even arbitrary. It seemed best to leave the application of this clause to the discretion of the competent authorities".

The age and degree of maturity leave therefore a great deal of discretion for many children not to be heard, as it depends not only on domestic legislations, but also on how a particular judge perceives age and maturity.

That should however not result in *a priori* decisions not to hear the child, particularly as children often have a point of view which is quite distinct from their parents' opinions. In addition, they are the first who have to accommodate with the decision of the court, whether they like it or not.

In this context, it is beneficial that a number of legislations provide for specific minimum ages, when the child is *presumed* to have reached sufficient maturity[40], and from this point further the judge is under the *obligation* to hear the child.

Under these legal limits of age, nevertheless, hearing a child is an option within the *margin of appreciation* of the judge[41].

As most children are abducted when they are quite young (in Romanian experience, the age is no more than 8-9 years), we consider that in abduction cases children should be heard under the age generally accepted in domestic litigations, or the exception articulated by Article 13 (2) is left without any practical function[42].

This obviously does not imply that the opinion of the child is necessarily validated in court, unless maturity is proved into the hearing (the child thus is given the possibility to express and argue an opinion).

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[38] In the EU, the law of 15 jurisdictions does not provide for a minimum age (see S. Lembrechts, *Hearing abducted children in Court – A comparative point of view from three countries (Belgium, France & the Netherlands),* in The Judges' Newsletter on International Child Protection, vol. XXII, Summer-Fall 2018, available online at the following link: *https://assets.hcch.net/docs/8e10ad94-9f28-41e0-9233-5f79cf99af75.pdf*, last accession on 25.03.2023, 18:26, pp. 28-31, p. 29).

[39] Drafted by Eliza Pérez-Vera, Madrid, April 1981, published in 1982 and available online at the following link: *https://www.hcch.net/en/publications-and studies/publications2/explanatory-reports*, last accession on 24.03.2023, 15:06.

[40] *E.g.*, 12 years in Spain and Italy, 10 years in Romania, 14 years in the Netherlands.

[41] *E.g.*, in abduction cases children may be heard generally starting from 7 years in Romania or 5 years in Canada („The question of maturity thus arises when the child is between the ages of 5 and 14", according to M.-C. Laberge, *op. cit.*, p. 28). In Netherlands, children from 6 years onwards are given an opportunity to express their views. In Belgium, courts generally allow children 10 years to be heard. In France, children younger than 9 were not heard.

[42] *E.g.*, in the Netherlands, children are in principle heard in legal proceedings from the age of 12, but judges have allowed hearing of children at the age of 6 in abduction cases.

In other words, biological age should not be considered as a criterion to decide whether or not the child should be heard. It is more in accordance with the right of the child to be allowed to express an opinion, which will later be evaluated in terms of maturity.

On the other hand, in absence of legal criteria, an inquiry in the case – law concludes that maturity is generally assessed based on ability speakings, behaviour, consistency of arguments, spontaneity, ability to understand the current situation.

In comes therefore as obvious that determining if a child should be heard (generally related to age) and what weight should be given to the child's views (generally related to maturity) is an extremely difficult and challenging task for judges/others interviewing the children, and therefore specialization is necessary.

C. Margin of appreciation

Although it might appear quite clear, fulfillment of the above-presented criteria does not imply that the child's opinion, once heard, will be validated in court.

This simply creates (again) another stage of discretion for the court determining the matter, related this time to the assessment of the child's objection as well-founded or not.

In other words, even if children are found to object, and also of age and degree of maturity when it is appropriate to take account of their views, they may still be returned to the state of habitual residence against their wishes[43].

In the absence of (even indicative) criteria provided by the 1980 Hague Convention and, in most cases, also by national legislation[44], the key to evaluation of the child's opinion is generally established related to common sense standards, as the ability to understand and evaluate consequences, the ability to express opinions in a reasonable and independent manner, consequences for return/non-return specific for each case.

2.3.5. Value of the voice of the child in practice

When considering the voice of the child in the context of the 1980 Hague Convention and as a matter of accuracy, we consider relevant to make a distinction between art. 13 para. (2) – objection of the child and art. 13 para. (1) (b) – grave risk.

In our opinion, less relevance to children's points of view should be granted when discussing grave risk, due to the fact that other evidences are requested in the vast majority of cases and (as already stated) hearing children is not aimed at gathering evidence.

Therefore, the importance children's voice should be evaluated mainly within the framework of art. 13 para. (2) and the child's objection to being returned.

In practice, nevertheless, the grave risk defence and the child's objection defence often act together, and cases where application of art. 13 alone results in non-return orders are rare.

When evaluating the voice of the child, it needs to be mentioned that there are specific circumstances to be considered for abduction cases.

The court must be aware that manipulation from the abducting parent might appear, as the child is living in unfamiliar surroundings, sometimes does not understand the language, and the only consistent individual in the child's life may be the abducting parent.

Specific safeguards may thus be recommended, such as hearing the child in the presence of an expert, who will then be asked to deliver a report of a possible influence of the abducting parent/specialization of the interviewer in this area.

According to jurisprudence, only firm and consistent objections will be treated as serious grounds for non-return. Children should have a voice in abduction, but this does not mean that they have a choice (to return or not) - their objection has to be seriously motivated, not just simply expressed.

Judicial practice revealed concrete situations when the child's opinion was not taken into account, in cases when, e.g., the child could not give any reasons justifying refusal to return to the state of origin or it was clearly influenced by the kidnapping parent (they were simply too mature for a child, they took over the words and arguments of the abductor, they described the abandoned parent in terms of absolute evil).

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[43] There is a reason for allowing this margin of appreciation, as the judge must strike the right balance between the individual child's rights and the collective interest in preventing/deterring abductions.

[44] In England and Wales, Guidelines for Judges Meeting Children who are subject to Family Proceedings were adopted in 2010.

Also, a sustainable objection under art. 13 para. (2) is clearly to be contrasted with a mere preference or wish, based on factual circumstances such as comfortable surroundings, nice school, etc.

Finally, the child's opinion is to be appreciated without assessing on parental authority or domicile of the child, as abduction litigations do not deal with such aspects, left in the competence of courts of the habitual residence.

Romanian courts generally rejected requests for return as a result of conjunct application of the child's opposition and the grave risk defences, examining the refusal of the child in the context of all the evidences taken, including psychological reports[45].

3. Conclusions

Family law has undergone massive changes related to the importance of the voice of children and there has been a significant movement towards greater recognition of children's right to be involved in decisions affecting their lives.

As juridical literature expressed: „The child, who was previously an object of the law, was becoming a subject of the law"[46] (we should act *with* children, not *upon* them).

For various reasons, the importance of child's voice has nevertheless proved more difficult to be achieved in practice within the framework of the 1980 Hague Convention.

There is in the first place the fear that the child's objection exception would provide an escape mechanism to the obligation to return, and therefore a low incidence of the exception is justified.

Secondly, judges have large discretion to discount children's views, based on very relative standards (minimum age for hearing, where existing, is not uniform and degree of maturity totally depends on the personal appreciation of the judge). Juridical literature pointed that: „Unfortunately, the child objection defence does not appropriately recognise the child's views (…) it gives judges too much discretion to discount children's views"[47].

Thirdly, there are also the practical aspects related to the fact that the overwhelming majority of kidnapped children are under 10 years old, and therefore they are not generally perceived as sufficiently aged and mature so that their opinion may be even asked for.

Still, „Few children are more vulnerable than those caught up in cross-border, often cross-continent, movement and turmoil"[48].

These children, more than their parents, will have to live with what the court decides. And this means that their opinion should be asked for and (if not influenced) should not easily be put aside, under the volatile roof of age-related arguments, as long as the maturity and robustness of their motivation was ascertained.

We consider therefore as beneficial first that all national legislations should introduce a minimum age when hearing children is compulsory, and secondly that this age should be reduced in case of international abductions.

Specialized training of all involved (judges, lawyers, mediators, psychologists, etc.) who activate in the specific area of international abductions is also a useful tool, as specialization elevates professional standards and creates the premises of better understanding.

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[45] Bucharest Trib., 4th civ. s., dec. no. 530/15.04.2021, case no. 3543/3/2021, definitive, not published. The court argued that the psychological report did not reveal any influence on the part of the mother, and also the minor aged 13years did not outline the relationship with his father in the specific terms of an alienated child, but referred, as a positive element, to the way the father cooks. The child's relationship with the father was conflictual, and the rest of the evidence indicated that the conflicting element of the relationship was the father himself. The child outlined the relationship with his father as being characterized by fear and unconditional compliance with the father's demand, imposed by the latter, if necessary, through verbal violence towards the child.

Similarly, Bucharest Trib., 4th civ. s., dec. no. 1145/13.09.2021, case no. 15924/3/2021, definitive, not published, where the court appreciated that a 13 years old boy was mature enough for his objection to be validated. The child explained that he was obliged by his father to perform daily hard work at the animal farm, he had to wake up at 50.30 to travel by car to the farm, he would return home at 9:00 p.m., and he was beaten when he failed to work. The child was also evaluated by a psychologist from DGASPC, who concluded that there were no reasons for his statements to be doubted.

[46] Ph. Lortie, Fr. Breger, *Foreword, op. cit*., pp. 3-5, p. 3.

[47] M. Henaghan, *The voice of the child in international child abduction cases – Do judges have a hearing problem?* in The Judges' Newsletter on International Child Protection, vol. XXII, Summer-Fall 2018, available online at the following link: *https://assets.hcch.net/docs/a8621431-c92c-4d01-a73cacdb38a7fde5.pdf*, pp. 28-33, p. 29, last accession on 21.03.2023, 20:04.

[48] F.J. Forcada Miranda, *op. cit.*, p. 25.

„The main objective of the Convention is not to return children at any cost, but to return them in situations where, under the Convention, they ought to be returned”[49].

It results that the prompt return mechanism, although generally appropriate and valuable, is not a solution in itself, not for all cases and not all children[50].

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- Council Regulation (EU) no. 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), published in the OJ L 178/1/02.07.2019;
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- Law no. 100/1992 for Romania's accession to 1980 Hague Convention on the Civil Aspects of International Child Abduction, published in the Official Gazette of Romania no. 243/30.09.1992;

[49] M. Fernando, *Children's Objections in Hague Child Abduction Convention Proceedings in Australia and the "Strength of Feeling" Requirement*, in The International Journal of Children's Rights, vol. 30, 2022, available online at the following link: *https://brill.com/view/journals/chil/30/3/article-p729_006.xml*, last accession on 25.03.2023, 19:15.

[50] ECtHR, decision adopted on 06.07.2010, Application no. 41615/2007, Case *Neulinger and Shuruk* v. Switzerland, para. 138: „It follows from art. 8 that a child's return cannot be ordered automatically or mechanically when the Hague Convention is applicable. The child's beste interests, from a personal development perspective, will depend on a variety of individual circumstances, in particular his age and level of maturity (…)."

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MEDIATION IN INTERNATIONAL FAMILY DISPUTES

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Abstract

There is an increasing importance attached to use of methods to reach agreed solutions in national and international family law, both during the course of litigations involving children, and also in order to prevent such juridical disputes.

Among the different means of amicable dispute resolution (such as conciliation, counselling, arbitration, etc.), mediation remains just one of many possibilities, but still the most widely promoted method of alternative dispute settlement.

The purpose of the article is to identify the advantages and limits of mediation in comparison with court proceedings, and subsequently to highlight its particularities in the context of child abduction cases (which characteristically involve the highest levels of tension between the parties).

Hence, the objectives of the present study are to identify specific challenges of mediation in international chils abductions, such as object, timeframes, cooperation among mediators and administrative/judicial authorities, (non)ennforceability of the agreement in all jurisdictions concerned or language difficulties, associated with different cultural and religious backgrounds, geographical distance, visa and immigration issues.

Furthermore, the study aims to identify use of mediation in order to prevent child abductions, at an early stage of the break of the relationship between parents, where an amicable solution is still reachable and recommendable in the best interests of the child.

Keywords: *family law, alternative methods of amicable resolution, mediation, international abduction, prevention.*

1. Introduction

Use of alternative forms of dispute resolution instead taking the case all the way to a formal judgement demonstrated the beneficies of exploring amicable agreements.

Among a large number of possible agreed solutions, mediation is the most established method applied not only to solve litigations in different areas, but also to prevent them.

Promotion of dispute resolution by agreement has proved to be particularly helpful in family disputes concerning children, as the parents in conflict will usually need to cooperate with each other long after their separation.

The subject has great importance, as agreed solutions are more sustainable in time and establish a less conflictual framework, and therefore they strongly support the interests of the child.

Also, agreed solutions take better into account the special characteristics of family disputes (involvement of persons who, by definition, will continue to have interdependent relationships; increased distressing emotions; impact on other members of the family, especially children).

The study will start by analysing the question whether alternative dispute resolution mechanisms are meant to (and can) totally replace court litigations.

It will continue by identifying the place of mediation among the other amicable solutions, and also the advantages and risks of mediation compared to court proceedings.

Subsequently, the analysis will concentrate on the specificities of mediation in international family law (more precisely, international child abductions, the most disputed litigations in the family area).

Doctrinal opinions and case-law will also be identified and presented, with the necessary mention that in Romanian juridical literature the subject has scarcely been discussed.

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2. Content

2.1. Alternative methods of facilitating agreed resolutions of disputes

Alternative dispute resolution encompasses any methods of resolution taking place outside the courtroom and the traditional way of dispute solutions by litigation.

These alternative methods apply in a great variety of different domains of law, including family law.

In the area of international family law, conventions adopted by the Council of Europe make reference to mediation, conciliation and similar methods to dispute resolution involving children[1].

Recommendation Rec (98)1 of the Committee of Ministers related to family mediation[2] encourages the governments of contracting states to introduce or promote family mediation or, where necessary, strengthen existing family mediation[3].

Also, most of the modern Hague Family Conventions adopted by Hague Conference on Private International law explicitly encourage mediation and similar processes for finding appropriate solutions to cross-border family disputes[4].

In the line promoted by the other Hague Conventions, the Hague Convention of October 25, 1980 on the Civil Aspects of International Child Abduction[5] also encourages the amicable resolution of family disputes.

Similarly, in European law, Council Regulation (EC) no. 2201/2003 of November 27, 2003[6] promotes means of alternative dispute resolution[7], solution maintained by the new Council Regulation (EU) no. 2019/1111[8], which specifically makes reference to mediation (Article 26).

Also, Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters[9] promotes „further the use of mediation and ensure that parties having recourse to mediation can rely on a predictable legal framework”[10].

Finally, in the area of national law, states all over the world adopted domestic instruments on mediation and other alternative methods to solve disputes, including family law[11].

[1] Art. 13 of European Convention on the Exercise of Children’s Rights, adopted on 25.01.1996.

[2] Recommendation Rec (98)1 of the Committee of Ministers to Member States on family mediation, adopted by the Council of Europe, the Committee of Ministers on 21.01.1998 (it is available online at the following address: *https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804ecb6e*, last accession on 04.03.2023, 15:04).

[3] Importance of family mediation and direct reference to Recommendation (98)1 appear in the case-law of the European Court of Human Rights. In this respect, see ECtHR dec. adopted on 06.12.2011, Application no. 16192/06, case *Cengiz Kılıç v. Turkey*, para. 132, where the Court notes „the absence of a civil mediation channel in the national judicial system, the existence of which would have been desirable as an aid to such cooperation for all the parties to the dispute”. Similarly, see ECtHR dec. adopted on 08.10.2015, Application no. 56163/12, case *Vujica v. Croatia,* para. 90-92, where the Court stated that the national mandatory mediation procedure had not been followed.

[4] Art. 31 b) of the Hague Convention of 19.10.1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, adopted on 19.10.1996; art. 31 of the Hague Convention on the International Protection of Adults, adopted on 13.10.2000; art. 6 para. 2 d) and art. 34 para. 2 i) of the Hague Convention of 23.11.2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, adopted on 23.11.2007.

[5] Intergovernmental agreement concluded at The Hague on October 25, 1980, during the 14th Session of the Hague Conference on Private International Law, which entered into force on December 1, 1983. Romania is a member state according to Law no. 100/1992 for Romania's accession to 1980 Hague Convention on the Civil Aspects of International Child Abduction, published in the Official Gazette of Romania no. 243/30.09.1992. For the application of the Convention, Romania adopted Law no. 369/2004 on the application of 1980 Hague Convention on the Civil Aspects of International Child Abduction, published in the Official Gazette of Romania no. 888/29.09.2004 and successively modified and republished, last republished in the Official Gazette of Romania no. 144/21.02.2023.

[6] Council Regulation (EC) no. 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) no. 1347/2000, published in the OJ L 338/1/23.12.2003.

[7] Preamble, para. 25: „Central authorities should cooperate both in general matters and in specific cases, including for purposes of promoting the amicable resolution of family disputes, in matters of parental responsibility”.

[8] Council Regulation (EU) 2019/1111 of 25.06.2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), published in the OJ L 178/1/02.07.2019.

[9] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, published in the OJ L 136/1/24.05.2008 (further on, Directive on mediation). The Directive is applicable only to cross-border disputes on civil and commercial matters (and not national disputes, which are governed by domestic law).

[10] Preamble, consideration 7.

[11] *E.g.*, in 2001, the National Conference of Commissioners of Uniform State Laws of the United States of America developed the Uniform Mediation Act as a model law to encourage the effective use of mediation. Romania adopted Law no. 192/2006 on mediation and the organization of the mediator profession, published in the Official Gazette of Romania no. 441/22.05.2006, successively modified.

As juridical literature pointed out, „mediation is now a permanent fixture on the dispute resolution landscape”[12].

2.1.1. Substitute or complement for judicial procedures?

Mediation and other means of amicable resolution have followers, but also opponents, because “these methods are sometimes perceived in a competitive way, as an infringement brought to the monopoly of law over social relations”[13].

Although they are strongly promoted, mediation and similar processes facilitating agreed solutions should not be seen as a substitute for judicial procedures, but rather as a complement[14].

Therefore, access to judicial proceedings must be available unconditionally, and not restricted as a second step after (compulsory) mediation[15].

In our opinion, as mediation operates on voluntary basis, courts cannot *impose* mediation against the will of the parties[16]. In agreement with juridical literature[17], we consider that such an approach might amount to a violation of the rights guaranteed by art. 6 para. (1) ECHR[18].

Mediation may take place within or outside court proceedings[19]; depending on domestic legislation, there are national systems where mediation and judicial procedures are independent, as well as some where they are closely connected (as it will be detailed further on for international abduction situations).

Moreover, complementary judicial measures will frequently be required in order to render an agreed solution legally binding and enforceable in all legal systems concerned (in other words, subsequent judicial steps are mandatory to this end).

In conclusion, we appreciate that there is a close link between judicial processes and mediation/other amicable methods, which cannot be but beneficial, as it may help to overcome certain shortcomings that exist in both proceedings.

Further on, we will try to sum up the main characteristics of the alternative methods most used in practice, mentioning at the same time that they make use of different methods to get the (extra-judicial) agreed result.

2.1.2. Mediation

Mediation was defined as a „voluntary, structured process whereby a *mediator* facilitates communication between the parties to a conflict, enabling them to take responsibility for finding a solution to their conflict.”[20]

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[12] M. Hanks, *Perspectives on mandatory mediation*, UNSW Law Journal, vol. 35 (3), 2012, pp. 929-952, p. 952, available online at *http://classic.austlii.edu.au/au/journals/UNSWLawJl/2012/39.pdf*, last accession 25.02.2023, 20,19.

[13] M. Avram, *Drept civil. Familia*, 3rd ed., revised and completed, Hamangiu Publishing House, Bucharest, 2022, p. 543.

[14] Recommendation Rec. (2002)10 of the Committee of Ministers to Member States on mediation in civil matters, adopted by the Council of Europe, the Committee of Ministers on 18 September 2002 (further on, Recommendation on mediation), available at *https://rm.coe.int/16805e1f76* (last accession on 22.02.2023, 12:09): „although mediation may help to reduce conflicts and the workload of courts, it cannot be a substitute for an efficient, fair and easily accessible judicial system”.

[15] Art. 3 of Recommendation on mediation, already cited: „access to the court should be available as it constitutes the ultimate guarantee for the protection of the rights of the parties”.

[16] See CCR dec. no. 266/07.03.2014, published in the Official Gazette of Romania no. 464/25.06.2014, which declared unconstitutional para. (1) and (1^2) of art. 2 from Law no. 192/2006 (in infringement of art. 21 of Romanian Constitution). The text declared unconstitutional stipulated that the parties were *obliged* to participate in the information session regarding the advantages of mediation (under penalty of inadmissibility of the summons request). The Court concluded that participation in the information meeting will no longer represent an obligation for the parties, but a voluntary option for those interested to resort to such alternative.

[17] For the same opinion, see V. Popova, *The Mediation in the Bulgarian and European Law, Bulgarian, European and International Civil Process,* in Civil Procedure Review, vol. 9/2018, pp. 43-72, p. 46, available online at file: *///C:/kits/159-Texto%20do%20Artigo-297-1-10-20210617.pdf*, last accession on 25.02.2023, 20:10 (the author makes an exhaustive presentation of mediation in Bulgaria).

[18] European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), adopted by the Council of Europe in Rome, on November 4, 1950. Romania is part to the Convention, according to Law no. 30/18.05.1994 for the ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the additional Protocols, published in the Official Gazette of Romania no. 135/31.05.1994.

[19] CJEU, dec. adopted on 14.05.2020, C-667/18, case *Orde van Vlaamse Balies,* para. 41 and 42: „(…) EU law itself encourages the use of mediation proceedings (...) in the context of judicial cooperation in civil matters, the Union legislature is called upon to adopt measures aimed at ensuring the development of alternative methods of dispute settlement (...) *the term ‘proceedings’ referred to in that provision includes judicial and extrajudicial mediation proceedings* in which a court is involved or is capable of being involved, whether when those proceedings are initiated or after they are concluded.” (s.n.)

[20] *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Mediation*, (Hague: Hague Conference on Private International Law – HCCH, Permanent Bureau, 2012), available online at the following link: *https://assets.hcch.net/docs/d09b5e94-64b4-4afe-8ee1-ab97c98daa33.pdf,* last accession on 10.02.2023, 17:50 (further on „*Guide to Good Practice*”), p. 7.

By means of mediation, parties obtain help from a third person (the mediator) to solve the dispute and work out a solution which is their own.

Mediation is based on the trust that the parties place in the mediator, as a neutral person capable of facilitating discussions, in order to obtain a mutually convenient, efficient and sustainable solution.

2.1.3. Conciliation

Conciliation was referred to as „a dispute resolution mechanism in which an impartial third party takes an active and directive role in helping the parties find an agreed solution to their dispute”[21].

The conciliator can therefore *direct* the parties towards a concrete solution (still, the parties are the ones who agree upon the proposed solution).

By contrast, in case of mediation, emphasis is placed on the fact that the mediator only *assists* them in finding their own solution.

The conciliator is therefore more active than the mediator and oriented to a particular solution, but in both cases the decision belongs to the parties involved.

2.1.4. Counselling

In contrast to mediation (and conciliation), counselling does not generally focus on the particular solution of a specific dispute.

It is rather a process that can be used to assist couples or families in dealing with relationship problems in general.

2.1.5. Arbitration

Arbitration is more formal than mediation and it is the arbitrator who (similar to a judge) *solves* the dispute by making a decision.

Similar to a trial, only one of the parties will prevail (it is a win-lose situation). Unlike a trial, appeal rights are limited.

Arbitration process does not therefore imply an agreed outcome (but the parties must nevertheless agree to use arbitration).

2.2. Advantages and risks of mediation

As already pointed out, mediation or other amicable methods are complementary to judicial proceedings and present both advantages and risks, carefully to be considered before choosing one way or another.

Concentrating on the subject of the article, we will further present the most relevant „pros” and „cons” for mediation (and not for all the other alternative methods) in the family law area, with focus on international child abductions.

2.2.1. Advantages

It is most important that mediation **facilitates communication** between the parties in an informal context, and thus allows them to develop their own solution to overcome the dispute, outside the rather rigid framework of legal proceedings.

Mediation is also a **flexible process**, which can easily be adapted to the needs of the individual case and deals better with all the facets of a conflict.

In comparison, the limits imposed in case of litigations cannot include topics that are not legally relevant and which would therefore have no place in a court hearing. For example, the mediation process could include discussions with grandparents, who generally would not have legal standing in judicial proceedings.

At the same time, mediation **reduces the stress** experienced by the parents and the child in the context of a judicial resolution of the conflict.

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[21] *Guide to Good Practice, op. cit.,* p. 8.

Attention should also be paid to the certain fact that mediation at an early stage **prevents escaladation of the conflict and might provide a prompt solution** (it is time-effective), whereas the length itself of judicial resolution will most probably deepen the parties' conflict.

Mediation is a **private** procedure which guarantees **confidentiality**, and therefore participants can be reassured that, should the mediation fail, what was said within the mediation will remain confidential and cannot be used in any present/future litigation.

Most relevant, mediation allows parties to keep **control over the outcome** and is more likely to lead to a long-time sustainable solution.

This results in **prevention of future legal proceedings** between the same parties, possible due to the particularity that decisions in family law are always revisable[22].

At the same time, mediation may **avoid costly legal proceedings** both for the parties, and also for the state.

This is particularly advantageous in cross-border family disputes, where legal proceedings in one country generally are followed/accompanied by litigations in another country, concerning different aspects of the same dispute.

In this context, overall costs connected with mediation are important[23], and they should encourage parties to try mediation, rather than become an obstacle[24].

In the context of **international child abduction**, free legal aid for mediation is available for the applicant parents in 1980 Hague Convention abduction cases in some states, such as Great Britain. There are nevertheless jurisdictions offering legal aid only for judicial proceedings, but not for mediation (such as Romania).

Also, mediation between the left-behind parent and the taking parent may facilitate the contact between the left-behind parent and the child during the proceedings or even the voluntary return of the child or an agreed outcome of the whole family conflict.

2.2.2. Risks

Although it might appear quite clear, we nevertheless underline that not all cases may be solved by means of mediation.

Non-mediation cases should be examined from the very beginning and may depend on various aspects, such as the nature of the conflict[25], the specific needs of the parties[26], or the particular circumstances of the case[27].

These are the cases which clearly require the intervention of a judicial authority, or otherwise precious time can be lost in attempting mediation.

Also, there may be a risk that **the agreed solution will not have legal effect** and thus may not safeguard the parties' rights in case of further dispute.

Such are the cases where the mediated agreement (or part of it) may be in conflict with the applicable law or not legally binding and enforceable (*e.g.*, in states where this is required, the agreement has not been registered or court approved).

Moreover, the law of certain states does not even provide for the enforceability of mediated agreements.

In the same line, it should be stressed that there are jurisdictions which **restrict the parties' autonomy** in regard to certain aspects of family law; *e.g.*, such are cases related to „the ability of a parent to limit the amount

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[22] They have but relative *res judicata* authority.

[23] Such as the mediator's fee, travel expenses, costs for interpretation and legal representation in mediation.

[24] „States that have not yet done so should consider the desirability of making legal aid available for mediation, or otherwise ensure that mediation services can be made available either cost-free or at a reasonable price for parties with limited means." (*Guide to Good Practice, op. cit.,* p. 50).

[25] „Potential mediation cases should be screened for the presence of domestic violence, as well as drug and alcohol abuse and other circumstances that may affect the suitability of the case for mediation." (*Guide to Good Practice, op. cit.,* p. 23).

[26] For a discussion of mediation in case of imbalanced powers of parties, who are "consequently denied procedural protections and ultimately perhaps forced to accept inexpensive and ill-informed outcomes", see R. Field, *Family Law Mediation: Process Imbalances Women Should be Aware of Before They Take Part*, QUT Law Review, vol. 14, 1998, available online at *https://lr.law.qut.edu.au/article/download/453/440/453-1-886-1-10-20121004.pdf*, last accession 24.02.2023, 21:34, pp. 23-39.

[27] *E.g.*, cases where one party is not willing to engage in a mediation process or cases where the position of the parties are completely „polarised".

of payable child support by agreement"[28], or agreements concerning the exercise of parental responsibilities (which might need court approval verifying that they comply with the best interests of the child[29]).

Mediation also differs substantially from court proceedings when it comes to introducing **the child's views and opinions** into the process.

A judge may hear the child in person or have the child interviewed by a specialist, with the appropriate safeguards to protect the child's psychological welfare (decision to hear the child generally depends on the age and maturity of the child).

By contrast, the powers of a mediator are limited, as she/he lacks the possibility to summon the child to a hearing or order an expert to interview the child.

As pointed out in juridical literature, direct participation of children in mediation „remains a rarity", situation based on the unjustified assumption that „an adequate representation of their views can be expressed through their parents"[30].

Finally, there is a clear risk that mediation might sometimes be **used just in order to delay judicial proceedings**.

As much as it is in everybody's interest that an amicable resolution should be attempted, the use of mediation by one party as a delaying tactic must be prevented.

This is the reason why, in particular for **international child abduction cases**, initiating return proceedings before commencing mediation should be considered.

This proposal in indeed in the spirit of Regulation no. 2019/111, respectively consideration 42 of the preamble, which stipulates that: „the fact that means of alternative dispute resolution are used should not as such be considered an exceptional circumstance allowing the timeframe to be exceeded".

2.3. Specific challenges for mediation in international child abduction cases

It cannot be emphasized strongly enough that there is a major difference between national and international family mediation.

All considerations presented above remain valid in case of international mediation, but there are also specific aspects which impose particular approaches and skills on mediators.

Mediation in international family disputes is much more complex and requires mediators to have relevant additional training[31], mainly due (but not restricted) to interconnection of two/more different legal systems, different cultures and languages, geographical distance, visa and immigration issues.

In this context, a careful balance must be kept between the general celerity condition associated to all child related proceedings (which is even more strict in international child abductions), and need to allow enough time for communication between parties in the mediation process.

In particular for international child abductions, it should be reminded that the 1980 Hague Convention promotes the search for amicable solutions in art. 7[32] and 10[33], when referring to Central Authorities[34].

Similarly, Regulation no. 2019/1111 makes reference to mediation „as early as possible"[35], either by Central Authorities or the courts.

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[28] *Guide to Good Practice, op. cit.,* p. 24.

[29] Art. 376 and 373-2-7 of the German Civil Code, according to *Guide to Good Practice, op. cit.,* p. 79. Similarly, art. 8 of Law no. 272/2004 concerning protection and promotion of children's rights, published in the Official Gazette of Romania no. 557/23.06.2004, successively modified.

[30] G. Mantle, *The nature and significance of agreement in family court mediation*, Social Work and Social Sciences Review no. 11/2004, pp. 19-35, p. 29 (available online at file*:///C:/kits/430-Article%20Text-466-1-10-20150219%20(1).pdf*, last accession on 24.02.2023, 21:44).

[31] According to *Guide to Good Practice, op. cit.,* p. 36, the following states indicated in the Country Profiles under the 1980 Hague Convention promoted legislation on mediation (and sometimes even specific legislation on family mediation) addressing the issue of necessary qualifications and experience of mediators: Argentina, Belgium, Finland, France, Greece, Hungary, Norway, Panama, Paraguay, Poland, Romania, Slovenia, Spain, Switzerland and the United States of America.

[32] Central Authorities „(…) shall take all appropriate measures (…) c) to secure the voluntary return of the child or to bring about an *amicable resolution* of the issues." (s.n.)

[33] „The Central Authority of the State where the child is shall take or cause to be taken *all appropriate measures* in order to obtain the voluntary return of the child." (s.n.)

[34] Para. 92 of Explanatory Report on the 1980 Hague Child Abduction Convention drafted by Eliza Pérez-Vera, Madrid, April 1981, published in 1982 makes reference to „the duty of Central Authorities to try to find an *extrajudicial solution*". (s.n.)

[35] Art. 26: „As early as possible and at any stage of the proceedings, *the court either directly or, where appropriate, with the assistance of the Central Authorities*, shall invite the parties to consider whether they are willing to engage in mediation or other means of alternative

In conclusion, the possibility of using mediation should be introduced to the parties to an international abduction as early as possible, even before pre-trial stage, from the very beginning of report of this situation to the Central Authorities[36].

We also consider that access to mediation should also be available throughout the proceedings, including the enforcement stage[37].

In this context, in several states, „mediation schemes specifically developed for international child abduction cases are already successfully providing such services"[38] (*e.g.*, the United Kingdom[39] or the Netherlands[40]).

To the same end, contracting states to the 1980 Hague Child Abduction Convention were „encouraged to establish a Central Contact Point for international family mediation to facilitate access to information on available mediation services and related issues for cross-border family disputes involving children, or to entrust this task to their Central Authorities"[41].

Finally, it should be mentioned that mediation may be an (only) option in cases involving children abducted to countries not party to the 1980 Hague Convention, where no legal framework exists and therefore a judicial return is not possible.

2.3.1. Object of mediation

The first challenging question is whether mediation in child abduction cases should be restricted only to modalities of the immediate return of the child, since the principle of the 1980 Hague Convention is the return of the child to the state of origin.

We consider that mediation can also discuss the possibility of non-return, such as the decision of the child's relocation and its implications (personal ties program, etc.), and also longer-term issues affecting the parental responsibility or child support arrangements.

Appreciating that those issues can be addressed in mediation is not, in our opinion, in contradiction with the 1980 Hague Convention, because mediation is a much more flexible process than return proceedings.

This aspect should nevertheless be also considered from a procedural perspective, as there are states where agreed solutions cannot be validated in court if they exceed the object of the litigation (the abduction)[42].

A future amendment of Regulation no. 1111/2019 and 1980 Hague Convention on child abduction might consider specific provisions, *expressly* allowing judges in international abduction cases to validate agreements (concluded in or extra mediation procedures), where the agreement refers not only to abduction, but also to other aspects related to the child (*e.g.*, parental authority, domicile of the child, personal ties program, etc.).

This is particularly relevant as, in practice, parties of such extended agreements do not accept partial validation, related only to the abduction (arguing that the agreements were concluded as a whole, encompassing interdependent clauses and intending to solve the entire familial conflict).

We appreciate that this is also the option of the EU legislator, based on consideration 43 of the preamble of Regulation no. 1111/2019, which appears to favour this solution.

The above-mentioned consideration is worded as follows: „Where in the course of return proceedings under the 1980 Hague Convention, *parents reach agreement on the return or non-return of the child, and also on matters of parental responsibility*, this Regulation should, under certain circumstances, make it *possible for*

dispute resolution, unless this is contrary to the best interests of the child, it is not appropriate in the particular case or would unduly delay the proceedings." (s.n.)

[36] In Switzerland, the legislation implementing the 1980 Convention provides for an explicit possibility for the Central Authority to initiate conciliation or mediation procedures (See art. 4 of the Swiss Federal Act of December 21, 2007 on International Child Abduction and the Hague Conventions on the Protection of Children and Adults, which entered into force on July 1, 2009 (Bundesgesetz über internationale Kindesentführung und die Haager Übereinkommen zum Schutz von Kindern und Erwachsenen (BG-KKE) vom 21 Dezember 2007), available at *http://www.admin.ch/ch/d/sr/2/211.222.32.de.pdf*, last accession 22.02.2023, 13:38.

[37] For the same opinion, see *Guide to Good Practice, op. cit.,* p. 41.

[38] *Idem, op. cit.,* p. 28.

[39] The non-governmental organisation Reunite - International Child Abduction Centre offers mediation services in cases of international child abduction (see the Reunite website at www.reunite.org). With effect from 16 April 2018, a Child Abduction Mediation Scheme is in place in England and Wales.

[40] The nongovernmental organisation Centrum Internationale Kinderontvoering (IKO) offers specialist mediation services in Hague child abduction cases, organised through its Mediation Bureau since November 1, 2009 (see *www.kinderontvoering.org*).

[41] *Guide to Good Practice, op. cit.,* p. 40.

[42] Such is the case of Romania.

them to agree that the court seized under the 1980 Hague Convention should have jurisdiction to give binding legal effect to their agreement, either by incorporating it into a decision, approving it or by using any other form provided by national law and procedure (…) *Member States* which have concentrated jurisdiction *should therefore consider enabling the court seized with the return proceedings under the 1980 Hague Convention to exercise also the jurisdiction* agreed upon or accepted by the parties pursuant to this Regulation in matters of parental responsibility *where agreement of the parties was reached in the course of those return proceedings*." (s.n.).

Nevertheless, we do not appreciate that this consideration is legally binding and directly applicable in member states, as it makes reference to the national laws and procedures. It is therefore rather a recommendation, than an obligation.

This is the reason why a clear and binding provision in the Regulation would be useful, and also in the interest of both the parents and the child/children involved.

2.3.2. Timeframes

Time is crucial in international child abduction cases and it always plays on the side of the "taking parent". The longer the child stays in the country of abduction without the family dispute being resolved, the more it becomes difficult to restore the relationship between the child and the left-behind parent.

Although these considerations should not prevent use of mediation, particular attention should be paid to specific timeframes (already referred to) related to the return proceedings in the framework of the 1980 Hague Child Abduction Convention.

To be compatible with the above-mentioned convention, mediation must comply with quite rigid time limitations. They clearly result from art. 11 para. (2) of the convention, which makes reference to a period of six weeks during which a decision should be reached, starting from the date of commencement of the proceedings.

As already indicated, Central Authorities under the 1980 Hague Child Abduction Convention will, as soon as the whereabouts of the child are known and before court proceedings, generally try to bring about an agreed voluntary return of the child.

The same celerity principle applies to court proceedings, although the states' approach is different as far as mediation is concerned.

We can distinguish two main types of mediation, respectively "court based or annexed mediation" and "out of court mediation".

In states such as Romania, Great Britain or France, mediation is conducted as a parallel and independent process to the Hague return proceedings (an amicable mediation result reached in the parallel process can be introduced into the return proceedings at any time).

By contrast, in Germany and the Netherlands, mediation in international abduction cases is integrated into the schedule of the court proceedings (mediation takes place within the short period of 2-3 weeks before court hearings).

Particular importance attached to timeframes relates also to art. 12 para. (2) of the afore-mentioned Convention.

The said provision stipulates that, when return judicial or administrative proceedings are commenced more than one year after the abduction, the court has discretion to refuse the return, provided that the child has settled into his/her new environment.

Therefore, specific sanctions are imposed in case of exceedment of timeframes, and they might result in non-return of the child in the state of habitual residence.

2.3.3. Cooperation among mediators and administrative/judicial authorities

Consequent to timeframes already referred to, it is advisable in international child abduction cases that mediators should maintain close links with Central Authorities and/or the courts on an administrative level.

Although this recommendation applies in all abduction cases, it is of outmost importance when mediation is integrated into the judicial return proceedings.

Also, close cooperation between mediators and legal representatives of the parties/Central Authorities may be very helpful, with regard to relevant information on legal effect in the relevant jurisdictions of mediated agreements.

It is indeed not the mediator's role to give legal advice, still basic legal knowledge is important for mediators in cross-border family cases.

This will enable them to understand the greater picture and conduct mediation in a responsible manner (for example, refusing mediation when the agreement cannot be valued in the states involved, as we will detail further on).

2.3.4. (In)compatibility of the agreement with national law or (non)enforceability of the agreement in all jurisdictions concerned

Specific difficulties for mediation in international child abduction disputes also result from the fact that more than one legal system is involved.

It is thus important to take into consideration the laws of all legal systems, such as an agreed solution should have legal effect in all jurisdictions concerned[43].

Mediators should thus draw the parties' attention to the importance of obtaining the relevant legal information (as they are not themselves in a position to give legal advice to the parties).

We appreciate that legal information is relevant at least with respect to two closely linked aspects (both substantial and procedural).

First, the substantial content of the mediated agreement needs to be compatible with legal requirements in national laws involved.

Secondly, there is the procedural question of how to give legal effect to the mediated agreement in the legal systems concerned.

These are aspects on which legal representatives of the parties or Central Authorities may offer valuable information and prove once more the importance of a cooperation between them and the mediators[44].

2.3.5. Language difficulties, different cultural and religious backgrounds

Another particular challenge in mediating international abductions is the fact that the parties often have different mother tongues, and also different cultural and religious backgrounds.

This might affect the result of the mediation, caused either by risk of misunderstandings as a result of language difficulties, or the way parties communicate with each other (and with the mediator) in the context of each other's personal background.

Bi-national mediation is sometimes seen as an advantage in this situation (two mediators from the two states involved, versed in the cultural and religious backgrounds of the parties, and at the same time in their mother tongues).

Use of a translator assisting parties in the mediation may also be another option.

Nevertheless, both options will increase the overall costs of mediation.

2.3.6. Geographical distance, visa and immigration issues

Distance between the state of the child's habitual residence (where the left-behind parent is located) and the state to which the child was taken (where the abducting parent lives) may also increase the difficulty of mediation in abduction cases.

Distance may on the one hand overload practical arrangements and also travel costs for mediation sessions (modern means of communication may be considered as an alternative to face-to-face communication).

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[43] Art. 6 of the European Directive on mediation (Enforceability of agreements resulting from mediation): „1. *Member States shall ensure that it is possible for the parties*, or for one of them with the explicit consent of the others, *to request that the content of a written agreement resulting from mediation be made enforceable*. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability. 2. *The content of the agreement may be made enforceable by a court or other competent authority* in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made." (s.n.).

[44] Country Profiles under the 1980 Hague Convention may serve as a useful source of information related to formalities required to render mediated agreements enforceable in contracting states (available at *https://www.hcch.net/en/publications-and-studies/details4/?pid=5289&dtid=42*, last accession 24.02.2023, 21:00).

On the other hand, distance may also affect the substantial content of an eventual agreement (which needs to be realistic in terms of time and expenses allocated to travel costs related to possible relocation of the child, personal ties programs, etc.).

Moreover, geographical distance implies provision of travel documents, so that the parents may participate in mediation (or legal proceedings).

As „The Central Authority should take all appropriate steps to assist the parents with obtaining the necessary documents through provision of information and advice, or by facilitating specific services"[45], this is another argument recommending cooperation between mediators and Central Authorities.

2.3.7. Criminal proceedings

Although the 1980 Hague Convention deals only with the civil aspects of international child abduction, criminal proceedings against the taking parent in the country of the child's habitual residence rise enormous difficulties in mediation/return proceedings.

Criminal proceedings initiated by the left-behind parent in the state of origin are in fact a „double-edged sword", as in particular circumstances they may result in non-agreement in mediation/denial of the return request.

This is the situation when the return would result in separation of the actual carer and child as a result of detention/incarceration of the abducting parent, which might constitute a grave risk of physical or psychological harm in the sense of art. 13 para. (1)b) of the 1980 Hague Convention.

In view of the possible implications shortly pointed out before, it is indeed important to address the issue in the mediation/judicial process.

As mediators themselves cannot prevent or stop such criminal proceedings[46], „co-operation among the relevant judicial and administrative authorities may be necessary to ensure that criminal proceedings are not, or are no longer pending before a mediated agreement (…), or that no such proceedings can be initiated following the return of the taking parent and child"[47].

2.4. Use of mediation in order to prevent child abductions

At a very early stage in a family dispute with extraneous elements concerning children, mediation may be of assistance in preventing abduction.

When the relationship of the parents breaks down and one of them wishes to leave the country with the minor, mediation can assist the parents in considering a possible relocation of the child, or help them to find whatever agreed solution, thus finally avoiding abduction and its consequences.

3. Conclusions

Mediation is the most promoted among processes facilitating the amicable resolution of dispute and presents an undeniable interest throughout the EU and the world.

Although in general advantages of mediation outweigh the risks, whether mediation or litigation serves better the needs of the parties depends on each case and should carefully be considered from the very beginning (not all the cases can be mediated).

The same tendency of growing use of mediation in solving disputes as an alternative to judicial decisions appears also in national and international family law, especially in the context of the increasing internationalisation of family relationships and the very particular problems associated with this phenomenon.

Nevertheless, while mediation in national family cases has substantial results, it does not happen with the same frequency in the international cases related to child abduction[48].

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[45] *Guide to Good Practice, op. cit.,* p. 33.

[46] And in some cases (depending on domestic legislation) not even the parent who initiated the criminal proceedings may dispose of them.

[47] *Guide to Good Practice, op. cit.,* p. 35.

[48] „In Romanian legal practice we could not identify relevant cases in cross-border mediation" (D.-A. Popescu, *Mediation in matters concerning parental responsibilities and international child abduction. Recognition and enforcement of agreements concluded during return proceedings*, 2019, available online at *https://law.ubbcluj.ro/ojs/index.php/iurisprudentia/article/view/29/46*, last accession 24.02.2023, 21:25).

There are significant challenges related to the specificities of international abductions, such as rigid timeframes, different laws/languages/cultures geographic distance, criminal proceedings, immigration issues.

All of them constitute limitative elements, testing the abilities of mediators and the outcome of mediation, which may be exceeded only by increase of specialization of all actors involved in this particular area of law.

In this context, adoption of national legislation specific for mediation in international law, including child abductions, would be helpful (such is the case of Romania, where specific legislation does not exist).

Also, specific training in mediation of judges involved in international abductions would be beneficial, doubled by the legal possibility to validate agreed solutions even where they exceed the limits of the abduction litigations.

Although exploration of new frontiers is always a challenge, „mediation is emerging as an important and viable alternative for families facing the crisis of international child abduction."[49]

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NATIONAL AND INTERNATIONAL LEGAL AND CONSTITUTIONAL ORDER. CONVERGENT AND DIVERGENT

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Abstract

The relationship between the national law and the EU law is interpreted differently, there are several doctrinal concepts and different jurisprudence solutions. One school of thought asserts the supremacy of the Constitution, including over EU law, even if it accepts the priority of application of the latter, in its mandatory rules, over all other rules of domestic law, and another the priority of unconditional application of all the provisions of the EU law compared to all the rules of the internal law, including the constitutional rules.

There are European constitutional jurisdictions that have established that they have the competence to control the constitutionality of EU law, integrated into the internal legal order, by virtue of the principle of the supremacy of the Fundamental Law

The Romanian Constitution enshrines two principles of a different nature and with specific implications whose effects are convergent but also divergent: the supremacy of the Constitution and the priority of EU law.

In this study we analyze the interferences between the principle of priority of EU law and the principle of supremacy of the Constitution with reference to the relevant doctrine and jurisprudence in the matter.

Keywords: *national legal and constitutional order, international legal order, principle of priority of EU law, principle of the supremacy of the Constitution, obligation of EU legal norms, conformity national law with EU law.*

1. Introduction

One of the most important defining elements of the EU is the existence of its own system made up of principles, written norms and rules established by jurisprudence. Therefore, it is important to clarify the relations between the EU law and national law. The solution to this problem is found in a set of rules that are not explicitly provided in the Constituent Treaties but were developed by the Court of Justice through several decisions, some of them controversial. The constitutions of the EU Member States state rules of principle regarding the relationship between EU law and national law.

In practical terms, the interference between EU law and national law occurs especially when there are contradictions between the legal norms belonging to the legal systems. Of course, the problem of the relationship between the two categories of legal norms is of interest not only in such a situation, but also in cases where a court can apply a norm of EU law. One of the most important aspects of this issue is the relationship between the supremacy of the constitution, and, on the other hand, the priority of the principle of the law of EU as well as the competences of the constitutional jurisdiction in the matter of application and interpretation of the rules stated by the EU legal acts.

We believe that this issue can be analyzed on two levels: 1. the relationship between domestic law (other than the constitutional law) and the EU; 2. the relationship between the constitutional norms of the Member States, and, on the other hand, the EU law.

One of the most interesting discussions, jurisprudential and doctrinal, involving the constitutional courts of the EU member states, concerns the cooperation mechanisms with the CJEU. The CJEU jurisprudence, the doctrine, but also the internal legislation refers to the principle of priority or supremacy, primacy, pre-eminence of EU law over the national law systems.

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2. Paper content

The relationship between the constitutional norms and EU Law is interpreted differently, there are several doctrinal conceptions. One current of thought affirms the supremacy of the Constitution, including over the European Union law, even if it accepts the priority of applying the latter, in its mandatory norms, over all other norms of domestic law, and another the priority of systematic and unconditional application of all the provisions of the EU Law in relation to all the norms of the internal law, including the national constitutions. Some traditional European constitutional jurisdictions have reached, at certain moments and historical contexts, the conclusion that it is within their competence to control the constitutionality of the EU law, integrated into the internal legal order, by virtue of the principle of the supremacy of the fundamental law (for example, the German Constitutional Tribunal).

The Court of Justice reached the development of the principle of priority of the EU law, considering the rule of public international law, according to which „A party cannot invoke the provisions of his domestic law to justify the non-execution of a Treaty". Another source was represented by the provisions of art. 10 TEC, modified by the Treaty of Lisbon. The norm contained in the provisions of art. 10, however, remained unchanged until now and establishes the obligation of the member states to take all the necessary measures to ensure the fulfillment of the obligations resulting from the treaties and acts of the Community institutions. The same provisions impose the negative obligation of the Member States to refrain from taking measures that would endanger the achievement of the Treaty's goals. These are not the only regulations from the EU Treaties that underpin the principle of priority of the European Union law over the national law.

The principle of priority and obligation of the EU Law was built especially through jurisprudence. In this matter, the historical CJEU jurisprudence is relevant, which marks a certain evolution of the affirmation of this principle in relation to the national law.

A significant moment is represented by the *Costa v. Enel* case[1]. The Italian court submitted two requests for interpretation, one to the Constitutional Court of Italy and the other to the CJEU. The Constitutional Court considered that the Treaty establishing the European Community can only have a normative value to the extent that it is incorporated into the law national through a law. At the same time, it was admitted that a national law can derogate from the provisions of the Treaty.

The Court of Justice had a different opinion expressed in the pronounced decision: „It follows from these considerations that the legal system born from the Treaty, an independent source of law, cannot, due to its special and original nature, be superseded by the internal legal norms or that would be their legal force, without being deprived of its community law feature and without the very legal foundation of the Community being called into question".

Another moment of the evolution of the CJEU jurisprudence in this matter is represented by the „International H" cases[2]; „Simmenthal I[3] [35/76, Simmenthal SpA (1976) ECR 1871] and Simmenthal II"[4].

The following considerations from the decision pronounced in the *Simmenthal II* case are relevant for our research topic: „as such, any provision of the national legal order or any practice, legislative, administrative or judicial, which would have the effect of being incompatible with the requirements inherent in the nature of the Community law diminishing the effectiveness of the Community law by refusing the competent judge to apply it, the power to do, at the very moment of this application, all that is necessary to remove the national legal provisions that, possibly, would represent an obstacle to the full effectiveness of community norms. Therefore, the answer to the first question is that the national judge tasked, according to his competence, to apply the provisions of Community law, has the obligation to ensure the full effectiveness of these rules, leaving unapplied, *ex officio*, if necessary, any provision contrary with the national legislation, even later, without requesting or waiting for its prior legislative elimination or by any other constitutional procedure" (para 22 and 24 of the decision).

Moreover, the Court considered that the national courts have the power to constrain and even sanction the legislative power and the executive power in order to guarantee the full efficiency of the principle of priority of European Union law over national law.

[1] 6/64 *Costa v. Enel* (1964) ECR 585.
[2] 11/70, *Internationale H.*, (1970) ECR 1125.
[3] 35/76, *Simmenthal SpA* (1976) ECR 1871.
[4] 106/77, *Simmenthal* (1978) ECR 629.

This principle must also be understood from the perspective of the rule of obligation of community acts. The *regulation* has general applicability and is mandatory in all its elements. In contrast, the *directive* is addressed to some or all of the Member States and is mandatory with regard to the result to be achieved, leaving for the national authorities the competence regarding the form and the means they use to achieve the set objectives. The *decision* is binding in all its elements on the addressees it indicates.

The rule of direct application that characterizes some of the legal acts of EU law is of interest to the understanding and application of the priority principle of the EU law. The regulations have direct application because they do not require transposition into national law. As the court indicated in its jurisprudence, Member States do not have to adopt national legislation to take over the regulations. Their provisions can be invoked by natural and legal persons directly before the national courts. In contrast, the directive is not directly applicable. It must always be transposed into the legal system of each Member State to which it is addressed. The domestic normative act transposing the directive is the one through which the content of the directive will enter the national legal system.

The principle of priority of the EU law over the national law must also be understood according to the criterion of the possibility of direct invocation of community acts before national courts. The phrase „direct effect" denotes the attribute of a community normative act to create in the patrimony of natural and legal persons rights that they can invoke directly before the national courts. Without going into details, we emphasize that under certain conditions, regulations, directives and decisions can have a direct effect.

One of the consequences of the principle of priority of the EU law is the obligation of national courts to interpret domestic law in accordance with the EU law. In an attempt to ensure the effectiveness and uniformity of the EU law, CJEU established several means to stimulate the states to implement the directives correctly and on time and to ensure their implementation. One of these means is the creation of the doctrine of direct vertical effect of directives.

In the hypothesis in which the provisions of an unimplemented or incorrectly implemented directive cannot have a direct vertical effect because they do not meet the condition of being sufficiently clear, precise and unconditional, in order to be able to deduce the right that the litigant wishes to exploit before the courts national, the Court established the obligation, for the national judge, to interpret the national legislation in relation to the content of the directive.

Among the first cases in which this obligation was expressly stated was the *Van Colson* case. The Court held in the considerations of the pronounced decision that the national legislation limits the right to reparation of persons who have been the object of discrimination in the case of exercising the right to work. Such a situation does not comply with the requirements of the effective transposition of Directive 76/207. Therefore, the court in Luxembourg ruled: „It follows that in the activity of applying the national law and in particular the provisions of a national law specially introduced in order to apply Directive 76/207, the national court is required to interpret the national law in the light of the text and the finality of the directive to obtain the result provided for in art. 189 para 3) of the TCE". Consequently, the Court specified: „It is in the competence of the national court to issue laws adopted in order to apply the directive, to the extent that the national law grants it a margin of appreciation, an interpretation and an application in accordance with the requirements of Community law".

The CJEU decision, pronounced in the case of *Seda Kücükdeveci v. Swedex GmbH & Co.*[5], is also edifying. The Court reaffirms the existence of the principle of non-discrimination on grounds of age, as well as the role of the national court in its application. The German regulation which stipulates that periods of work completed before the age of 25 are not taken into account for the calculation of the notice period is contrary to the principle of non-discrimination on grounds of age, as provided by Directive 2000/78. In this situation, the national court must remove, if necessary, any contrary internal regulation, even in the context of a dispute between individuals.

From the considerations of this decision, it follows that Directive 200/78 concretizes the principle of equal treatment in the field of employment. The principle of non-discrimination on grounds of age is a general principle of the Union law. Therefore, the national court referred to a dispute in which the principle of non-discrimination on grounds of age, as provided by Directive 2000/78, is brought into question, is obliged to ensure, within the framework of its competences, the legal protection arising for justiciable in Union Law and to guarantee the full right of this principle, removing, if necessary, the application of any provision, possibly contrary, of the national law.

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[5] Decision C-555/07.

In accordance with these conclusions of the CJEU, it follows that the Romanian courts, in the situations where they will apply the provisions of a national law implementing a directive, interpret it in accordance with the text and purpose of the directive. From the jurisprudence of the Court, it follows that the national court is obliged, when it has to apply a law implementing a directive, to take into account not only that law, but the whole set of national law rules and to interpret them in accordance with the requirements the respective directive, in order to pronounce a solution in accordance with the purpose pursued by the community act.

Given that the Romanian law is characterized by excessive procedural formalism and especially by significant inconsistencies and contradictions, the realization of this obligation by the national courts will be very difficult.

Moreover, in its jurisprudence, CJEU considers that this obligation of the national courts is subject to certain limits. The obligation to interpret domestic law taking into account the text and purpose of the directive exists only to the extent that national law grants a margin of appreciation to the court. In this sense, the Court held the following in the Papino case: „The principle of interpretation in the light of the directive cannot serve as a foundation for a *contra legem* interpretation of national law”[6].

We believe that whenever the national law confers on the court a „related competence” that excludes the existence of a margin of appreciation, the aforementioned obligation does not exist for the national judge. By way of example, some of the procedural normative provisions can be included in this category. Also, in criminal matters, the national courts cannot aggravate the criminal liability of persons in the event that they commit an act criminalized by a directive, if it has not been implemented in domestic law.

Another important issue is the relationship between the constitutional norms, the decisions of the Constitutional Court, and on the other hand the law of the European Union.

Constantly, the constitutional courts of some Member States, especially Germany, Italy and France, considered that the principle of priority of the European Union law does not apply in relation to the regulations included in a constitution, because the fundamental law of a state expresses the identity and national sovereignty. This solution particularly concerned the regulations regarding fundamental human rights and freedoms. Until December 1, 2009, when the Treaty of Lisbon and the Charter of Fundamental Rights of the European Union entered into force, the EU law did not include a coherent normative system for guaranteeing fundamental human rights. Consequently, the courts of the Member States invoked the internal constitutional regulations in such situations.

Moreover, the practice of the courts of the EU Member States does not offer many examples of conflict between the rules of the EU law, and on the other hand, the constitutional regulations. This situation is explained by the fact that, following the process of joining the EU, the Member States adapted their constitutional regulations of principle to the specific requirements of the European Union law and established in one form or another the principle of priority of this legal system against domestic law whenever there is a contradiction between the rules of the two categories of legal norms. Of course, this problem remains open and is far from being solved. We note that in the jurisprudence of the Constitutional Council and the French Council of State in recent years, the concept of „constitutional national identity” has been developed. According to this principle, the national courts will always apply the internal constitutional norms, but also the rules inscribed in the ordinary legislation whenever they have no counterpart in the EU law.

The Romanian Constitution makes the distinction between the principle of the supremacy of the fundamental law, and on the other hand, the principle of the priority of EU law over national law. Thus, the provisions of art. 1 para. (5) of the Constitution enshrines the principle of the supremacy of the fundamental law: „In Romania, compliance with the Constitution, its supremacy and the laws are mandatory”. This principle cannot be mistaken with that of the priority of the law of the European Union over the contrary regulations of the internal laws enshrined in Art 148 Para 2 from the Constitution.

The CCR jurisprudence reflects this difference. By CCR dec. no. 148/16.04.2003 regarding the constitutionality of the legislative proposal to revise the Romanian Constitution, our constitutional court clearly distinguishes between the supremacy of the Constitution and the principle of priority of the EU law, stating: „The consequence of accession starts from the fact that the EU Member States have understood to place the communitarian acquis, the EU constitutive treaties and the regulations derived from them in an intermediate position between the Constitution and the other laws when it comes to binding European normative acts”. In

[6] Decision C-105/03.

the specialized legal literature, with reference to the provisions of art. 148 of the Constitution and in accordance with CCR dec. no. 148/16.04.2003, it was stated that „Therefore, it can be stated that in the internal legal order, the legal act by which Romania joins the EU has a legal force inferior to the Constitution and constitutional laws, but superior to organic and ordinary laws"[7].

In its subsequent jurisprudence, CCR seems to have renounced this distinction, basing its decisions only on the principle of the priority of the EU law[8].

However, by CCR dec. no. 1258/08.10.2009[9], which we consider to be of historical importance in subsequent constitutional jurisprudence, the Court finds that an internal law transposing an EU directive into internal law is unconstitutional. Such a solution, in our opinion, enshrines the principle of supremacy of the Constitution and the obligation to respect it in relation to the principle of priority of the EU law.

Through the decision with the number above, the constitutional court found that the provisions of Law no. 298/2008[10] are unconstitutional. From the considerations of the decision, it follows that Law no. 298/2008 was adopted to transpose into national legislation the Directive 2006/24/EC of the European Parliament and of the Council of March 15, 2006, regarding the retention of data generated or processed in connection with the provision of publicly accessible electronic communication services or public communication networks. The Court refers to the legal regime of such community acts, emphasizing that: „(...) it imposes its obligation on the EU Member States in terms of the regulated legal solution, not in terms of the specific methods by which this result, the states benefiting from a wide margin of appreciation in order to adopt them according to the specifics of national legislation and realities". Examining the content of the Law no. 298/2008, the Court found that this normative act is likely to affect the exercise of rights or fundamental freedoms, namely the right to intimate, private and family life, the right to secrecy of correspondence and freedom of expression. The constitutional court considers that the restriction of the exercise of these rights does not correspond to the requirements established by art. 53 of the Romanian Constitution[11].

CCR dec. no. 80/16.02.2014[12], on the legislative proposal regarding the revision of the Romanian Constitution is relevant for our research topic. Regarding the interpretation of the provisions of art. 148 regarding integration into the EU, the Court notes that: the „constitutional provisions do not have a declarative character, but represent mandatory constitutional norms, without which the existence of the rule of law, provided for by art. 1 para. (3) from the Constitution. At the same time, the Basic Law represents the framework and extent in which the legislator and the other authorities can act; thus, the interpretations that can be brought to the legal norm must take into account this constitutional requirement, included in art. 1 para. (4) of the Fundamental Law, according to which in Romania the compliance with the Constitution and its supremacy is mandatory".

Another aspect analyzed in the constitutional jurisprudence refers to the application of the Charter of Fundamental Rights of the European Union within the framework of the constitutional review. Our constitutional court ruled that, in principle, this is applicable within the framework of constitutionality control „to the extent that it ensures, guarantees and develops the constitutional provisions in the matter of fundamental rights, in other words, to the extent that their level of protection is at least at the level of constitutional norms in the field of human rights"[13].

Also in connection with the application of the European Union norms, regarding human rights within the framework of constitutionality control, it was stated that the reporting of the provisions contained in an act having the same legal force as the constitutive treaties of the European Union must be done according to the provisions of art. 148 of the Constitution, and not those stated by art. 20 of the Basic Law, which refers to international treaties on human rights, other than those of the EU[14]. Our constitutional court ruled that the

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[7] M. Constantinescu, A. Iorgovan, I. Muraru, E.S. Tănăsescu, *Constituţia României revizuită – comentarii şi explicaţii*, All Beck Publishing House, Bucharest, 2004, p. 331.

[8] CCR dec. no. 308/2006, published in the Official Gazette of Romania no. 390/05.05.2006; CCR dec. no. 59/2007, published in the Official Gazette of Romania no. 98/08.02.2007; CCR dec. no. 1042/2007, published in the Official Gazette of Romania no. 12/08.02.2008 and CCR dec. no. 1172/2007, published in the Official Gazette of Romania no. 54/23.01.2008.

[9] Published in the Official Gazette of Romania no. 798/23.11.2009.

[10] Published in the Official Gazette of Romania no. 780/21.11.2008.

[11] CCR dec. no. 17/21.01.2015, published in the Official Gazette of Romania no. 79/30.01.2015 through which our constitutional court established the unconstitutionality of the law on Romania's cyber security

[12] Published in the Official Gazette of Romania no. 246/07.04.2014.

[13] CCR dec. no. 871/25.06.2010, published in the Official Gazette of Romania no. 433/28.06.2010.

[14] CCR dec. no. 967/20.11.2012, published in the Official Gazette of Romania no. 853/18.12.2012 and CCR dec. no. 206/06.03.2012, published in the Official Gazette of Romania no. 254/17.04.2012.

provisions of art. 41 of the Charter of Fundamental Rights of the European Union, regarding the right to good administration, can be invoked through the prism of art. 148, and not art. 20 of the Constitution[15].

Also, in the constitutional jurisprudence it was established that it is not within the competence of the Constitutional Court to analyze the conformity of a provision of constitutional law with the text of the Treaty on the Functioning of the European Union, through the prism of art. 148 of the Constitution. Such a competence, namely that of determining whether there is a contradiction between the national law and the treaty, belongs exclusively to the court, which also has the possibility to formulate a preliminary question to the CJEU. It is interesting that the constitutional court considers itself incompetent to verify the conformity of a provision of national law with the text of the constituent treaties of the European Union and for the fact that, if it were to arrogate such competence, a possible conflict would be reached of jurisdiction between CCR and CJEU, which, at this level, is considered inadmissible[16].

Regarding the cooperation between CCR and CJEU, our constitutional court stated that it remains at its discretion, in the application of the CJEUs judgments or the Court's formulation of questions preliminary in order to establish the content of the European norm. „Such an attitude is related to the cooperation between the national and the European constitutional court, as well as to the judicial dialogue between them, without bringing into discussion aspects related to the establishment of a hierarchy between these courts".

CJEU, in its recent jurisprudence, has a different opinion and ruled the supremacy of the legal order of the European Union Law, over the internal legal order and even over the constitutional order.

Thus, through the Judgment delivered on May 18, 2021[17], CJEU rules on a series of reforms in Romania regarding the judicial organization, the disciplinary regime of magistrates, as well as the patrimonial liability of the state and the personal liability of judges for judicial errors.

Six requests for a preliminary decision were made before the Romanian constitutional court in the context of the disputes between legal entities or natural persons, on the one hand, and authorities or bodies such as the Judicial Inspection, the Superior Council of the Magistracy and the Prosecutor's Office attached to the HCCJ, on the other hand. The main disputes are in the context of a far-reaching reform in the field of justice and the fight against corruption in Romania, a reform that has been subject to monitoring at the EU level since 2007, based on the cooperation and verification mechanism established by dec. 2006/928[18] with the occasion of Romania's accession to the Union (hereinafter referred to as CVM).

In this context, the referring courts raised the issue of the nature and legal effects of the CVM, as well as the scope of the reports drawn up by the Commission pursuant to it. According to these courts, the content, legal nature and temporal extent of the mentioned mechanism should be considered circumscribed by the Accession Treaty, and the requirements formulated in these reports should be binding for Romania. In this regard, however, the respective courts mention a national jurisprudence according to which the Union law would not prevail over the Romanian constitutional order, and dec. 2006/928 could not constitute a reference rule in the framework of a constitutionality review, since this decision was adopted prior to Romania's accession to the Union, and the issue of whether the content, nature and scope of dec. 2006/928/EC falls within the scope of the Accession Treaty has not been the subject of any interpretation by the Court.

Regarding the legal effects of the dec. 2006/928, the Court found that it is binding in all its elements for Romania from the date of its accession to the Union and obliges it to achieve the reference objectives, also mandatory, which appear in the annex to this. The respective objectives, defined as a result of the deficiencies noted by the Commission before Romania's accession to the Union, aim, among other things, to ensure compliance by this member state with the value of the rule of law. Romania is thus obliged to take the appropriate measures in order to achieve the mentioned objectives and to refrain from implementing any measure that risks compromising the achievement of the same objectives.

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[15] CCR dec. no. 12/22.01.2013, published in the Official Gazette of Romania no. 114/28.02.2013.

[16] CCR dec. no. 1249/07.10.2010, published in the Official Gazette of Romania no. 764/16.11.2010 and CCR dec. no. 137/25.02.2010, published in the Official Gazette of Romania no. 182/22.03.2010.

[17] Decision in connected cases C-83/19, the Association „The Forum of Judges in Romania"/Judicial Inspection, C-127/19, the Association „The Forum of Judges in Romania" and the Association „The Movement to Defend the Status of Prosecutors" and OL/Prosecutor's Office attached to the HCCJ – General Prosecutor of Romania and C-397/19, AX/Romanian State – Ministry of Public Finances.

[18] 2006/928/EC: Commission Decision of 13.12.2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (OJ 2006 L 354, p. 56, Special Edition, 11/vol. 51, p. 55).

The Court ruled that the principle of the supremacy of the Union law opposes a national regulation of constitutional rank that deprives a lower court of the right to leave unapplied *ex officio* a national provision that falls within the scope of dec. 2006/928 and which is contrary to the Union law. The Court recalls that, according to established jurisprudence, the effects associated with the principle of the supremacy of the Union law are imposed on all organs of a Member State, without the internal provisions relating to the distribution of judicial powers, including constitutional ones, being able to prevent this. Also recalling that national courts are obliged, as far as possible, to give domestic law an interpretation that complies with the requirements of the Union law or to leave unapplied *ex officio* any contrary provision of national legislation that could not be subject to such a compliant interpretation, the Court notes that, in the event of a proven violation of the EU Treaty or dec. 2006/928, the principle of supremacy of the Union law requires the referring court to leave the provisions in question unapplied, regardless of whether they are of legislative or constitutional origin.

Through the Decision of December 21, 2022[19], CJEU ruled that the EU law opposes the application of a case law of the constitutional court to the extent that it, in conjunction with the national provisions on prescription, creates a systemic risk of impunity.

The supremacy of the EU law requires that national judges have the power to leave unenforced a decision of a constitutional court that is contrary to this right, without being exposed to the risk of being engaged in disciplinary liability.

In the reasoning of the decision, the following is essentially noted:

In these cases, the question arises as to whether the application of the jurisprudence resulting from various CCR decisions, regarding the rules of criminal procedure applicable in matters of fraud and corruption, is likely to violate the Union law, in particular the provisions of this law that aim to protect the financial interests of the Union, guarantee the independence of judges and the value of the rule of law, as well as the principle of the supremacy of the Union law.

The Court, gathered in the Grand Chamber, confirmed its jurisprudence resulting from a previous decision, according to which the CVM is binding in all its elements for Romania[20]. Thus, the acts adopted before accession by the institutions of the Union are binding for Romania from the date of its accession. This is the situation of dec. 2006/928, which is binding in all its elements for Romania as long as it has not been repealed. The benchmarks that aim to ensure respect for the rule of law are also binding. Romania is thus required to take the appropriate measures to achieve these objectives, taking into account the recommendations formulated in the reports drawn up by the Commission[21].

The Union law opposes the application of a jurisprudence of the Constitutional Court that leads to the annulment of judgments handed down by illegally composed panels of judges, to the extent that this, in conjunction with the national provisions on prescription, creates a systemic risk of impunity for acts that constitute serious crimes of fraud affecting the Union's financial interests or corruption.

It was also noted that in this case, the application of the jurisprudence of the Constitutional Court in question has the consequence that the respective cases of fraud and corruption must be re-judged, if necessary, several times, at first instance and/or on appeal. Given its complexity and length, such a retrial inevitably has the effect of prolonging the duration of the related criminal proceedings.

The Court recalls that, taking into account the specific obligations incumbent on Romania under dec. 2006/928, national regulation and practice in this matter cannot have the consequence of extending the duration of investigations into corruption offenses or weakening the fight against corruption in any other way. On the other hand, taking into account the national statutes of limitation, the retrial of the cases in question could lead to the statute of limitations of the crimes and could prevent the sanctioning, in an effective and dissuasive way, of the persons who occupy the most important positions in the Romanian state and who were convicted of committing acts of serious fraud and/or serious corruption in the exercise of their functions. Therefore, the risk of impunity would become systemic for this category of persons and would call into question the objective of combating high-level corruption.

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[19] Decision for the connected cases C-357/19 Euro Box Promotion et al., C379/19 DNA, Oradea Territorial Service, C-547/19 Association „The Forum of Judges", C-811/19 FQ et al., and C-840/19 N.

[20] Decision of 18.05.2021, the Association „The Forum of Judges" *et al.*, C-83 C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 (see also CP no. 82/21).

[21] Pursuant to the principle of loyal cooperation, enshrined in art. 4(3) TEU.

In the reasoning, the supremacy of the European Union law is invoked and it is noted that the principle of the supremacy of the Union law prevents national courts from being able, at the risk of applying disciplinary sanctions, to leave unapplied the decisions of the Constitutional Court contrary to the Union law.

The Court recalls that, in its jurisprudence regarding the TEEC, it established the principle of the supremacy of Community law, understood in the sense that it enshrines the prevalence of this right over the law of the Member States. In this regard, the Court found that the establishment by TEEC of a legal order of its own, accepted by the Member States on the basis of reciprocity, has as a corollary the impossibility of the mentioned states to prevail against this legal order, a subsequent unilateral measure or to oppose to the right born from the TEEC norms of national law, regardless of their nature, otherwise there is a risk that this right will lose its community character and that the legal foundation of the Community itself will be called into question.

In addition, the executive force of the Community law cannot vary from one Member State to another depending on subsequent domestic laws, otherwise there is a risk that the achievement of the TEEC objectives will be jeopardized, nor can it give rise to discrimination on the grounds of citizenship or nationality, prohibited by this treaty. The Court thus considered that, although it was concluded in the form of an international agreement, the TEEC constitutes the constitutional charter of a community of law, and the essential features of the community legal order thus constituted are in particular its supremacy in relation to the law of the Member States and its direct effect of a whole series of provisions applicable to Member States and their nationals.

According to the Court, the effects associated with the principle of the supremacy of Union law are imposed on all organs of a member state, without the internal provisions, including constitutional ones, being able to prevent this. National courts are required to leave unapplied, *ex officio*, any national regulation or practice contrary to a provision of Union law which has direct effect, without having to request or wait for the prior elimination of that national regulation or practice by legislative means or by any another constitutional procedure.

On the other hand, the fact that national judges are not exposed to procedures or disciplinary sanctions for having exercised the option to refer the Court under art. 267 TFEU, which belongs to their exclusive competence, constitutes an inherent guarantee of their independence. Thus, in the hypothesis in which a national common law judge would come to consider, in the light of a Court decision, that the jurisprudence of the national constitutional court is contrary to Union law, the fact that this national judge would leave the said jurisprudence unapplied cannot engage his disciplinary liability.

3. Conclusions

In the opinion of our constitutional court, to consider that the EU law is applied without any differentiation within the national legal order, not distinguishing between the Constitution and the other internal laws, is equivalent to placing the Fundamental Law in a secondary plan compared to the EU legal order. The legitimacy of the Constitution is the will of the people itself, which means that it cannot lose its binding force, even if there are inconsistencies between its provisions and the European ones. Moreover, it was emphasized that Romania's accession to the EU cannot affect the supremacy of the Constitution over the entire internal legal order.

The Constitutional Court has established that the mandatory acts of the EU are norms introduced within the framework of constitutionality control[22]. At the same time, the lack of constitutional relevance of the EU law norm, interposed in constitutional reference norms within the framework of constitutionality control, was emphasized. In this case, it is inadmissible to refer the Court based on non-compliance with the provisions of art. 148 para. (4) of the Constitution[23]. Through the same decision, the Court established that it is necessary for the legal norm of the European Union law to be circumscribed to a certain level of constitutional relevance, so that its normative content supports the possible violation by the national law of the Constitution – „the only direct norm of reference in within the framework of constitutional control". The constitutional court consecrated, just like the French Constitutional Council, the concept of „national constitutional identity", by which it understands the relevance of the supremacy of the constitution whenever the question of compliance of internal laws with the EU acts arises[24].

[22] CCR dec. no. 668/18.05.2011, published in the Official Gazette of Romania no. 487/08.07.2011.
[23] CCR dec. no. 157/19.03.2014, published in the Official Gazette of Romania no. 296/23.04.2014.
[24] CCR dec. no. 64/24.02.2015, published in the Official Gazette of Romania no. 286/28.04.2015.

CCR, in a press release, stated the following, with reference to the recent CJEU decisions issued recently regarding the relationship between the internal constitutional order and, on the other hand, the EU law: according to art. 147 para. (4) of the Constitution, the CCR decisions are and remain generally binding.

Moreover, CJEU also recognizes, in its decision of December 21, 2021, the binding feature of the decisions of the Constitutional Court. However, the conclusions of the CJEU decision according to which the effects of the principle of the supremacy of the EU law are imposed on all organs of a member state, without internal provisions, including those of a constitutional order, being able to prevent this, and according to which national courts are required to leave unapplied, *ex officio*, any regulation or national practice contrary to a provision of the EU law, assumes the revision of the Constitution in force.

In practical terms, the effects of this decision can be produced only after the revision of the Constitution in force, which, however, cannot be done as a matter of law, but exclusively at the initiative of certain legal subjects, in compliance with the procedure and under the conditions provided for in the Romanian Constitution itself.

We fully agree with the opinion expressed by the Constitutional Court.

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GUARANTEEING THE ACCES OF THIRD PARTIES TO THE NETWORK INDUSTRIES SPECIFIC INFRASTRUCTURES – A VITAL COMPONENT OF EU'S POLICY IN THE FIELD OF COMPETITION ON THE ENERGY MARKET, IN THE CONTEXT OF THE NEED TO INSURE ENERGY INDEPENDENCE WHILE MANTAINING AFFORDABLE PRICES

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Abstract

As both the practical experience and the theoretical constructions of successive generations of practitioners and researchers of the phenomenon of the economy and the legal norms associated with its proper functioning have proven, the most important mechanism for increasing consumer satisfaction in a market, both from the perspective of the quality of the goods and services they benefit from, as well as from that of the prices demanded, is the competition. But in order to fulfill its otherwise noble functions, the competition must take place freely, since only then can it be considered genuine. Any deterioration of the free nature of competition results in a proportional decrease in consumer satisfaction (from the perspective of both previously identified dimensions) and, at the same time, an exponential deterioration of the functionality of the market in which competition occurs. From all these main considerations, but also in the light of the American experience, capitalized on the occasion of the recovery policies implemented as a result of the Great Crisis, exported through the conditionalities associated with the Marshall Plan, the European Communities and, subsequently, the Union have carried out a constant and active policy in the field of competition, whose legal basis is represented by numerous provisions of primary law, supplemented by provisions of secondary law and, of course, a rich jurisprudence on the matter. Ensuring free competition in the energy field is also part of this policy, an aspect that is consistent with the Union's policy in this aforementioned field. However, considering the impact of the war in Ukraine and the effects of the sanctions imposed on Russia on the review of the energy supply sources of the member states, aspects such as free competition in the energy field and the effects of the liberalization of this market on consumers become even more important, the more the price of energy resources increase or close to the origin of the inflationary phenomenon they are. Precisely for these reasons, our research will explore the issue of guaranteeing access to the infrastructures specific to the energy sector as a way of implementing the desired Union policy in the field of competition on the energy supply market.

Keywords: *guaranteeing, access, network industries, infrastructures, competition, energy market, energy independence, inflation, Russia, war, diversification of energy sources, affordable prices.*

1. Introductory considerations. The three-folded EU law approach to competition and energy policy

As the first year of the war between the Russian Federation and Ukraine has just come to an end and the second one has begun, one can remember, along with the Bucha, Irpin of Mariupol war crimes, the soaring energy prices and the galloping inflation that hit all the economic sectors. In this gravely affected economic and political environment, how can the EU maintain decent energy prices and, given the fact that the energy prices have a direct impact on all the prices, how can the EU keep an acceptable inflation[1], while at the same time breaking up from its dependency from Russian imported oil and gas? Because it cannot be argued that these goals must be met at the same time, as the alarming price increase is in itself a risk to the economic and social

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[1] We use the terms *acceptable inflation* because, as the economic theory states, the inflation is a perfectly normal phenomenon, only its dimension, extent or dynamism in a given period of time being normal or abnormal.

peace, while the dependency on Russian imported gas comes with the need to make painful political concessions to an already overly-aggressive international actor. As we will state in this study, in our view, the answer relies, in a significant part, in the EU's free and fair competition policy, applied to the energy field, to which the free access to infrastructure plays a part whose importance cannot be stressed enough.

Therefore, it is our opinion that, for reaching the goal of maintaining both energy independence and affordable prices, the European Union relies of a whole system of norms, each acting according to its force (given by its place in the hierarchy of the EU law sources) and object, therefore each one completing the others. This system consists of Treaty norms (providing the legal basis that the institutions require in order to be able to act according to the EU's competences and each institution's attributions), secondary law and non-binding EU law.

As far as the primary EU law dispositions, an extensive interpretation can even include the EU values among the applicable norms. Given the fact that the EU „ *is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities* [and] [t]*hese values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*”[2], it can be inferred that the EU is bound to refrain from establishing close economical or political cooperation with those states that do not support or respect these values.

Therefore, as importing oil and gas from Russia in large quantities helps supporting the Russian economy and, as a consequence, its regime that acts against those values, in the light of art. 2 TEU, it can be considered against the EU primary law to enforce such a regime.

Such an interpretation is further supported by the content of art. 3 point 4 TEU, which states that **„[i]*n its relations with the wider world, the Union shall uphold and promote its values*** *and interests* ***and contribute to the protection of its citizens***. *It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter*”[3].

Further legal basis enshrined in the art. 3 TEU, which governs the matter of the EU objectives, is given by the third point of the aforementioned article, which states as follows: [t]*he Union shall establish an internal market.* ***It shall work for the sustainable development of Europe based on balanced economic growth and price stability***, *a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance*”[4]. As the content of this article reads, the EU is both entitled and obliged to act both in order to achieve the sustainable development of Europe, which cannot be achieved by depending on a single supplier of oil and natural gas, and in order to maintain a balanced economic growth, which would be severely affected by a constant and overwhelming prices increase, as it is the case in the very moment we write these lines.

As far as the Treaty on the Functioning of the European Union is concerned, it provides far more legal basis for the EU action in both competition and energy fields. For example, in the very beginning of the Treaty, article 3 states the competition among the exclusive competences of the EU, however limited to the aspects affecting the functioning of the internal market[5].

A veritable transposition of this internal competence in the field of the external agreements derives from another point of art. 3 TFEU, which states that „[t]*he Union shall also* ***have exclusive competence for the conclusion of an international agreement*** *when its conclusion is provided for in a legislative act of the Union* ***or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope***”[6].

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[2] Art. 2 TEU.

[3] Art. 3 point 5 TEU.

[4] Art. 3 TEU.

[5] Art. 3 TFEU states as follows: *The Union shall have exclusive competence in the following areas*: (...) *(b) the establishing of the competition rules necessary for the functioning of the internal market* (...).

[6] Art. 3 point 2 TFEU.

Regarding the energy area, the EU competence to act is enshrined, first of all, in the dispositions of art. 4 point 2 letter (i), which states that „[s]*hared competence between the Union and the Member States applies in the following principal areas:* (…) (i) *energy* (…)”[7].

To sum up, the TFEU places the EU competence in the areas of competition (having impact on the functioning of the internal market) and energy in two distinct categories of competence fields: the first in the exclusive competences category, while the second in the category of shared competences. Therefore, in order to better understand the way these competences are exercised we have to take a look at the Treaty rules governing the exercise of the competences.

Precisely, „[w]*hen the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts*”[8], while [w]*hen the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence*”[9].

However, even if these general rules are well known and applied, they do not govern each and every aspect of exercising an EU competence, but only the main rules regarding it. The detailed procedural ways and, not less important, the limitations related to the exercise of each competence are enshrined in the specific dispositions of the Treaties, as the TFEU itself states: „[t]*he scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area*”[10]. These exact aspects are the one that we will talk about in the following.

2. Competition and energy policies. Specific provisions of the TFEU

As stated above, in order to precisely understand the scope, limits and procedures that govern the EU power to regulate in each specific field, one must firstly consult the specific provisions regarding the given fields. Given the fact that the TFEU acts as the *sedes materiae* for the most relevant primary law dispositions regarding competition and energy, our analysis will be centered on this Treaty and its structure will follow the two main branches of this study: competition and energy.

2.1. Competition in the TFEU

A first example of specific Treaty dispositions governing the exercise of EU competences in the competition field is the one stating that „[i]n *carrying out the tasks entrusted to it under this Chapter*[11] *the Commission shall be guided by:* (…) *developments in conditions of competition within the Union in so far as they lead to an improvement in the competitive capacity of undertakings* [and] (…) *the requirements of the Union as regards the supply of* ***raw materials*** *and semi-finished goods; in this connection the Commission shall take care to avoid distorting conditions of competition between Member States in respect of finished goods*[12]. Of course, such dispositions only set up certain guidelines for the institutions to keep in mind when drafting legislative acts proposals regarding competition. Nevertheless, simply by doing this, such provisions offer clear landmarks for the institutions, therefore playing a far from neglectable role in the EU action in the competition field.

More such dispositions can be found in Title VII of the TFEU, named *common rules on competition, taxation and approximation of laws*, and especially in its first chapter regarding the *rules on competition*, whose first section is home to the *rules applying to undertakings*. This section can be considered as having a two-fold approach: first, it sets certain prohibitions for the undertakings, and secondly, it offers the institutions the legal bases they need in order to act in the competition field.

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[7] Art. 3, point 2 letter (i) TFEU.

[8] Art. 2 point 1.

[9] Art. 2 point 2.

[10] Art. 2 point 6 TFEU.

[11] Art. 28 point 1 TFEU states as follows: *The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.*

[12] Art. 32 (b) and (c) TFEU.

Dispositions like the one stating that „[t]*he following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts" fall in the first category*"[13].

The impact of such provisions on the activity of the undertakings from the energy sector cannot be overestimated. Given their usual size and market quotas, such undertakings are especially prone to agreements that cause disorder in the market and that prohibit fair and free competition. Therefore, it goes without saying that the simple existence of the aforementioned prohibitions achieves most of the desired effect of keeping the energy market as far as possible, given the circumstances, from being monopolized or shared in a matter that would devoid it from the real competition that is vital for keeping a decent level of prices.

However, the effect of these provisions on the real market is at least partially impeded by the existence of certain exceptions, part of which are enshrined in the Treaty (therefore being considered legal exceptions) and the other part deducted from the CJEU jurisprudence. The legal exceptions read as follows: „(…) *any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings, any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question*"[14].

A similar effect can be attributed to the Treaty provisions that prohibit any *„abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States*"[15]. As stated before, given their size and the difficulty of accessing and distributing the object of their trade, the energy companies are especially prone to such a behavior. Therefore, the fact that the Treaty prohibits abuses such as *„directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;* (…) *limiting production, markets or technical development to the prejudice of consumers;* (…) *applying dissimilar conditions to equivalent transactions with other trading parties*, thereby *placing them at a competitive disadvantage;* (…) *making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts*"[16] does a great deal to keep the energy market reasonably fair and competitive.

And keeping the market reasonably fair and competitive can be considered not only as an ideal, but as an imperative of the EU action in a time where *„the 'market' values and criteria such as efficiency and utility tend to obscure and even to replace non-market values like social solidarity, equity or civic engagement, changing the allocation of resources within society*"[17]

The second fold of the Treaty approach to the competition field consists in empowering the EU institutions to act in order to practically implement the primary law dispositions. This is what the TFEU does when stating that „[t]*he appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102*[18] *shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament*"[19] or that „[w]*ithout prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures*

[13] Art. 101 TFEU.
[14] *Ibidem*.
[15] Art. 102 TFEU.
[16] Art. 101 TFEU.
[17] M.F. Popa, *What the economic analysis of law can't do - pitfalls and practical implications,* Juridical Tribune no. 11/2021, pp. 81-94.
[18] Both previously discussed.
[19] Art. 122 point 1 TFEU.

appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy"[20].

The former can be considered a concession made to the specific situation of each member state, as opposed to the overall contemporary EU tendency to „*promote the application of uniform juridical solutions to different social and cultural contexts*"[21]

In a way related to the aforementioned second fold is also the proactive approach of another treaty disposition that institutes an obligation for the Union, in order to „*enable citizens of the Union, economic operators and regional and local communities to derive full benefit from the setting-up of an area without internal frontiers,* (…) [to] *contribute to the establishment and development of* ***trans-European networks*** *in the areas of transport, telecommunications and* ***energy infrastructures***"[22].

So, from what we stated in this subsection, it can be inferred that the EU has all the competence it needs in order to keep the energy market (and not only it) safe from agreements or behaviors that affect competition, while at the same time acting in order to facilitate the development of energy infrastructures enshrined in the primary law dispositions. However, in order to also ensure a satisfactory level of functionality on the energy market, more than simple interdictions are needed and active measures are a vital necessity. Therefore, in the following we will refer to those active measures that the Treaties provide a legal basis for.

2.2. The European Union's energy policy

Most of the aspects that can be considered relevant for the energy policy of the EU can be found in Title XXI of the Treaty on the Functioning of the European Unions, named *Energy*. As the previous example regarding competition, it also follows a two-folded approach.

First of all, it states a series of objectives for the EU energy policy and the overall ecological imperative, when stating that „[i]*n the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to: (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks*"[23].

All of the above are legal solutions derived not only from the market imperatives but, given their social and ecological dimensioned, can be considered an expression of the practical application of „*the values common to the European Union, in general, and to each democratic state in particular, as the foundation of economic and social progress and the growth [welfare] of their members*" [24]

Second, on the active side, the Treaty sets out certain obligations for the institutions to act, at the same time providing the necessary legal basis of the said action: „[w*]ithout prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1*[25]*. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions*"[26].

The Treaty also contains a specific limitation, imposed by the words „[s]*uch measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply*"[27].

As can be derived from this, the objective of the energy independence was, before the war in Ukraine, set to be „*achieved gradually, (in line) with the economic and political evolution at national and international level*"[28], but de sudden and catastrophic events triggered an almost complete EU-Russia economical and political breakup,

[20] Art. 122 point 2 TFEU.

[21] M.F. Popa, *Legal Taxonomies between Pragmatism and the Clash of Civilizations*, in Revista de Drept Public no. 1/2016, pp. 58-67.

[22] Art. 170 TFEU.

[23] Art. 194 TFEU.

[24] D.M. Marinescu, *Respecting equal opportunities - a guarantee for maintaining societal security in Romania and in the European Union,* in Proceedings of the „Romania in the New International Security Environment" Conference, University National Defense „Carol I", June 26, 2020, pp. 38-46.

[25] Previously stated.

[26] Art. 194 TFEU.

[27] *Ibidem*.

[28] O.M. Salomia, A. Mihalache, *Principiul egalității statelor membre în cadrul Uniunii Europene*, in Dreptul no. 1/2016, pp. 166-174.

which had a major impact on the EU energy supply, therefore conducting to a severe replacement of the oil and natural gas imports from the Russian Federation.

The two-fold approach would, however, be incomplete and would not reach its purpose in the absence of secondary law sources governing the detailed and often profoundly technical aspects of the energy sector – especially in the power and gas fields. Therefore, in order to have a decent understanding of how the EU can maintain a reasonable level of competition in these markets we must get down to the level of the Regulations and Directives that govern the right of access for third parties at the power and gas infrastructure.

3. Secondary law dispositions governing the access of third parties to the energy infrastructures

The fields of the energy market that have by far the heaviest impacts on the overall goods prices are the power and the gas fields. Both these fields share a particular trait: the infrastructure needed to provide power and natural gas is vast and both expensive to build and to maintain. Therefore, only the big operators, most of the times state-owned or previously state-owned have developed the infrastructure they need. As a consequence, in the absence of specific legal provisions, they could distort the competition by simply refusing the access of third parties to their infrastructure. This is exactly the kind of situation that made the EU intervention necessary and for which the Treaties have provided both the incentives and the legal basis that are necessary in order for the EU to act.

3.1. The power field

In the power field, the two main secondary law acts that govern the right to access by third parties to the energy infrastructure are the **Directive 2019/944 of the European Parliament and the Council of June 5, 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU**[29] (hereinafter called *The Power Directive*) and **Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity**[30] (hereinafter called *The Power Regulation*).

First of these acts, the Directive, aims, according to its preamble, to „[p]romot[e] *fair competition and easy access for different suppliers is of the utmost importance for Member States in order to allow consumers to take full advantage of the opportunities of a liberalized internal market for electricity*"[31]. However, „[i]*n order to foster competition and ensure the supply of electricity at the most competitive price, Member States and regulatory authorities should facilitate cross-border access for new suppliers of electricity from different energy sources as well as for new providers of generation, energy storage and demand response*"[32].

The Directive also „*aims to ensure affordable, transparent energy prices and costs for consumers, a high degree of security of supply and a smooth transition towards a sustainable low-carbon energy system*"[33]. In order to achieve this objective and the ones we stated before, „[i]*t lays down key rules relating to the organization and functioning of the Union electricity sector, in particular rules on consumer empowerment and protection, on open access to the integrated market, on third-party access to transmission and distribution infrastructure, unbundling requirements, and rules on the independence of regulatory authorities in the Member States*"[34].

With this view in mind, certain obligations are imposed to the Member States. One of them is that they „*ensure a level playing field where electricity undertakings are subject to transparent, proportionate and non-discriminatory rules, fees and treatment, in particular with respect to balancing responsibility, access to wholesale markets, access to data, switching processes and billing regimes and, where applicable, licensing*"[35].

Member states are obliged to „*ensure the implementation of a system of third-party access to the transmission and distribution systems based on published tariffs, applicable to all customers and applied objectively and without discrimination between system users.* [They are also to] *ensure that those tariffs, or the methodologies underlying their calculation, are approved* (…) *prior to their entry into force and that those tariffs,*

[29] OJ L 158/125 from 14.06.2019.
[30] OJ L 158 from 14.06.2019.
[31] Considerent (12) from the Preamble of the *Power Directive*.
[32] Considerent (13) from the Preamble of the *Power Directive*.
[33] Art. 1 of the *Power Directive*.
[34] *Ibidem*.
[35] Art. 3 *Power Directive*.

and the methodologies — where only methodologies are approved — are published prior to their entry into force"[36].

However, this does not mean that „[t]*he transmission or distribution system operator may* [not*] refuse access where it lacks the necessary capacity. Duly substantiated reasons shall be given for such refusal* (…), *and based on objective and technically and economically justified criteria. Member States or, where Member States have so provided, the regulatory authorities of those Member States, shall ensure that those criteria are consistently applied and that the system user who has been refused access can make use of a dispute settlement procedure. The regulatory authorities shall also ensure, where appropriate and when refusal of access takes place, that the transmission system operator or distribution system operator provides relevant information on measures that would be necessary to reinforce the network. Such information shall be provided in all cases when access for recharging points has been denied. The party requesting such information may be charged a reasonable fee reflecting the cost of providing such information"*[37].

Regulation (EU) 2019/943 of the European Parliament and of the Council of June 5, 2019 on the internal market for electricity does complete and circumstantiate some of the dispositions that can be found in the Directive. It has as the main objectives to *„set the basis for an efficient achievement of the objectives of the Energy Union and in particular the climate and energy framework for 2030 by enabling market signals to be delivered for increased efficiency, higher share of renewable energy sources, security of supply, flexibility, sustainability, decarbonization and innovation*; [to] *set* [a series] *fundamental principles for well-functioning, integrated electricity markets, which allow all resource providers and electricity customers non-discriminatory market access, empower consumers, ensure competitiveness on the global market as well as demand response, energy storage and energy efficiency, and facilitate aggregation of distributed demand and supply, and enable market and sectoral integration and market-based remuneration of electricity generated from renewable sources;* [to] *set fair rules for cross-border exchanges in electricity, thus enhancing competition within the internal market for electricity, taking into account the particular characteristics of national and regional markets, including the establishment of a compensation mechanism for cross-border flows of electricity, the setting of harmonized principles on cross-border transmission charges and the allocation of available capacities of interconnections between national transmission systems* [and to] *facilitate the emergence of a well-functioning and transparent wholesale market, contributing to a high level of security of electricity supply, and provide for mechanisms to harmonize the rules for cross-border exchanges in electricity"*[38].

In order to achieve these objectives, the Regulation sets up a number of principles *„regarding the operation of electricity markets Member States, regulatory authorities, transmission system operators, distribution system operators, market operators and delegated operators"*[39], amongst which can be found the one stating that *„market participants shall have a right to obtain access to the transmission networks and distribution networks on objective, transparent and non-discriminatory terms"*[40].

Ensuring equal access is vital to a balanced market, as stated in the dispositions imposing the obligation for the Member States to organize the energy markets *„in such a way as to* (…) *ensure non-discriminatory access to all market participants, individually or through aggregation, including for electricity generated from variable renewable energy sources, demand response and energy storage"*[41].

Almost the exact same principles are formulated in the secondary law sources that govern the gas market, as we will state in the following.

4. The natural gas field

Matters relating to the right of access for third parties to the gas infrastructures are enshrined in Directive 2009/73/EC of the European Parliament and of the Council of July 13, 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC[42] (hereinafter called *The Gas Directive*) and in Regulation (EC) no. 715/2009 of the European Parliament and of the Council of July 13, 2009 on conditions for

[36] Art. 6 *Power Directive*.
[37] *Ibidem*.
[38] Art. 1 *Power Regulation*.
[39] Art. 3 *Power Regulation*.
[40] Art. 3 letter (q) *Power Regulation.*
[41] Art. 6 *Power Regulation.*
[42] OJ L 211 from 14.08.2009.

access to the natural gas transmission networks and repealing Regulation (EC) no. 1775/2005[43] (hereinafter called *The Gas Regulation*).

The aforementioned Directive „*establishes common rules for the transmission, distribution, supply and storage of natural gas. It lays down the rules relating to the organization and functioning of the natural gas sector, access to the market, the criteria and procedures applicable to the granting of authorizations for transmission, distribution, supply and storage of natural gas and the operation of systems*”[44].

In order to achieve these aims, „[t] *he activity of gas transmission include*[s] *at least* (…) *granting and managing third-party access on a non-discriminatory basis between system users or classes of system users; the collection of all the transmission system related charges including access charges, balancing charges for ancillary services such as gas treatment, purchasing of services (balancing costs, energy for losses)*”[45].

In practically the same vein, the Regulation comes up with a series of definitions that clarify some of the terms used in both the Directive and in the Treaties themselves. For example, by *transmission*, the Regulation understands „*the transport of natural gas through a network, which mainly contains high-pressure pipelines, other than an upstream pipeline network and other than the part of high-pressure pipelines primarily used in the context of local distribution of natural gas, with a view to its delivery to customers, but not including supply*”[46], a definition that is of utmost importance for the whole gas market EU policy, as it sets the basis for the dispositions regarding the right of access.

The main objectives of the Regulation are to „*set*(…) *non-discriminatory rules for access conditions to natural gas transmission systems taking into account the special characteristics of national and regional markets with a view to ensuring the proper functioning of the internal market in gas;* [to]*set*(…) *non-discriminatory rules for access conditions to LNG facilities and storage facilities taking into account the special characteristics of national and regional markets;* (…) [or to] *facilitat*[e] the *emergence of a well-functioning and transparent wholesale market with a high level of security of supply in gas and providing mechanisms to harmonize the network access rules for cross-border exchanges in gas*”[47].

The aforementioned objectives translate into „*the setting of harmonized principles for tariffs, or the methodologies underlying their calculation, for access to the network, but not to storage facilities, the establishment of third-party access services and harmonized principles for capacity-allocation and congestion-management, the determination of transparency requirements, balancing rules and imbalance charges, and the facilitation of capacity trading*”[48].

The means of achieving these objectives are mainly stated in the obligations for the transmission system operators to „*ensure that they offer services on a non-discriminatory basis to all network users;* (…) [to] *provide both firm and interruptible third-party access services* (…) [and to] *offer to network users both long and short-term services*”[49].

In the same vein, the Liquified Natural Gas (LNG) operators are obliged to „*offer services on a non-discriminatory basis to all network users that accommodate market demand; in particular, where an LNG or storage system operator offers the same service to different customers, it shall do so under equivalent contractual terms and conditions;* [to] *offer services that are compatible with the use of the interconnected gas transport systems and facilitate access through cooperation with the transmission system operator; and* [to] *make relevant information public, in particular data on the use and availability of services, in a time-frame compatible with the LNG or storage facility users' reasonable commercial needs, subject to the monitoring of such publication by the national regulatory authority*”[50].

Apart from this, all the natural gas system operators are to „*provide both firm and interruptible third-party access services; the price of interruptible capacity shall reflect the probability of interruption;* [to] *offer to storage facility users both long and short-term services; and* [to] *offer to storage facility users both bundled and unbundled services of storage space, injectability and deliverability*”[51].

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[43] OJ L 158 from 14.06.2019.
[44] Art. 1 *Gas Directive.*
[45] *Ibidem*.
[46] Art. 2 *Gas Directive.*
[47] Art. 1 *Gas Regulation*.
[48] *Ibidem*.
[49] Art. 14 *Gas Regulation*.
[50] Art. 15 *Gas Regulation*.
[51] *Ibidem*.

5. Conclusions

The whole point of the EU competition and energy policies seems to be the creation of a harmonized, functioning and resilient space, characterized by *„ties that go beyond the framework of the nation-state, (...) voluntary adhesion, (...)* [and] *peaceful transformation"*[52] This outstandingly ambitious objective has always been torn apart between the states' ambitions and legitimate objectives of following their own interests in energy and, moreover, in economy areas and the need to follow common policies. This former need has only amplified over time, along with and as an effect of *„the multiplication of the areas which fall under the exclusive competences of the European Union and of those shared between the European Union and the Member States, correlated with the principles of subsidiarity, proportionality, conferral and loyal cooperation"*[53]. Such an amplification is at the very origin of the multiple layered approach that we have seen has been followed by the Union in the competition and energy markets. The very objective of this complex approach is centered both on the enterprises and on the consumers. The consumers stand to gain from an economic environment characterized both by free and by fair competition, as free competition can sometimes be less fair, as enterprises tend to reach certain agreements that impede the normal competition that can be found on an ideal market. However, in order to maintain both a decent level of prices and a fair level of innovation and quality of goods and services (both of them contributing to the customers' satisfaction), competition must be kept fair, although this might mean that it is not completely free (anti-competition agreements being forbidden).

Therefore, the Union action in the competition field is not merely an option but a necessity. This is all the truer in the field of energy, and especially in the power and natural gas areas, as both the production and the distribution of power and gas are complex, expensive industries, prone to concentration and anticompetition agreements. So, the states as authors of the Treaties have granted it the power to act in both fields. They have done this by, on the one hand, including certain interdictions in the Treaties and by granting the EU the power to act not only to put them in practice but also to develop common policies consisting in active measures. In its turn, the EU has acted by the means of secondary law sources, namely Regulations and Directives, thus creating an integrated and until now functional competition and energy space. However, the war in Ukraine and the sudden and almost total breakup from what we now perceive as the overwhelming European dependence on the oil and gas imported from Russia has created an energy shock on European markets, in a way similar to the oil shocks in the 1970s, thus putting the whole EU policies in the competition and energy fields to a test, as they are now called to act for maintaining decent overall prices and decent power and gas prices in particular. This is exactly where the Member States are also called to act. As in each and every one of them „[t]*he integration into the European Union,* (...) *has generated a series of* [profound and probably irreversible] *changes*"[54], they are now tied to each other and a faulty conduct by one of them can have disastrous consequences of all, thus making the current situation a true and thorough test of the efficacity of the whole European project.

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[53] A. Fuerea, *Permanența actualității reformei sistemului jurisdicțional al Uniunii Europene*, in Dreptul no. 4/2017, pp. 155-168.

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RUSSIA'S EXCLUSION FROM THE REGIONAL HUMAN RIGHTS MECHANISM OR HOW HUMAN RIGHTS ARE ENDANGERED IN A SENSITIVE INTERNATIONAL CONTEXT?!

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Abstract

The Russian Federation and the ECtHR have never had a very „friendly" relationship; on the contrary, in some periods the relationship between them has even been tense.

By joining the Council of Europe in 1996, the Russian Federation also accepted the compulsory jurisdiction of the ECtHR after ratifying the Convention in 1998. After a tumultuous relationship of more than 20 years characterised by non-compliance and rhetorical attacks, in the context of the „military operation on Ukraine" which began in February 2022, the Russian Federation notified the Secretary General on 15.03.2022 of its withdrawal from the Council of Europe and its intention to denounce the ECtHR.

Moreover, as of 16.03.2022, the Russian Federation was excluded from the Council of Europe as a result of its aggression against a member state of the organisation - Ukraine, for which reason the Russian state ceased to be a High Contracting Party to the ECHR as of 16.09.2022.

This study will attempt to analyse the legal consequences of this exclusion. After all, who „loses" and who „gains" from this exclusion?

Keywords: *exclusion, ECHR, ECtHR, human rights, Russia, Ukraine.*

1. Introductory remarks

The European Court of Human Rights (hereinafter „***the Court***" or „***ECtHR***") is the international jurisdiction created within the Council of Europe, specialising in human rights litigation, and is recognised as the most highly regarded regional court in the world in this field.

With subject-matter jurisdiction to examine individual applications and inter-State applications concerning violations of the provisions of the European Convention on Human Rights and the additional protocols to the Convention (hereinafter „***ECHR***"[1]), the Court is entrusted each year with the adjudication of an impressive number of applications.

Thus, according to the most recent general statistics communicated by the Court[2], **in 2022**, **45,500 applications** were assigned to a judicial formation, and as of 28.02.2023 there were **77,400 applications pending** before the Court's judicial formations, including **16,700 applications against the Russian Federation**[3].

In addition to the fact that the Court's judgments sentencing Member States require the payment of sums of money by way of **just satisfaction**, in some cases the Court also orders **the change of the applicable domestic law** to comply with the provisions of the Convention or its protocols (*e.g.*, through the pilot judgment procedure

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[1] Please see, for instance, C. Bîrsan, *Convenția europeană a drepturilor omului: comentariu pe articole* (*European Convention on Human Rights: Commentary per Articles*, C.H. Beck Publishing House, Bucharest, 2010, L.-C. Spătaru-Negură, *Protecția internațională a drepturilor omului. Note de curs* (*International Protection on Human Rights. Course Notes*), Hamangiu Publishing House, Bucharest, 2019, p. 116 *et seq*.

[2] Please see the statistics available at *https://www.echr.coe.int/Documents/Stats_annual_2022_ENG.pdf*.

[3] Please see the statistics available at *https://www.echr.coe.int/Documents/Stats_pending_month_2023_BIL.PDF*.

- see the *Maria Atanasiu and others v. Romania*[4], *Rezmiveș and others v. Romania*[5], *Burdov v. Russia (no. 2)*[6], *Gerasimov and Others v. Russia*[7]).

The Russian Federation and the ECtHR **have never had a very „friendly" relationship**, but, on the contrary, they have even had a tense relationship at times.

Having joined the Council of Europe in 1996, under art. 59 para. (1) of the Convention, the Russian Federation also accepted the compulsory jurisdiction of the Court after it ratified the Convention in 1998.

To get an idea of the extent of **the Court's burden with regard to the Russian Federation**, it should be noted that as regards the year 2022, the Court:

- examined **6,183 applications**[8] - of which 4,424 were declared inadmissible or struck out;
- rendered **384 judgments** on 1,759 applications of which **374 found at least one violation** of the Convention[9].

After a **tumultuous relationship** of more than 20 years characterised by non-compliance and rhetorical attacks, in the context of the „military operation on Ukraine" which started in February 2022, **the Russian Federation notified the Secretary General on 15.03.2022 of its withdrawal from the Council of Europe and its intention to denounce the Convention.**

On **15.03.2022**, at an emergency session, the Parliamentary Assembly of the Council of Europe adopted Opinion no. 300[10] stating that **the Russian Federation should be suspended from the Council of Europe** because of the „aggression against Ukraine".

Considering that the action of the Russian Federation is **(i)** a violation of the UN Charter, **(ii)** „a crime against peace" under the Charter of the Nuremberg Tribunal, **(iii)** an „aggression" under the UN General Assembly Resolution 3314 (XXIX) adopted in 1974 and **(iv)** a serious violation of art. 3 of the Statute of the Council of Europe, **the Parliamentary Assembly condemned in the strongest terms the Russian state's aggression against Ukraine.**

The Parliamentary Assembly underlined **the very sensitive context of this situation**, stating that: *„The Assembly deplores that, despite the many appeals to cease the hostilities and to comply with international law, the Russian leadership has persisted in its aggression, escalating the violence in Ukraine and making threats should other States interfere. Through its attitude and actions, the leadership of the Russian Federation poses a blatant menace to security in Europe, following a path which also includes the act of military aggression against the Republic of Moldova and in particular the occupation of its Transnistrian region, the act of military aggression against Georgia and the subsequent occupation of two of its regions in 2008, the illegal annexation of Crimea and the Russian Federation's role in eastern Ukraine, which culminated in the illegal recognition of the self-proclaimed republics of Donetsk and Luhansk as „independent States."*[11].

It was obvious that, in the context of aggression against Ukraine, **the Russian Federation could no longer be tolerated within the Council of Europe**, as its actions[12] **violated fundamental values and even the spirit of this organisation and of the Convention.**

We can say that the „farce" of representing a democratic society that respects human rights had gone too far.

On **16.03.2022**, by Resolution CM/Res (2022)2, **the Committee of Ministers decided that the Russian Federation should cease to be a member state.** Thus, as of **16.03.2022**, as a result of its aggression against

[4] ECtHR, Grand Chamber, Judgment of 12.10.2010, app. no. 30767/05 and no. 33800/06, available at *https://hudoc.echr.coe.int/fre?i=001-100989*.

[5] ECtHR, Fourth Section, Judgment of 25.04.2017, app. no. 61467/12, no. 39516/13, no. 48231/13 and no. 68191/13, available at *https://hudoc.echr.coe.int/fre?i=001-173105*.

[6] ECtHR, First Section, Judgment of 15.01.2009, app. no. 33509/04, available at *https://hudoc.echr.coe.int/eng?i=001-90671* – the first judgment in the pilot procedure against Russia concerning non-execution or delayed execution of final domestic judgments.

[7] ECtHR, First Section, Judgment of 01.07.2014, app. no. 29920/05, no. 3553/06, no. 18876/10, no. 61186/10, no. 21176/11, no. 36112/11, no. 36426/11, no. 40841/11, no. 45381/11, no. 55929/11 and no. 60822/11, available at *https://hudoc.echr.coe.int/eng?i=001-145212*.

[8] The number for 2020 was even more significant – 10,163 applications were examined of which 6,509 have been declared inadmissible or struck out. Only in 570 cases judgments were given.

[9] Please see *https://www.echr.coe.int/documents/cp_russia_eng.pdf*.

[10] Please see *https://pace.coe.int/en/files/29885/html*.

[11] Please see *https://pace.coe.int/en/files/29885/html*.

[12] For example, attacks against civilians, indiscriminate use of artillery, rockets and bombs, attacks on humanitarian corridors intended to allow civilians to escape from besieged areas or towns, hostage taking, reckless attacks by Russian armed forces on Ukrainian nuclear facilities.

another member state of the organisation - Ukraine, **the Russian Federation was excluded from the Council of Europe**, which is why the Russian state ceased to be a High Contracting Party to the ECHR as of **16.09.2022**.

On **22.03.2022**, the ECtHR adopted a resolution[13] on the **consequences of the termination of the Russian Federation's membership of the Council of Europe**.

2. What are the legal consequences of this exclusion? Who wins and who loses from such a duel?

We think **the answer** to these questions **is predictable**. Thus, it is indisputable that, first and foremost, **the victims of human rights violations by the Russian Federation lose out** – the victims in the present or in the near past - who could have referred the matter to the Court, so that they have lost the chance of an effective remedy in an international jurisdiction to examine a complaint against the Russian State for violation of a right guaranteed by the Convention.

Therefore, some **140 million Russian citizens will be deprived of the legal protection offered by the Convention.**

From a statistical point of view, the Court's figures on the Russian Federation **for the period 1998-2022**[14] could be summarised as follows:

- 3,500 judgments;
- 3,317 judgments finding at least one violation out of which:
  - 363 judgments on right to life – deprivation of life;
  - 419 judgments on lack of effective investigation under Article 2 of the Convention;
  - 89 judgments on prohibition of torture;
  - 1,190 judgments on inhuman or degrading treatment;
  - 291 judgments on lack of effective investigation under Article 3 of the Convention;
  - 45 judgments on conditional violations;
  - 1 judgment on prohibition of slavery and forced labour;
  - 1,494 on judgments on right to liberty and security;
  - 1,076 judgments on right to a fair trial
  - 209 judgments on lengths of proceedings;
  - 170 judgments on non-enforcement;
  - 4 judgments on no punishment without law;
  - 395 judgments on right to respect for private and family life;
  - 20 judgments on freedom of thought, conscience and religion;
  - 139 judgments on freedom of expression;
  - 128 judgments on freedom of assembly and association;
  - 820 judgments on right to an effective remedy;
  - 33 judgments on prohibition of discrimination;
  - 700 judgments on protection of property;
  - 3 judgments on right to education;
  - 9 judgments on right to free elections;
  - 10 judgments on right not to be tried or punished twice;
  - 180 judgments on other articles of the ECHR;
- 121 judgments finding no violation;
- 16 friendly settlements/striking-out judgments;
- 44 other judgments (just satisfaction, revision, preliminary objections, lack of jurisdiction).

Also from a statistical point of view, the Court's figures on the Russian Federation **for 2022**[15] could be summarised as follows:

- 384 judgments;
- 374 judgments finding at least one violation out of which:
  - 14 judgments on right to life – deprivation of life;

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[13] Please see *https://echr.coe.int/Documents/Resolution_ECHR_cessation_membership_Russia_CoE_ENG.pdf.*
[14] Available at *https://www.echr.coe.int/Documents/Stats_violation_1959_2022_ENG.pdf.*
[15] Available at *https://www.echr.coe.int/Documents/Stats_violation_2022_ENG.pdf.*

- 13 judgments on lack of effective investigation under art. 2 ECHR;
  - 6 judgments on prohibition of torture;
  - 198 judgments on inhuman or degrading treatment;
  - 18 judgments on lack of effective investigation under art. 3 ECHR;
  - 2 judgments on conditional violations;
  - 195 on judgments on right to liberty and security;
  - 88 judgments on right to a fair trial
  - 2 judgments on lengths of proceedings;
  - 4 judgments on non-enforcement;
  - 1 judgment on no punishment without law;
  - 98 judgments on right to respect for private and family life;
  - 6 judgments on freedom of thought, conscience and religion;
  - 25 judgments on freedom of expression;
  - 49 judgments on freedom of assembly and association;
  - 119 judgments on right to an effective remedy;
  - 6 judgments on prohibition of discrimination;
  - 12 judgments on protection of property;
  - 2 judgments on right to free elections;
  - 3 judgments on right not to be tried or punished twice;
  - 17 judgments on other articles of the ECHR;
- 6 judgments finding no violation;
- 2 friendly settlements/striking-out judgments;
- 2 other judgments (just satisfaction, revision, preliminary objections, lack of jurisdiction).

And **the Court loses**, because in this geo-political crisis it can no longer prevail over the Russian Federation in the field of human rights protection. Secondly, in practice, European jurisdiction itself can no longer defend the **„conscience of Europe"** in the field of human rights protection in a state such as the **Russian Federation, as the founders of the Council of Europe saw it, with Russia increasingly isolating itself from the democratic world. The Court is thus threatened in terms of its authority and legitimacy** (like other international jurisdictions). Thus, the victims of the Russian Federation of the rights and freedoms guaranteed by the Convention are, on the one hand, Ukrainian or foreign citizens on Ukrainian territory and, on the other, Russian or foreign citizens on Russian territory.

Ukraine also loses, leaving it only with the possibility of bringing an action before the International Court of Justice, which it has done.

So who wins, obviously on a pejorative level in the public international law? Certainly the Russian Federation, which has not been thwarted in its plans by any international sanctions imposed since the beginning of the „aggression against Ukraine". Indeed, neither the Council of Europe nor the Court has been able to stop the Russian Federation in its aggression or to protect its victims in Ukraine, in the Russian Federation or elsewhere. What has been achieved, however, is that at the plenary session on 22.03.2022, a ruling was adopted emphasising that the ECtHR will have jurisdiction over all applications against the Russian Federation lodged before 16.09.2022 (the official date of withdrawal[16] according to a poorly reasoned ECtHR ruling), as well as applications already pending and current at that time.

Thus, **the ECHR prevented withdrawal with immediate effect** (which the Russian Federation would have wanted) **and extended its temporal jurisdiction.**

What is **sad and unfair** is that, even if the ECtHR condemns Russia, it is **extremely unlikely that the Russian Federation will comply with the Court's rulings in the period ahead.** We believe, however, that those judgments could at least represent recognition of the violated rights of the victims of the Russian Federation, which would represent „just satisfaction" from a moral point of view. It is unimaginable how in the years 2022-2023 there can still be **flagrant violations of public international law**, as there are strong indications that **war crimes and serious human rights violations may have been committed in Ukraine**. For people who are dying or whose lives are endangered on a daily basis, **the exclusion of the Russian Federation is a lost opportunity to have the possibility to defend their Convention rights before the Court.**

[16] Even on the Court's website there is this information that on 16.09.2022 the Russian Federation ceased to be a party to the ECHR.

The basis for the termination of the Russian Federation's membership is art. 58 para. (3) ECHR which provides that a state which leaves the Council of Europe loses its status as a party to the Convention. In our view, art. 58 para. (3) ECHR is *lex specialis*, a „dormant" provision.

And in 2014, after the annexation of Crimea, the voting rights of the Russian Federation in the Parliamentary Assembly of the Council of Europe were suspended. In July 2017, in protest, the Russian Federation stopped paying its full contribution, threatening to withdraw from the Council of Europe if its voting rights were not restored. In return, Ukraine, which had lost control over a considerable part of its territory, also threatened to withdraw from the organisation if the Russian Federation's rights were restored.

The Russian Federation's bad faith could also be deduced from the late ratification of Protocol 14 to the Convention in 2010, which allowed for the simplification of the procedure before the ECtHR and the resolution of delays in the examination of certain categories of cases before the Court. The Russian Federation has also paid the small amounts imposed by the ECtHR, but has not proceeded to change the legislation as required.

The *Yukos*[17] case was an important precedent for the Russian Federation as it was ordered by the Court to pay €1.9 billion in compensation but refused to pay it in 2017.

The justification for the non-payment (*i.e.*, non-compliance) was the Duma's amendment to the Constitution, allowing the Russian Constitutional Court to decide not to implement rulings of the international human rights jurisdiction if they are deemed unconstitutional.

Despite vehement criticism from the Venice Commission that this amendment was incompatible with the obligation in art. 46 ECHR, nothing has changed internally within the Russian constitutional system.

3. Final remarks

Although the Russian Federation ceased to be a member of the Council of Europe as of 16.03.2022 [by Resolution CM/Res(2022)2], and a party to the Convention as of 16.09.2022, in light of its continuing obligation to implement the Court's judgments, the Department for the Execution of Judgments of the European Court of Human Rights has continued to write to the Russian authorities to request information on cases, action plans, reports and to direct communications received under Rule 9.

On the other hand, as of 03.03.2022, **the Russian Federation ceased all communication with the Secretariat**. Despite the fact that according to para. 7 of Resolution CM/Res(2022): *„The Russian Federation is to continue to participate in the meetings of the Committee of Ministers when the latter supervises the execution of judgments with a view to providing and receiving information concerning the judgments where it is the respondent or applicant State, without the right to participate in the adoption of decisions by the Committee nor to vote*."[3], **there was no participation of the Russian Federation in the human rights meetings of the Committee of Ministers.**

On the other hand, we point out that **on 11.06.2022, the Russian authorities enacted a new law on the execution of the ECtHR judgments.**

As the Committee of Ministers pointed out, this law: *„because of the „procedurally incorrect exclusion" of the Russian Federation from the Council of Europe, the Committee of Ministers cannot insist upon the obligations on Russia flowing from the Council of Europe's legal instruments, with the consequence that judgments of the European Court which became final after 15 March 2022 shall not be enforced, nor shall they serve as a ground for the reopening of proceedings. Just satisfaction awarded may be paid until 1 January 2023 for judgments which became final before 15 March 2022. However, payment will be made in roubles and only to bank accounts in Russia*."[18].

Even at the press conference held by the President of the Court at the opening of the judicial year 2023, the Russian Federation was the first topic addressed by **the President of the European Court of Human Rights Siofra O'Leary**, who stressed that the extremely serious events in Europe, such as the invasion of Ukraine, Russia's expulsion from the Council of Europe and the termination of its status as a High Contracting Party to the Convention, had produced considerable legal repercussions for the Court[19].

[17] Please see ECtHR, Former First Section, Judgment of 31.07.2014 in the app. no. 14902/04 *Oao Neftyanaya Kompaniya Yukos v. Russia*, available at *https://hudoc.echr.coe.int/fre?i=001-145730*.

[18] Please see the Strategy paper regarding the supervision of the execution of cases pending against the Russian Federation available at *https://rm.coe.int/0900001680a91beb*.

[19] Please see also the Court's press release of 26.01.2023 on the press conference held by the President of the Court - *https://hudoc.echr.coe.int/eng-press?i=003-7551718-10375614*.

The Russian Federation has repeatedly accused the ECtHR of having an **anti-Russian bias**, one argument being the use of the large number of applications filed with the Court each year[20].

What the Russian Federation does not want to admit is that **this very large number of applications stems from the systematic failure of the Russian state to respect the human rights** laid down in the Convention and the additional protocols, and to implement viable legislative or administrative solutions that would effectively and beneficially[21] change domestic legal provisions declared contrary to the ECHR by the Court. An analysis of the Court's case-law shows that the European Court has found systematic or repeated violations of human rights in the territory of the Russian Federation.

Not even **the Kremlin's defiant attitude** each time the Russian Federation was condemned by the European Court of Human Rights did not help either and did not fit in with the fair play required by membership of such a human rights protection mechanism, but, on the contrary, supported the anti-ECtHR campaign it waged.

But although the Russian Federation was very vocal when it was in the ECtHR system, although it was a critical voice of this system of protection, although it too often violated the principles that govern the whole architectural system of the Council of Europe, **we believe that exclusion from the ECtHR (and from the Council of Europe) is now a loss for the effective protection of human rights at the regional level.**

On the principle of **„better with evil than without evil"**, when it was under the European human rights protection system, there was, however, a certain „abstention" (not total) on the part of the Russian authorities, in order not to be sanctioned even on a „conveyor belt", which no longer exists today.

Thus, **for the millions of people in the Russian Federation, in Ukraine and even in neighbouring states, this reality is very sad**, and the words of the Secretary General of the Council of Europe are true: *„Russia's aggression against Ukraine continues to bring pain and suffering to millions of people in Ukraine and all over Europe. We once again urge the Russian leadership to immediately stop the war in Ukraine and to put an end to the ongoing repression of its own people."*[22].

Moreover, the official underlined that: *„Under the terms of the Convention, the Russian Federation has a binding legal obligation to implement all judgments and decisions from the European Court of Human Rights concerning its actions or omissions occurring up until 16 September 2022. The Council of Europe will continue to do its utmost to ensure justice and accountability for the people involved."*[23].

Although the Russian authorities no longer communicate with the Committee of Ministers of the Council of Europe, information on the situation in the Russian Federation is communicated by non-governmental organisations present there. This information „remains a vital resource to enable the Committee to keep up to date with the situation in the Russian Federation."[24].

At the same time, despite the „departure" of the Russian Federation from the Council of Europe, on the one hand, **the Russian Federation remains a member state of the UN and**, on the other hand, **a contracting state to several conventional human rights instruments** adopted within the framework of the UN, which have their own protection mechanism.

We emphasise that **certain of these mechanisms are already seised** of issues which have been raised in cases considered by the Court and which are pending before it.

Thus, we exemplify with the following situations concerning the Russian Federation:

- group of cases *Khashiev*[25] - enforced disappearances in Chechnya and the failure of the Russian authorities to investigate or search for missing persons => some of these issues fall within the competence of the United Nations Working Group on Enforced or Involuntary Disappearances[26];
- group of cases *Volodina*[27] - shortcomings in the protection of women against domestic violence => some

[20] According to official statistics, the Russian Federation ranked first in the number of applications per State Party to the Convention in 2021 - there were about 17,000 pending applications, but now, due to its exclusion from the European mechanism, it has been overtaken by Turkey – please see *https://www.echr.coe.int/Documents/Stats_pending_month_2023_BIL.PDF*.

[21] A fact recognised by the Court, please see for example *https://hudoc.exec.coe.int/eng?i=004-47097*.

[22] Please see *https://www.coe.int/ca/web/portal/full-news/-/asset_publisher/y5xQt7QdunzT/content/secretary-general-millions-of-russians-no-longer-protected-by-the-european-convention-on-human-rights*.

[23] *Ibidem*.

[24] Please see the Strategy paper regarding the supervision of the execution of cases pending against the Russian Federation available at *https://rm.coe.int/0900001680a91beb*.

[25] Please see *https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-4436591-5335890&filename=003-4436591-5335890.pdf*.

[26] Please see *www.ohchr.org*.

[27] Please see *https://hudoc.echr.coe.int/eng?i=001-194321 and https://hudoc.echr.coe.int/fre?i=001-211794*.

of these issues fall within the competence of the United Nations Committee on the Elimination of Discrimination against Women[28].

Despite these realities, **our sincere hope is that one day** (not far from the time of writing), **(i)** the Russian Federation will once again respect the sovereignty, independence and territorial integrity of its neighbouring states, **(ii)** it will return to democracy and respect human rights, and that **(iii)** Russian citizens or persons under its jurisdiction will once again be protected by the ECHR and its protocols and be able to exercise their fundamental rights.

In a modern world such as the one we live in, **actions such as those of the Russian Federation only set us back from the path of normal and healthy social development**, **seriously violating both individual rights** such as the right to life, the right not to be subjected to torture and ill-treatment, the right to a healthy environment, the right to privacy, **and collective rights** such as the right to development, the right to peace and the right to the common heritage of humanity.

Only one state has withdrawn from the Council of Europe in the past: in 1969, Greece, during the colonial regime, but in 1974 it was readmitted, as the Council of Europe's values had returned to normal.

Thus, although the future looks pessimistic, we believe that we must remain optimistic.

From this point of view, we can only wait and see **how and when the Russian Federation will stop the path it started** on 24 February 2022... or **who and when will succeed in stopping it and help (determine) it to return to the path of democracy?!**

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[28] Please see *www.ohchr.org*.

TO BEE OR NOT TO BE! DEFINE AND DEFEND IN CJEU ENVIRONMENTAL CASE-LAW

Alina Mihaela CONEA[*]

Abstract

The present paper aims to draw attention to the vital role the bees are playing. In a way, the bees are keeping the world together, in an enormous well-built and well-adjusted hive. The bees are everywhere. Even in the law, even in the CJEU case-law. These cases offer the court the opportunity to define some relevant legal concepts on apiculture and environmental law and to defend the equilibrium between the markets and the protection of the environment. Besides, one of the key principles in EU environmental law is the precautionary principle, which is regarded as a complex and flexible principle, that operates in a networked rather than hierarchical manner. The Court has had the chance to expand on the concept of the precautionary principle in a few cases relating to bees. First, the paper will outline the cases in which the CJEU defined the legal concepts of honey, pollen, raw wax, and emissions in the environment. Second, the paper will examine cases in which the Court defended biodiversity by utilizing internal market tools or the precautionary principle. In a threaten ecosystem it seems like the European court is bee-friendly.

Keywords: *bees, CJEU case-law, environment, precautionary principle, pesticides, honey*

1. Introduction

We all have two things firmly ingrained in our minds when it comes to bees: first, they sting, and second, they make honey. The bee responsible for these firm ideas is, of course, *Apis mellifera*, the hive- or honey-bee[1].

But there is something more out there.

The majority of cultivated and wild plants depend on animals, known as pollinators, to transfer pollen. Animal pollination plays a vital role as a regulating ecosystem service in nature. Globally, nearly 90 per cent of wild flowering plant species depend, at least in part, on the transfer of pollen by animals. Many animals are considered important pollinators: bats, butterflies, moths, birds, flies, ants, non-flying mammals and beetles. Bees are the most important. There are approximately 20,000 identified bee species worldwide. A few species of bees are widely managed by humans, including the western honey bee (*Apis mellifera*), the eastern honey bee (*Apis cerana*), some bumble bees, some stingless bees and a few solitary bees[2].

Land-use change, intensive agricultural management and pesticide use, environmental pollution, invasive alien species, pathogens and climate change pose significant threats to the abundance, diversity, and health of pollinators. These threats put societies and ecosystems at risk.

The bees were taken several times to the CJEU.

These cases offer the court the opportunity *to define* some relevant legal concepts on apiculture and environmental law and *to defend* the equilibrium between the markets and the protection of the environment.

2. To define

2.1. Honey, pollen and genetically modified organisms (GMO)

Honey is, according to Honey Directive[3], „the natural sweet substance produced by *Apis mellifera* bees from the nectar of plants or from secretions of living parts of plants or excretions of plant-sucking insects on the living parts of plants, which the bees collect, transform by combining with specific substances of their own, deposit, dehydrate, store and leave in honeycombs to ripen and mature".

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[1] Nixon, G. E. J. The world of bees. London: Hutchinson, 1954.

[2] IPBES (2016). The assessment report of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services on pollinators, pollination and food production. S.G. Potts, V. L. Imperatriz-Fonseca, and H. T. Ngo (eds). Secretariat of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, Bonn, Germany. 552 pages.

[3] Council Directive 2001/110/EC of 20.12.2001 relating to honey, OJ L 10, 12.1.2002, p. 47-52.

In the case ***Bablok***[4] the Court had to decide whether the presence of pollen from a genetically modified maize in the beekeepers' apicultural products, such as honey and pollen, makes those products no longer marketable or fit for consumption.

In 1998, Monsanto Europe obtained authorization to place genetically modified MON 810 maize on the market, which contains a gene from the soil bacterium Bacillus thuringiensis (Bt) that excretes Bt toxins in maize plants. These toxins help to combat corn borer caterpillars, a variety of butterfly that is a harmful maize parasite and the larvae of which, in the event of infestation, weaken the growth of maize plants.

However, in 2009, the cultivation of MON 810 maize was prohibited in Germany due to safety concerns by the German Federal Office for Consumer Protection and Food Safety, which ordered the provisional suspension of the marketing authorization. Freistaat Bayern owns various plots of land on which MON 810 maize has been cultivated for research purposes, and it does not rule out the possibility of resuming cultivation of that crop once the prohibition in force throughout Germany expires.

Mr. Bablok was an amateur beekeeper who produced honey both for sale and for his own personal consumption in the vicinity of the plots of land owned by Freistaat Bayern. In 2005, MON 810 maize DNA and transgenic proteins were detected in the maize pollen harvested by Mr Bablok in beehives. Additionally, very small amounts of MON 810 maize DNA were detected in a number of samples of Mr Bablok's honey. As a result, an application was made for a declaration that the apicultural products are no longer marketable or fit for consumption.

The national court upheld the application[5], stating that the honey and pollen-based food supplements were foods which required authorisation, and therefore could not be placed on the market without such authorisation under relevant EU regulations. Monsanto Technology, Monsanto Agrar Deutschland, and Freistaat Bayern appealed against this decision, arguing that Regulation no. 1829/2003 was not applicable to pollen from the MON 810 strain of maize found in honey or used as a food supplement.

The case was referred to the CJEU, which was asked to interpret relevant EU regulations and determine whether pollen from MON 810 maize found in honey or used as a food supplement constitutes a GMO.

In answer to this question, the Court, sitting as the Grand Chamber, clarifies first the notions of *honey and of GMO.*

As regards the question whether the pollen is a genetically modified organism, the Court will clarify the concept of GMO. The Court consider that the concept of a GMO is to be read as „meaning that a substance such as pollen derived from a variety of genetically modified maize, which *has lost its ability to reproduce and is totally incapable of transferring the genetic material* which it contains, no longer comes within the scope of the concept"[6] of organism and, accordingly to the concept of „organism".

The Court consider that `pollens are solid particles actually derived from honey collection, partly due to bees but mainly due to the centrifugation carried out by the beekeeper`. Therefore, `*pollen is not a foreign substance or impurity in honey, but rather a normal component of honey*`. According to the intention of the Union legislature, the pollen `cannot in principle be removed from it, even if the frequency with which it is incorporated and the quantities in which it is present in honey are attributable to certain random factors arising during production`.

The Court concludes that the pollen must be regarded as a substance which is used in the manufacture or preparation of a foodstuff and still present in the finished product and must therefore also be classified as an 'ingredient'[7] within the meaning of art. 2.13 of Regulation no. 1829/2003[8] and art. 6(4)(a) of Directive 2000/13[9].

Consequently, products such as honey containing such a pollen constitute 'food … containing ingredients produced from genetically modified organisms'[10].

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[4] CJEU, Grand Chamber, Judgment of 06.09.2011, *Karl Heinz Bablok and Others v. Freistaat Bayern*, Case C-442/09, ECLI:EU:C:2011:541.

[5] On the procedure in front of CJEU, see: A. Fuerea, *Dreptul Uniunii Europene. Principii, actiuni,* libertăți, Universul Juridic Publishing House, Bucharest, 2016, pp. 95-111.

[6] CJEU, Grand Chamber, Judgment of 06.09.2011, *Bablok v. Freistaat Bayern*, Case C-442/09, para. 62.

[7] *Idem*, para. 77-79, 92, operative part 2.

[8] Regulation (EC) no. 1829/2003 of the European Parliament and of the Council of 22.09.2003 on genetically modified food and feed (text with EEA relevance), OJ L 268, 18.10.2003, p. 1-23.

[9] Directive 2000/13/EC of the European Parliament and of the Council of 20.03.2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs implicitly repealed by Regulation (EU) no. 1169/2011.

[10] CJEU, Grand Chamber, Judgment of 06.09.2011, *Bablok v. Freistaat Bayern*, Case C-442/09, operative part 2.

2.2. Raw beewax

According to *International Convention on the Harmonized Commodity Description and Coding System* [11] '*Beeswax* is the substance with which bees build the hexagonal cells of the combs in their hives. In the natural state it has a granular structure and is light yellow, orange or sometimes brown, with a particularly agreeable smell; when bleached and purified, it is white or faintly yellow with a very slight smell. It is used, inter alia, for the manufacture of candles, waxed cloth or paper, mastics, polishes, etc. (…) Beeswax and other insect waxes are classified in this heading whether in the raw state (including in natural combs), or pressed or refined, whether or not bleached or coloured.'

The Court was called to interpret the meaning of *raw beewax*. The case ***KAHL***[12]questioned whether the Combined Nomenclature (CN) must be interpreted as meaning that beeswax which has been melted down, and from which foreign bodies have been mechanically removed in part during the melting process, then solidified to form blocks or slabs, falls under subheading 15219091 of the CN, which covers *'raw' beeswax*, or under subheading 15219099 thereof, which covers *'other' beeswax.*

The case KAHL concerns the tariff classification of *beeswax* imported into the European Union. KAHL sought to classify the wax as `*raw*` under subheading 15219091of the Combined Nomenclature (CN)[13], which provides for exemption from customs duties. The Principal Customs Office, Hanover, classify the goods under subheading `other` of the CN, which attracts a customs duty of 2.5%. KAHL appealed the decision, claiming that the classification of beeswax under the former subheading should not depend on the level of impurities it contains. The referring court describes the goods at issue as beeswax which has been melted down and coarsely filtered in the exporting State then solidified before being exported, and which consists of melted pieces of approximately 15 × 5 centimetres (cm) and fragments of approximately 7 × 4 cm, which are easy to cut, honey yellow in colour and smell like beeswax, with cracks and structures that are created when melted wax solidifies, and contain a number of dark impurities which adhere to the exterior. The referring court sought a preliminary ruling from the Court of Justice of the European Union on whether must be applied in the language version in which the word "melted" appears and whether "raw" beeswax from which some foreign bodies have been mechanically separated during the process of melting it down should be classified under subheading 15219091 (Raw -This subheading includes waxes in natural combs).

The case ***Roeper***, involves a company that imports beeswax into the European Union for resale to undertakings in the cosmetic, pharmaceutical, and food industries. The Principal Customs Office in Hamburg charged Roeper a customs duty of EUR 2614 for 800 bags of beeswax that were classified as "other" beeswax under subheading 15219099 of the Combined Nomenclature (CN) by the customs office. Roeper argued that the goods should be classified as „raw" beeswax under subheading 15219091 of the CN, as the term "melted" in the Explanatory Notes to subheading 15219099 also includes subsequent processing involving the purification and separation of wax components. The Principal Customs Office, Hamburg, disagreed and maintained its position that the goods fell under subheading 15219099 of the CN. The Finanzgericht Hamburg stayed the proceedings and referred questions to the Court of Justice for a preliminary ruling. The statement of reasons for the request for a preliminary ruling in Case C-216/20 matched that of Case C-197/20. The two cases were joined.

The Court notes, first of all, that, „the provisions of the CN do not contain any indication as to the level of processing up to which beeswax or other insect wax remains 'raw', for the purposes of classification under subheading 15219091 of the CN, and the level of processing beyond which that wax must be classified under subheading 15219099 of the CN as 'other' wax`[14].

Consequently, the court states that `in the absence of such clarification in the CN, it is necessary to refer to the usual meaning of the word 'raw' in everyday language, which designates that which is in its natural state,

[11] Harmonised Commodity Description and Coding System ('the HS') was established by the International Convention on the Harmonized Commodity Description and Coding System, concluded in Brussels on 14.06.1983 within the framework of the World Customs Organization (WCO) and approved, together with its Protocol of Amendment of 24.06.1986, on behalf of the European Economic Community by Council Decision 87/369/EEC of 7 April 1987 (OJ 1987 L 198, p. 1).

[12] CJEU, 9th Chamber, Judgment of 28.10.2021, *KAHL GmbH & Co. K.G. v. Hauptzollamt Hannover and C.E. Roeper GmbH v. Hauptzollamt Hamburg*, Joined Cases C-197/20 and C-216/20, ECLI:EU:C:2021:892.

[13] The Combined Nomenclature (CN) is a tool for classifying goods, set up to meet the requirements both of the Common Customs Tariff and of the EU's external trade statistics. The CN is also used in intra-EU trade statistics.

[14] CJEU, 9th Chamber, Judgment of 28.10.2021, *KAHL GmbH & Co. K.G. v. Hauptzollamt Hannover and C.E. Roeper GmbH v. Hauptzollamt Hamburg*, Joined Cases C-197/20 and C-216/20, para. 35.

which has not yet been treated or processed`[15]. The narrow definition offered by court implies that only waxes 'in the form of natural combs' are raw beewax.

2.3. Emissions into the environment

„Emission" means, according to EU legislation, `the direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into air, water or land`[16]. The definition remained unchanged, regardless the successive legislative act regulating the field[17]

The case ***Bijenstichting***[18] outlines a legal dispute between Dutch association for bee protection, Bijenstichting, and company Bayer over access to 84 documents related to the authorisation of plant protection products and one biocide containing the active ingredient imidacloprid, which, inter alia, has an insecticide effect. The Bijenstichting had requested access to the documents under Directive 2003/4[19], but Bayer objected, citing concerns over confidentiality, copyright infringement, and data protection.

The competent Dutch authority for the granting and amending of authorisations to place plant protection products and biocides on the market (CTB) initially refused Bijenstichting's request, but following an appeal, partially granted it, ordering disclosure of 35 documents containing factual information relating to actual emissions of plant protection products or biocides into the environment. The remaining 49 documents were not deemed to relate to „information on emissions into the environment" and access was refused. Both Bijenstichting and Bayer challenged the decision of the CTB before the referring court, which raises questions regarding the relationship between the rules on confidentiality laid down by the specific legislation concerning the placing of plant protection products and biocides on the market and the general rules on access to information in environmental matters governed by Directive 2003/4.

The Court notes, first of all, that the referring court is essentially asking whether the releases of plant protection products or biocides into the environment should be considered as „emissions into the environment". The Court take note that the directive defines neither 'emissions into the environment' nor 'information relating to emissions into the environment'[20].

The Court considers that a clarification is needed on whether „emissions into the environment" *includes* releases of plant protection products or biocides. This involves determining whether there is a distinction between „emissions" and „discharges" or „releases" and whether this concept is *limited to emissions from industrial installations*.

Applying the *ubi lex non distinguit…,* the court notes that `nothing in the Aarhus Convention or in Directive 2003/4 permits the view that the concept of 'emissions into the environment' should be restricted to emissions emanating from certain industrial installations`. The Courts stated that it is not necessary to make a distinction between the concept of 'emissions into the environment' and those of 'discharges' and 'releases' or to confine that concept to the emissions covered by Directive 2010/75, excluding the release of products or substances into the environment emanating from sources other than industrial installations[21].

As for the concept of '*information on emissions into the environment'*, the Court finds that the confidentiality of commercial or industrial information may not be invoked against the disclosure of 'information relating to emissions into the environment'. Consequently, the Court acknowledge `the principle of the widest possible access to the environmental information held by or for public authorities`[22]. In that regard the concept 'information on emissions into the environment' within the meaning of that provision covers information concerning the nature, composition, quantity, date and place of the 'emissions into the environment' of those products or substances, and data concerning the medium to long-term consequences of those emissions on the environment, in particular information relating to residues in the environment following application of the

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[15] *Ibidem*.

[16] Council Directive 96/61/EC of 24.09.1996 concerning integrated pollution prevention and control, OJ L 257, 10.10.1996, p. 26-40.

[17] Directive 2010/75/EU of the European Parliament and of the Council of 24.11.2010 on industrial emissions (integrated pollution prevention and control) (recast) (text with EEA relevance), OJ L 334, 17.12.2010, p. 17-119.

[18] CJEU, 5th Chamber, Judgment of 23.11.2016, *Bayer CropScience SA-NV and Stichting De Bijenstichting v. College voor de toelating van gewasbeschermingsmiddelen en biociden*, Case C-442/14, ECLI:EU:C:2016:890.

[19] Directive 2003/4/EC of the European Parliament and of the Council of 28.01.2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L 41, 14.2.2003, p. 26-32.

[20] CJEU, 5th Chamber, Judgment of 23.11.2016, *Bijenstichting*, Case C-442/14, para. 60.

[21] *Idem*, para 75.

[22] *Idem*, para. 57.

product in question and studies on the measurement of the substance's drift during that application, whether the data come from studies performed entirely or in part in the field, or from laboratory or translocation studies[23].

3. To defend

3.1. Protection of life of animals. Biodiversity. Læso brown bee

The ***Bluhme***[24] case concerns restrictions on the keeping of bees other than brown bees (*Apis mellifera mellifera -Læsø brown bee*) on the small and remote Danish Island of Læsø, situated 22 km from the mainland. It raises, in particular, the questions whether such restrictions come within the scope of application of art. 30 of the Treaty regarding measures equivalent to a quantitative restriction on imports, and, if so, whether they are justified.

The Court holds, in the first place, that `a legislative measure prohibiting the keeping on an island such as Læsø of any species of bee other than the subspecies *Apis mellifera mellifera (Læsø brown bee)* constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of art. 30 of the Treaty`[25].

The Court considers that measures to preserve an indigenous animal population with distinct characteristics contribute to the maintenance of biodiversity by ensuring the survival of the population concerned. The Court takes into account the Rio Convention[26].

The Court states that `from the point of view of such conservation of biodiversity, it is immaterial whether the object of protection is a separate subspecies, a distinct strain within any given species or merely a local colony, so long as the populations in question have characteristics distinguishing them from others and are therefore judged worthy of protection either to shelter them from a risk of extinction that is more or less imminent, or, even in the absence of such risk, on account of a scientific or other interest in preserving the pure population at the location concerned`[27].

The conclusion of the court is that `a national legislative measure prohibiting the keeping on an island such as Læsø of any species of bee other than the subspecies *Apis mellifera mellifera (Læsø brown bee)* must be regarded as justified, under art. 36 of the Treaty, on the ground of the protection of the health and life of animals`[28].

3.2. The precautionary principle

One of the key principles in EU environmental law is the precautionary principle, which is regarded as a complex and flexible[29] principle. It can be viewed as an embodiment of post-modern law that operates in a networked rather than hierarchical manner[30]. The Court has had the chance to expand[31] on the concept of the precautionary principle in two cases relating to bees.

One of these cases is ***Bayer CropScience***[32]. The European Commission asked the European Food Safety Authority (EFSA) to assess the risk of plant protection products containing neonicotinoids, which were causing losses of honeybee colonies. After several studies were published, EFSA concluded that further research was necessary, but also identified high acute risks to honeybees from exposure to dust drift and residues in nectar and pollen. In response to the risks, the European Commission introduced a Regulation in May 2013 (based on

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[23] *Idem*, para. 103.

[24] CJEU, 5th Chamber, Judgment of 03.12.1998, Criminal proceedings against *Ditlev Bluhme*, Case C-67/97, ECLI:EU:C:1998:584.

[25] *Idem*, para. 23.

[26] See about the competence of the EU to conclude international agreements: R.-M. Popescu, *Competenţa Uniunii Europene de a încheia acorduri internaţionale*, in Dreptul no. 7/2016, pp. 142-155.

[27] CJEU, 5th Chamber, Judgment of 03.12.1998, *Bluhme*, Case C-67/97, para. 34.

[28] *Idem*, para. 38.

[29] From the environment field the principle was extended to other fields like health, agri-food or consumer protection, as seen in D. Saluzzo, *Risk Management in the Wine Supply Chain*, in Wine Law and Policy, 710-48, Brill Nijhoff, 2020, pp. 727-728.

[30] A. Donati, *The Precautionary Principle Under EU Law: The Knots and the Links of its Network* (2022), EUI Department of Law Research Paper no. 2022/01, available at SSRN: *https://ssrn.com/abstract=4026140*.

[31] E. Anghel, *Judicial Precedent, a Law Source*, LESIJ- Lex ET Scientia International Journal XXIV, no. 2 (2017), p. 68-76.

[32] CJEU, 1st Chamber, Judgment of 06.05.2021, *Bayer CropScience AG and Bayer AG v. European Commission*, Case C-499/18 P, ECLI:EU:C:2021:367.

Regulation no. 1107/2009[33]) that prohibited non-professional use of neonicotinoids and restricted their use for seed and soil treatment on certain crops. Bayer CropScience and Syngenta Crop Protection, supported by various agricultural associations and industry groups, brought an action, in front of the General Court, seeking the annulment of that regulation. However, the General Court dismissed the action.

In its judgment, the Court confirms, while also providing detail as to its scope, its case-law: `The precautionary principle means that where there is uncertainty as to the existence or extent of risks, including risks to the environment, protective measures may be taken without having to wait until the reality and seriousness of those risks become fully apparent. Where it proves to be impossible to determine with certainty the existence or extent of the alleged risk, because the results of studies conducted are inconclusive, but the likelihood of real harm to the environment persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures`[34] Furthermore, the precautionary principle does not require that the adoption of measures under art. 21(3) of Regulation no. 1107/2009 be deferred solely on the grounds that studies are underway which may call into question the available scientific and technical data.

In the other case, ***Pesticide Action Network***[35], the Court was asked if a Member State can authorize, on the bases of art. 53(1) of Regulation no. 1107/2009[36], the sale and use of plant protection products for seed treatment and treated seeds, even if an implementing regulation expressly prohibits it.

The active substances clothianidin and thiamethoxam, which belong to the neonicotinoid family of insecticides, have been subject to restrictions since 2013 due to risks to bees. Their approval expired in 2019, and their use is now prohibited in the EU.

However, temporary authorizations have been granted by diverse member states for the placing on the market of plant protection products containing those active substances. The Belgian authorities granted temporary authorizations for the treatment of sugar beet seeds. The applicants in the main proceedings argue that the derogation provided for in art. 53(1) of Regulation no. 1107/2009 is being wrongfully used, and they express concerns about the toxic effects of clothianidin and thiamethoxam on bees. The referring court expresses doubts as to the scope of art. 53 of Regulation no. 1107/2009 and the scope of the derogation for which it provides.

The court begins by recalling that `those provisions are based on the *precautionary principle*, which is one of the bases of the policy of a high level of protection pursued by the EU in the field of the environment, in accordance with the first subparagraph of art. 191(2) TFEU`[37]. The reason is to prevent active substances or products placed on the market from harming human or animal health or the environment.

The interpretation of art. 53(1) of Regulation no. 1107/2009 is that it does not allow a Member State[38] to authorize the sale of plant protection products for seed treatment or the sale and use of seeds treated with such products if their use has been expressly prohibited by implementing regulation. The near future will reveal how member states will behave towards this unequivocal ban. The principle of sincere cooperation will be put to the test[39].

[33] Regulation (EC) no. 1107/2009 of the European Parliament and of the Council of 21.10.2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC, OJ L 309, 24.11.2009, p. 1-50.

[34] CJEU, 1st Chamber, Judgment of 06.05.2021, *Bayer CropScience AG and Bayer AG v. European Commission*, Case C-499/18 P, ECLI:EU:C:2021:367, para. 80.

[35] CJEU, 1st Chamber, Judgment of 19.01.2023, *Pesticide Action Network Europe ASBL and Others v. État belge*, Case C-162/21, ECLI:EU:C:2023:30.

[36] Regulation (EC) no. 1107/2009 of the European Parliament and of the Council of 21.10.2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC, OJ L 309, 24.11.2009, p. 1-50.

[37] CJEU, 1st Chamber, Judgment of 19.01.2023, *Pesticide Action Network Europe ASBL and Others v. État belge*, Case C-162/21, ECLI:EU:C:2023:30, para.47.

[38] For a focus on the legal liability in administrative law, see: E.E: Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii juridice în dreptul administrativ*, Pro Universitaria Publishing House, Bucharest, 2013.

[39] M.-A. Dumitrașcu, O.-M. Salomia, *Principiul cooperării loiale–principiu constituțional în dreptul Uniunii Europene, In Honorem Ioan Muraru. Despre Constituție în mileniul III*, 2019.

3.3. Money versus honey

The complex issue of balancing commercial interests and environmental protection has been a central point in several cases, as both features are enshrined in the EU Charter. In the bee cases, the choice between these fundamental rights[40] made by the CJEU seems consistently tilted in favor of the environment.

In the *Bijenstichting* case, the protection of industrial and commercial interests was explicitly raised as an issue, as it concerned the balancing of the rights guaranteed by art. 16 and 17 of the Charter and art. 39(3) of the TRIPS with the need to achieve the objectives of environmental protection and maximum disclosure of environmental information. The court`s conclusion was that in order to achieve these goals, it was necessary to grant access to „information on emissions into the environment" *even if such disclosure* could potentially compromise the confidentiality of commercial or industrial information.[41]

Furthermore, the Court recognized in *Læsø brown bee case* that preserving the indigenous animal population with distinct characteristics contributes to maintaining biodiversity and ensures the survival of the bee population. Therefore, the national legislative measure prohibiting the keeping of any other bee species on the island was justified under art. 36 TFEU, on the grounds of protecting the health and life of animals.

The recent case of *Pesticide Action Network* led the Court to conclude that `when granting authorisations of plant protection products, the objective of protecting human and animal health and the environment should '*take priority' over* the objective of improving plant production`[42]

4. Conclusions

The paper outlined the cases in which the CJEU *defined* the legal concepts of honey, pollen, raw wax, and emissions in the environment. These cases helped to clarify the legal framework for apiculture and environmental law. The second part examined cases in which the Court *defended* biodiversity by utilizing internal market tools or the precautionary principle. These cases demonstrate the Court's commitment to protecting the environment while maintaining a balance with market interests. The Court's recent statement in the Pesticide Action Network case emphasized that the protection of human and animal (bees) health and the environment should be given priority over the objective of improving plant production.

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[40] M.-C. Cliza, C. Nivard, L.-C. Spătaru-Negură, *The European Social Charter and the Theory of Human Rights Law*, in The European Social Charter: A Commentary, 211-35. Brill Nijhoff, 2022, p. 212.

[41] CJEU, 5th Chamber, Judgment of 23.11.2016, *Bijenstichting*, Case C-442/14, para. 99.

[42] CJEU, 1st Chamber, Judgment of 19.01.2023, *Pesticide Action Network Europe ASBL and Others v. État belge*, Case C-162/21, ECLI:EU:C:2023:30, para. 48.

Legal framework

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- Directive 2003/4/EC of the European Parliament and of the Council of 28.01.2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L 41, 14.02.2003;
- Directive 2010/75/EU of the European Parliament and of the Council of 24.11.2010 on industrial emissions (integrated pollution prevention and control) (recast) (text with EEA relevance), OJ L 334, 17.12.2010;
- Council Directive 96/61/EC of 24.09.1996 concerning integrated pollution prevention and control, OJ L 257, 10.10.1996;
- Council Directive 2001/110/EC of 20.12.2001 relating to honey, OJ L 10, 12.01.2002;
- Regulation (EC) no. 1829/2003 of the European Parliament and of the Council of 22.09.2003 on genetically modified food and feed (text with EEA relevance), OJ L 268, 18.10.2003;
- Directive 2000/13/EC of the European Parliament and of the Council of 20.03.2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs implicitly repealed by Regulation (EU) no. 1169/2011;
- Harmonised Commodity Description and Coding System ('the HS') was established by the International Convention on the Harmonized Commodity Description and Coding System, concluded in Brussels on 14.06.1983 within the framework of the World Customs Organization (WCO) and approved, together with its Protocol of Amendment of 24.06.1986, on behalf of the European Economic Community by Council Decision 87/369/EEC of 07.04.1987 (OJ 1987 L 198, p. 1). OJ L 109, 06.05.2000, p. 29-42 (ES, DA, DE, EL, EN, FR, IT, NL, PT, FI, SV);
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THE IMPLICATIONS AND PREDICTED IMPACT OF THE DIGITAL SERVICES ACT IN ROMANIA

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Abstract

Increased transparency in the online environment is a theme that runs throughout the Digital Services Act (DSA), circumstance which has led to the writing of this paper, intended to be an overview of this „old but new" and comprehensive set of rules, with the authors' personal notes. Building on the premise that the responsible and diligent behavior of intermediary services is essential for a safe, predictable and trustworthy online environment, the DSA harmonizes, by means of a directly applicable legal act, the provision of information society services in the form of intermediary services, by preserving, in principle, the main rules regulating the (exemption from) liability of the intermediary services providers, while also regulating an extensive set of due-diligence and transparency obligations for the later.

Such harmonization is desirable bearing in mind that online platforms are part of the macro-system that determines future innovations and consumer choice. To what extent the DSA will succeed in doing its part in transforming digital space into a safer one, where the fundamental rights of users (and especially of consumers) are protected, remains to be seen. Meanwhile, the authors are nevertheless assured that the impact will be significant, especially on the topics consciously chosen to be addressed hereafter.

Keywords: *digital services act, intermediary services, marketplace, digitalization, transparency, consumer protection, neutrality test, good Samaritan protection, online platforms.*

1. Introduction

27 October 2022 marks the day when the long-awaited Regulation (EU) 2022/2065 of the European Parliament and of the Council on a Single Market for Digital Services and amending Directive 2000/31/EC[1] (hereinafter referred to as „Digital Services Act" or „DSA") has been published in the Official Journal of the European Union.

DSA has entered into force on the twentieth day following that of its publication and shall become directly applicable into the national legislation of the Member States, including in Romania, starting with 17.02.2024. Specific provisions of DSA, as expressly indicated, are nevertheless applicable since 16.11.2022.

DSA modifies Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (hereinafter referred to as the „e-Commerce Directive"), by eliminating art. 12-15 of the normative act.

However, the principles under which the intermediary service providers could be held responsible for the content provided through acts of 'mere conduit', 'caching' or 'hosting', as previously regulated through art. 12-15 of the e-Commerce Directive, are not forgotten. The main rules governing the liability of intermediary services are incorporated into the DSA legal framework, thus seeking to preserve the intermediary liability framework of the e-Commerce Directive, but also to clarify certain elements, by considering the CJEU case law.

The necessity of a new legal framework aiming at regulating, through a directly applicable normative act, the liability of the intermediary services, arose from at least two perspectives. On the one side, the transposition of the e-Commerce Directive in the Member States left room for divergences in both the law-making and the application of the legislation at the national level. On the other side, clarity and coherence in regulation were

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[1] Directive 2000/31/EC of the European Parliament and of the Council of 08.06.2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

required, especially having regard to the case-law built by the European Union's (hereinafter referred to as „EU") Court of Justice under the provisions of art. 12-15 of the e-Commerce Directive[2].

This paper aims at presenting, while also opening the floor for further debates on, the conditions under which the providers of online platforms allowing consumers to conclude distance contract with traders may be held liable toward the consumers for the content stored within the online platform, at the request of the trader, as a recipient of the service.

The legal regime of the responsibility the providers of online platforms allowing consumers to conclude distance contract with traders have toward the consumers, is a subject of utmost importance in a context where intermediary services in e-commerce sector, as a sub-category of information society services, have become a part of the daily life of citizens in EU.

The focus of this paper however is to identify and excite the appetite for further discussions in relation to the main challenges the DSA, as directly applicable in the national legislation in Romania, may pose in the context of its implementation and enforcement, considering its proclaimed complementarity with the existing consumer protection legislation in force, both at the EU and national level.

As acknowledged in the DSA Explanatory Memorandum, the rules set out in the normative act will be complementary to the consumer protections acquis and specifically with regard to Directive (EU) 2019/2161 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU which established specific rules to increase transparency as to certain features offered by certain information society services[3].

In addition, art. 2 para. 4 DSA specifically states that the DSA is without prejudice to the rules laid down by EU law on consumer protection and products safety.

With a desire to ensure full consistency with the existing EU policies, the DSA is construed based on a horizontal approach in relation to a series of existing EU legislative instruments that the first would leave unaffected and with which it would be consistent[4].

Based on the consistency purpose, the direct applicability of the DSA into the national legislation in Romania would inherently involve the necessity of identifying the corresponding mechanisms and solutions as to ensure the implementation of the DSA requirements in the context of the existing legislative framework (including in the field of consumer protection).

While the core legislative framework in the field of consumer protection at the national level resides in normative acts that transpose the EU pieces of legislation, it is important to bear in mind that the central legislative act that governs the business-to-consumers relationships subject to the national legislation in Romania, at the moment when this piece of paper is made available, resides in GO no. 21/1992 on consumers protection, as republished.

2. Liability of online platforms allowing consumers to conclude distance contracts with traders under the DSA Regulation

2.1. Territorial scope of the DSA

As specifically stated, the DSA is intended to apply to intermediary services offered to recipients of the service that have their place of establishment or are located in the EU, irrespective of where the providers of these intermediary services have their place of establishment.

Under the DSA, the recipient of the service shall designate any natural or legal person who uses an intermediary service, in particular for the purpose of seeking information of making it accessible. As indicated

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[2] Preamble (16) of DSA specifically states in the sense that *„(T)he legal certainty provided by the horizontal framework of conditional exemptions from liability of providers of intermediary services, laid down in Directive 2000/31/EC, has allowed many novel services to emerge and scale up across the internal market. The framework should therefore be preserved. However, in view of the divergences when transposing and applying the relevant rules at national level, and for reasons of clarity and coherence, that framework should be incorporated in this Regulation. It is also necessary to clarify certain elements of that framework, having regard to the case-law of the Court of Justice of the European Union".*

[3] European Commission, „Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC", COM (2020) 825 final (European Commission, December 2020), p. 6 *<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0825&from=en>*.

[4] C. Cauffman, C. Goanta, *A New Order: The Digital Services Act and Consumer Protection, < https://www.cambridge.org/core/journals/european-journal-of-risk-regulation/article/new-order-the-digital-services-act-and-consumer-protection/8E34BA8A209C61C42A1E7ADB6BB904B1>*.

through the Preamble to the DSA, the recipients of the service shall encompass business users, consumers and other users.

Thus, the DSA chooses one interesting solution in establishing its territorial scope, by reference to the place of establishment or location of the recipients of the intermediary services providers, regardless of the place of establishment of the intermediary services provider.

2.2. Material scope of DSA. Status qualification of online platforms allowing consumers to conclude distance contracts with traders

The DSA shall govern the provisions of intermediary services consisting in one of the following information society services: *„mere conduit", „caching"* and *„hosting"* services.

The *hosting* service shall designate the activity of the intermediary service provider which ensures the storage of information provided by, and at the request of, a recipient of the service.

Furthermore, within the broader category of providers of hosting services, the DSA specifically sub-categorizes the online platforms allowing consumers to conclude distance contracts with traders (simply put, business-to-consumer („*B2C*") online marketplaces), as providers of *hosting* services, since those platforms not only store information provided by the recipients of the service at request, but also disseminate that information to the public upon request of the recipients of the service.

Thus, the B2C online marketplaces shall observe a set of extended requirements, considering the layered regulatory model governing their legal regime under the DSA. Specific obligations imposed to online platforms, in general, and to online platforms allowing consumers to conclude distance contract with traders, in particular, are built on the general requirements set forth for the hosting services providers to observe.

In order to avoid disproportionate burdens however, providers that are micro or small enterprises, as defined in Commission Recommendation 2003/361/EC[5], are exempted from various requirements regulated by DSA while large and very large online platforms are subject to specific additional obligations, as to ensure the management of systemic risks.

2.3. Between the principle of neutrality and extended due-diligence obligations imposed through DSA

The uninterrupted growth of the early Internet has been built on a set of regulatory assumptions. Unnecessary regulation should be avoided, the e-commerce should be promoted, and the intermediaries should be given a neutrality status from a liability regime standpoint[6].

2.3.1. To be or not to be liable, as a hosting service provider

In the context of the legal regime established through the provisions of the DSA for hosting services providers, including B2C online marketplaces, it is worth mentioning that the EU legislation only aims at covering the exemption criteria under which the hosting services provider would not incur liability. Situations in which a hosting services provider may be held liable however are to be subject to other EU or national laws[7].

As expressly stated through the preamble to the DSA, the rules that frame the liability regime of the hosting services providers are not meant to provide *a positive basis* for establishing when a provider can be held liable, and only to determine the exemptions under which the service provider cannot be held liable in relation to illegal content provided by the recipients of the service.

It should be noted that the DSA does not harmonize what content or behavior counts as illegal. Thus, the qualification and interpretation of the „illegal content" remains under the sovereignty of Member States.

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[5] Commission Recommendation 2003/361/EC of 06.05.2003 concerning the definition of micro, small and medium-sized enterprises.

[6] Andrej Savin, *„The EU Digital Services Act: Towards a More Responsible Internet" (Copenhagen Business School Law),* < https://research.cbs.dk/en/publications/the-eu-digital-services-act-towards-a-more-responsible-internet>.

[7] Caroline Cauffman, Catalina Goanta, „A New Order: The Digital Services Act and Consumer Protection", <https://www.cambridge.org/core/journals/european-journal-of-risk-regulation/article/new-order-the-digital-services-act-and-consumer-protection/8E34BA8A209C61C42A1E7ADB6BB904B1>.

2.3.2. Neutrality of the hosting service provider

The situations under which the hosting service provider is exempted from liability are expressly provided in Article 6 of the DSA, namely:

(i) the provider does not have actual knowledge of illegal activity or illegal content, or

(ii) upon obtaining such knowledge or awareness, the provider acts expeditiously to remove or to disable access to the illegal content.

The exemptions, however, do not apply in cases where the recipient of the service is acting under the authority or the control of the provider.

To put it simple, in order for the liability exemption to be applicable, the behavior of the hosting services provider shall pass the neutrality test. This is not a novelty brought by the DSA, since the issue has been extensively analyzed by the CJEU under the e-Commerce Directive.

In its case-law, CJEU formulated the core criterion to be fulfilled by the hosting services providers in order to pass the neutrality test. Thus, the hosting service provider may rely on the exemption from liability provided by the EU law if they took a neutral position in relation to their users'[8] content, which would involve that no active role is played as to confer them knowledge of or control over that content[9].

As CJEU has stated:

(i) the mere fact that the operator of an online marketplace store offers for sale on its server, sets the terms of its service, is remunerated for that service and provides general information to its customers cannot have the effect of denying it the exemptions from liability[10];

(ii) the exemption applies in the case where the service provider has not played an active role of such a kind as to give it knowledge of, or control over, the data stored; the service provider cannot be held liable for the data which it has stored at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of those data or of that advertiser's activities, it failed to act expeditiously to remove or to disable access to the data concerned[11].

The principles established by the CJEU case law have been now codified in Recital 17 and Recital 18 of the DSA. The DSA follows, in particular, the CJEU's ruling in *L'Oréal v. eBay*. The clarifications provided in *L'Oréal v. eBay* (para. 115-116) are that storing offers for sale, setting the terms of service, being remunerated for the service and providing general information to users do not make a hosting service provider „*too active*". The ruling also clarifies that this would be different, however, where a provider optimizes the presentation of the offers for sale or promotes those offers.

The national courts in Romania have followed in turn the rationale expressed by CJEU and also stated in the favor of the neutrality principle by not holding liable those intermediary services providers that did not remove *ex officio* the alleged illicit content, without a specific request to be submitted in this respect, as to ground that the intermediary services provider would have become aware of the illicit character of the said content[12].

Nonetheless, one should not ignore the fact that the above case law conveys that intermediary service providers (our note: predominantly hosting service providers) can play an active role to some extent, provided such role is not likely to give them knowledge of or control over the content that they share or store for their users.

[8] Given the wording of the relevant provisions, online platforms may need to take into account users beyond just those registered with accounts (where relevant).

[9] Folkert Wilman, „*The Evolution of the DSA's Liability Rules in Light of the CJEU's Case Law",* (Putting the DSA into Practice: Enforcement, Access to Justice, and Global Implications) < https://verfassungsblog.de/dsa-preservation-clarification/>.

[10] C-324/09 L'Oréal SA and Others v eBay International AG and Others ECLI:EU:C: 2011:474.

[11] Joined Cases C-236/08 to C-238/08, *Google France SARL and Google Inc. v. Louis Vuitton Malletier SA* (C-236/08), *Google France SARL v. Viaticum SA and Luteciel SARL* (C-237/08) and *Google France SARL v. Centre national de recherche en relations humaines* (CNRRH) SARL and Others (C-238/08), EU:C:2010:159.

[12] HCCJ, 1st civ. s., dec. no. 338/2021; Ploiești Court of First Instance, civ. s., dec. no. 2082/2021.

2.3.3. Good Samaritan Exemption

As opposed to the applicable legal regime in the United States[13], in the EU, the e-Commerce Directive did not explicitly protect internet intermediaries involved in good faith measures against illegal or inappropriate content.

DSA comes with an update and regulates the so-called „*Good Samaritan*" protection rule, through the provisions of art. 7, stating that voluntary own-initiative investigations or other measures taken by the providers of intermediary services, aiming at detecting, identifying and removing, or disabling access to, illegal content, or simply measures that are necessary as to comply with requirements of EU law and national law in compliance with EU law, shall not preclude the exemptions from liability regulated by the DSA in relation to hosting services providers[14].

It is important to underline that the *„Good Samaritan"* protection is dependent on the intermediary service provider acting in good faith and in a diligent manner.

Considering the wording of art. 7 DSA and the provisions of Recital 26[15], it has been underlined that the principle of good faith and diligence are meant to strike a balance between the interests of the intermediary services provider and the fundamental rights of internet service users[16].

At least in theory, the codification of the „*Good Samaritan*" protection rule through the DSA seems to be welcomed by the stakeholders, since it appears as a firm confirmation of the recent judgment delivered by the CJEU in the *YouTube* case[17], whereby the CJEU specifically expressed itself in the sense that if an intermediary undertakes technological measures aimed at detecting content which may infringe the applicable legal requirements in force (the case under discussion was expressly referring to infringement of copyrights) does not mean, by itself, that said operator plays an active role, giving it knowledge of and control over the content uploaded by a service recipient.

Going further, it is worth mentioning that the final thesis of art. 7 DSA, when specifically stating that the liability exemption provided for intermediaries remains applicable also in cases where the intermediaries take the necessary measures to comply with the requirements of the EU law or national law, including the requirements established by the DSA, should not be undermined under a potential „stating the obvious" rationale.

As it has been pointed out, the final thesis of art. 7 DSA, regulating the *„Good Samaritan"* protection rule, may prove to be an opportune regulatory incentive for those who would need to be reassured that compliance with the extensive due-diligence obligations will not lead, by itself, to failing the neutrality test and thus, becoming *„too active"*[18].

2.3.4. The specific case of hybrid marketplaces

It has been statistically shown that consumers are increasingly buying goods online and the e-commerce marketplace is inherently growing, thus including more and more examples of hybrid marketplaces also[19].

The DSA covers, in terms of liability, the specific situation of online hybrid marketplaces, by expressly stating that platform that allow consumers to conclude distance contracts with traders are not exempted from liability provided by art. 6 DSA where such an online platform presents the specific item of information or otherwise

[13] For a very insightful contextual presentation of the relevant legal provisions in the United States that ground an exemption from liability for internet intermediaries in relation to any voluntary actions taken in good faith against certain types of objectionable content, see A. Kuczerawy, *The Good Samaritan that wasn't: voluntary monitoring under the (draft) Digital Services Act, <https://verfassungsblog.de/good-samaritan-dsa/>.*

[14] To be borne in mind however that the so-called „*Good Samaritan*" protection rule is regulated as to apply for all the information society services covered by the DSA (*mere conduit, caching* and *hosting*).

[15] Recital 26 specifically states in the sense that *„(…) The condition of acting in good faith and in a diligent manner should include acting in an objective, non-discriminatory and proportionate manner, with due regard to the rights and legitimate interests of all parties involved and providing the necessary safeguards against unjustified removal of legal content, (…).*"

[16] J. van de Kerkhof, *Good Faith in Article 6 Digital Services Act (Good Samaritan Exemption* (The Digital Constitutionalist, 15.02.2023)*, <https://digi-con.org/good-faith-in-article-6-digital-services-act-good-samaritan-exemption/?utm_source=rss&utm_medium=rss&utm_campaign=good-faith-in-article-6-digital-services-act-good-samaritan-exemption>.*

[17] Joined Cases C-682/18 and C-683/18, *Frank Peterson v. Google LLC, YouTube Inc., YouTube LLC, Google Germany GmbH* (C-682/18) and *Elsevier Inc. v. Cyando AG* (C-683/18), EU:C:2021:503.

[18] W. Folkert, *The Evolution of the DSA's Liability Rules in Light of the CJEU's Case Law,* (Putting the DSA into Practice: Enforcement, Access to Justice, and Global Implications), *< https://verfassungsblog.de/dsa-preservation-clarification/>*.

[19] European E-commerce Report 2022, *<https://ecommerce-europe.eu/wp-content/uploads/2022/06/CMI2022_FullVersion_LIGHT_v2.pdf>*.

enables the specific transaction at issue in a way that would lead an average consumer to believe that the information, or the products or services that is the object of the transaction, is provided either by the online platform itself or by a recipient of the service who is acting under its authority or control[20].

The specific case of hybrid marketplaces' liability has been subject to a very recent judgment of the CJEU. While the judgment has been rendered following the adoption of the DSA, with the joined cased being however submitted with CJEU before the moment of the DSA adoption, the rationale of the Court of Justice follows and are mirrored into the regulatory mechanism chosen by the DSA.

The judgment of the CJEU highlights a set of essential criteria to be considered when analyzing whether a hybrid marketplace may fall under the scenario provided for through art. 6 para. 3 DSA, scenario that impedes the application of the liability exemption regulated through art. 6 para. 1 DSA.

CJEU points out that, when establishing if a hybrid online market place leaves room for confusion among consumers in relation to the identity and/or characteristics of the trader providing the products and/or services made available on the online marketplace, the following are relevant: the marketplace using a uniform method of presenting the offers published on its website, displaying both the advertisements relating to the goods sold by the marketplace in its own name and on its own behalf and those relating to goods offered by third-party sellers on that marketplace, the fact that the marketplace offers third-party sellers, in connection with the marketing of goods bearing the sign at issue, additional services consisting inter alia in the storing and shipping of those goods[21].

The criteria provided by CJEU are to be, of course, analyzed and applied on a case-by-case basis.

Under the national legislation, however, various challenges may be predicted in relation to the application of art. 6 para. 3 DSA. One of the many challenges would reside in the interpretation conferred to the *average consumer*, especially considering the lack of any express definition or specific criteria provided by the national legislation in this respect, on the one hand, and the restrictive approach endorsed by the national authorities in the field.

2.3.5. Extended due-diligence obligations under the DSA

The B2C online marketplaces would be bound to observe an extensive set of due-diligence requirements under the DSA, including (without being limited to) transparency and reporting obligations, compliance-by-design requirements, especially in relation to a general prohibition of using dark patterns, traceability obligations in relation to traders, as recipients of the intermediary services provided by the B2C online marketplace.

Especially in the field of the extended due-diligence obligations set forth in the DSA for online platforms, the implementation and enforcement of the legal requirements at the national level in each Member State, including in Romania, is clearly highly dependent on the way the designated national authorities will understand to use their enforcement powers[22].

One of the main challenges we anticipate that the B2C online marketplaces will confront at the national level, in Romania, resides in the manner in which the priority of the specialized norms regulated through the DSA, as a directly applicable legal act, would be recognized and endorsed within the practice of the competent national authorities in the field of consumers protection.

This prediction follows a long standing practice of the competent national authorities revealing an obvious reluctance in giving full effect to the specialization requirement when comes to the general – special law relationship and thus, getting to enforce the specialized norms (even in case of harmonized specialized norms at the European Union level) in light of the general legal provisions applicable in the field of consumers protection in Romania, mainly codified through GO no. 21/1992 on consumers protection, as republished.

A strong point of reference in the DSA enforcement should reside however in the practice that the European Commission is expected to crystallize within the market. Thus, the monitoring and enforcement actions that will be conducted by the European Commission in relation to the online platforms are reasonably expected

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[20] Art. 6 para. 3 DSA.

[21] Joined Cases C-148/21 and C-184/21, *Christian Louboutin v. Amazon Europe Sarl* (C-148/21), *Amazon EU Sarl* (C-148/21), *Amazon Services Europe Sarl* (C-148/21), *Amazon.com Inc* (C-184/21), *Amazon Services LLC* (C-184/21), EU:C:2022:1016.

[22] For a strong point of view on the codependency between the DSA's success and its enforcement within the Member States, along with a parallel with GDPR (weak) enforcement over the past several years, please see, J. Jaursch, *Platform Oversight. Here is what a Strong Digital Services Coordinator Should Look Like* (Putting the DSA into Practice: Enforcement, Access to Justice, and Global Implications), <*https://www.stiftung-nv.de/en/publication/platform-oversight-what-strong-digital-services-coordinator-should-look*>.

to constitute, for the national legislators, enforcement bodies and courts of law, the main landmark of good practice when talking about monitoring the activity and behavior of an online platform[23].

Moreover, in order for the Member States to provide the necessary support and reaction as to ensure that the harmonization goal of the DSA is properly achieved, the national legislators, enforcement bodies and even the courts of law should be opened to make use of the instruments offered by the EU, in this case, especially of those instruments designed to gather and analyze data on online platforms' activity and general behavior, data which would be further translated in feedback to be considered and recommendations and guidelines to be followed under the main scope of improving the online environment and make it safer for both the business users and consumers[24].

3. Conclusions

The DSA is a shield of legal liability that aims to incentivize companies to be more proactive and legally assertive when moderating the content on their online platform. DSA will apply across online marketplaces, social networks, app stores, travel and accommodation platforms, and many others.

On one note, as an EU Regulation, the DSA's provisions are directly applicable in every Member State and enforcement will be split between national regulators and the European Commission, whilst interested parties will be having access to dispute resolution mechanisms in their own country, where the implementation and enforcement modalities of the DSA are effectively judicially clarified.

On another note, clarifications on the intermediary liability regime and service providers' active role tend to build on existing CJEU case law and will, undoubtedly, along the way generate new case law. DSA's rules on matters as due diligence and risk assessments signal without question a different approach adopted by the European legislator in terms of liability-related matters.

Besides, a legal foresight might materialize – more precisely, the concept of „intermediary service provider" may well change by virtue in view of the differing contextualization under the DSA umbrella – whereas under the e-Commerce Directive the liability exemption was rather the common rule.

Furthermore, what emerges from the foregoing study is that a major importance in the application of DSA's art. 6 is the „*diligent economic operator test*" applied by the CJEU in the past, which should also be considered going forward in distinguishing active intermediaries from passive ones. This test resembles the reasonable person test stemming from tort law, which essentially asks what a reasonable person of ordinary prudence would have done under the same or similar circumstances.

As such matter is left to domestic courts to decide under their applicable common civil law, divergent interpretations and applications of the test will not be inevitable. The highest risk in practice will consist in having a uniform understanding of the term „diligence" which will consequently, most likely, lead to fragmented applications across the EU – until the CJEU perhaps will further clarify this notion and will clearly set up the „*standard of care*" viewed under art. 6 DSA.

Nevertheless, it should be underlined that art. 6 does not protect intermediaries against the fact that voluntary actions could lead intermediaries to have „actual knowledge" of illegal content. Hence, the provision protects an intermediary only from being considered „active" solely based on actions taken to remove illegal content voluntarily. The „Good Samaritan" clause on the other hand, illustrates the difficulties of trying to hold on to the legal distinction between passive and active service providers in the moderated online world. This aspect will be left, in any case, firstly, to the assessment of the consumer protection bodies and, secondly, to the assessment of the national courts that would settle disputes arising in this legislative context.

[23] It is worth mentioning that, at the date when this research paper is written, the European Commission has already launched its proposal on a Commission Implementing Regulation on detailed arrangements for the conduct of certain proceedings by the Commission pursuant to the Regulation (EU) 2022/2065 of the European Parliament and of the Council („Digital Services Act"). For consulting the current form of the proposal, along with detailed information on the legislative procedure status and future outcomes, please see: *https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13565-Digital-Services-Act-implementing-regulation_en*.

[24] A very useful and somehow underrated instrument resides in the *Observatory on the Online Platform Economy*, which monitors the evolution of the online platform economy to advise and support the Commission in its policy making in relation to online platforms. The Observatory aims to contribute to an environment of fair and trusted cooperation between business users and online platforms. However, the outcome delivered to the consumers is also under the scrutiny of the Observatory. An interesting piece of paper delivered by the Observatory, along other expert groups, which includes some good remarks on the dark patterns and their incidence in the online platform, with negative effects on the consumers, may be consulted here: *https://op.europa.eu/en/publication-detail/-/publication/ee55e580-ac80-11eb-9767-01aa75ed71a1/language-en/format-PDF/source-206332284*.

It may be particularly difficult to prove in court when and if we are discussing „actual knowledge„ of illegal content on the platform in certain situations where online platforms are highly automated - for example, it remains to be seen how the situation will be judicially assessed when discussing the fact that online platforms are largely AI-moderated using algorithms designed to identify, filter and eliminate certain „risks", even if it could be proven that the algorithms were set in a very diligent way[25].

DSA is still novel, so new but old legal issues will arise, and it will be worth observing how will DSA adapt also in the context of national law.

It is therefore of paramount importance to point out that private individual remedies, such as claims for damages, injunctive reliefs or preliminary injunctions, do not follow the obligations set out in the DSA. Injured parties will continue to rely on national civil (tort or contractual) law provisions when claiming damages, which is not favored by the exemption from liability.

Certainly, many questions of a procedural nature will also emerge when it comes to litigation arising out of the infringements underpinning DSA. One may think for instance of the situation of preliminary injunctions against intermediaries – who in certain circumstances should be considered as the persons who have standing and an interest in being ordered to temporarily remove certain online content or to take other temporary measures (*i.e.*, they may be treated as accountable), although this would not mean that they should also be liable for damages on the merits (*i.e.*, they may be treated as not liable).

The DSA is yet another tangible proof of the fact that the legislation regulating digital technologies is emerging gradually and is likely to produce a major impact on the way we have been applying and interpreting the legislation so far. All actors thus involved in the practical implementation or enforcement of the DSA, need to equip themselves with a new mindset that must be compatible both with the technological progress perceptible day by day, as well as with the rule-making requirements for providing effective protection to services users and beyond.

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[25] Miriam C. Buiten, Alexandre De Streel and Martin Peitz, '*Rethinking Liability Rules for Online Hosting Platforms Rethinking Liability Rules for Online Hosting Platforms*' (2019) 27 International Journal of Law and Information Technology (IJLIT) 139.

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THE RIGHT TO SOUND ADMINISTRATION IN THE EUROPEAN UNION. THEORETICAL AND PRACTICAL ASPECTS. ELEMENTS OF CASE LAW

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Abstract

In the activity of adopting legal acts through which any entity endowed with decision-making powers carries out in order to achieve its objectives, there are inherently moments when it is necessary to make choices, and identify legal solutions to the problems raised by the development of both economic and social areas of life. However, these decisions, whether legislative or administrative, have consequences for the subjects of law on which the effects of the acts adopted extend.

Due to their nature, the positive consequences are not the object of our analysis. However, on one hand, the limitation of the negative consequences to what is strictly necessary in order to achieve the set goals and, on the other hand, the need for the action of those respective institutions to meet the expectations of the legal subjects concerned, are aspects that have always been of interest for the institutions, courts, relevant doctrine and addressees alike.

From this preoccupation, inherently present at the level of the EU, was born the initial jurisprudential consecration, followed by that at the level of primary law, of the right to a good administration and the doctrinal comments that accompany it. These are the perspectives that we will consider in our study that will follow the development of good administration at the level of the EU, from the jurisprudential consecration of this right, which occurred shortly after the establishment of the European Communities, through its inclusion in the Charter of Rights Fundamentals of the European Union (initially in the absence of binding legal force), until the current situation, in which the principle in question is part of the Charter that acquired, following the entry into force of the Treaty of Lisbon, the legal force of the sources of primary law of the EU.

It is also important to mention that we will refer exclusively to this activity (and the right associated with it, that of good administration) throughout our study, and not to the broader concept of governance, of which we can consider the activity of administration to be only a part.

Keywords: *EU, good administration, the European Ombudsman, the Code of Good Administrative Behavior, EU Court of Justice's jurisprudence.*

1. Introduction

As we stated in the abstract of our research, any institutional activity, whether it is embodied in *legislative* acts (according to the terminology used by the TFEU [1]) or legal acts with the force of law (in the terminology of the internal law of Romania) or in *delegated* or *implementing* acts (in the sense of the same Treaty [2]) or in *administrative* acts (in the Romanian legal order), this institutional activity implies the exercise of the margin of appreciation or the discretionary power of the institutions to decide on the appropriateness of the legal solutions contained in an act in order to solve a problem generated by the socio-political-economic realities of the entity that represents, governs, administers, etc. or whose institutional framework they belong to. However, these decisions are almost never neutral. In fact, their neutrality can be considered a pure abstraction, since, in real life, administrative or legislative solutions have as a fundamental feature the fact that they always leave the impression that they do not correspond to the expectations of at least some recipients and, in many situations, they affect some rights, freedoms or interests of them, even if the infringement in question is justified by the institution that adopted them, by reference to the general interest.

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[1] See art. 289 para. (3) TFEU, C-326, 26/10/2012, pp. 0001-0390.

[2] See art. 290 para. (1)-(3) and art. 291 para. (1)-(4) TFEU.

What the recipients of the mentioned legal acts must and, in general, want to pursue is not to avoid these touches altogether, such a desire could be considered utopian, but to benefit from an institutional framework in which their expectations from the institutions that make it up, (expectations) materialized in the observance of some general principles, in the safeguarding of some rights and freedoms, etc. (the concrete details may differ depending on the specific features of each legal system and each cultural area in particular, taking into account the fact that "the accelerated opening of the world economy that followed the end of the Cold War and the collapse of the communist bloc was accompanied of an unprecedented mobility of law"[3]) to be realized. In other words, to benefit, among other things, from the right to *good administration*. But the actual content of this right needs to be defined by the action of the courts and institutions of each legal order, including the European one.

We will deal with its content in the legal order of the EU in the present study, however, before this stage we want to make a series of brief references to an umbrella concept that we consider relevant for our study, namely that of the decision-making process.

2. The concept of *decision-making process*. General aspects

Analyzing the concept of the decision-making process, we refer, for the beginning, to the statements of the doctrinaire David Plunkett, according to whom „social planning is indispensable for the existence of any contemporary society, given the complexity of the social relations that underlie its functioning. This planning materializes, however, through legal norms"[4]. In other words, the approach by which legal norms are created represents the essence of the social planning process, the essence in which the interest in those mechanisms by which the mentioned norms are built has its origins.

Being an expression of social planning activity, the adoption of legal norms or, in other words, social planning through normative activity creates and modifies norms that have the role of representing common standards of behavior regulating social activities through general policies accessible to the public.

Within the normative activity, some people occupy certain positions. One of the most important features of these offices is that the prerogatives associated with them do not depend on the identity of the people who occupy them. Therefore, functions tend to be relatively stable, and the identities of those who exercise them not only may vary, but frequent changes are generally to be expected. David Plunkett[5] uses the term master plan to refer to the organization or regulation of the planning activity, respectively to „the norms according to which the institutions involved in the planning process exercise their powers, norms intended especially for the participants in this process, and not for the recipients of the norms adopted by them"[6], however, we can compare this concept with that of:

- an *international agreement*, if such an agreement establishes the rules according to which an international organization operates (*Basic Constitutional Charter*, in the expression of the Court of Justice), if we refer to aspects related to the legal order of the Communities, initially, and after that of the European Union
- or of the *Constitution*, if the analysis is within the state legal order.

These fundamental rules, of the *master - plan* type, are distinguished, among others, by the fact that they „regulate procedures that allow the institutions that participate in the exercise of power to do something even in the absence of the express intention of the people who compose them"[7]. This suggests that the rules that regulate the functioning of institutions influence the behavior of the people who compose them, which refers to the principle of the superiority of institutions, according to the general interests they represent.

We conclude by stating that norming represents „that activity exercised jointly by a plurality of agents, formalized, institutionalized, mandatory and self-confirming of social planning, features that are also influencing the institutions that carry this norming out"[8].

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[3] M.F. Popa*, Tipologiile juridice între pragmatism și ciocnirea civilizațiilor*, in Revista de Drept Public no. 1/2016, Universul Juridic Publishing House, pp. 58-67.

[4] D. Plunkett*, The Planning Theory of Law I: The Nature of Legal Institutions*, Philosophy Compass magazine no. 8/2 (2013), pp. 149-158.

[5] *Ibidem*.

[6] *Ibidem*.

[7] *Ibidem*.

[8] *Ibidem*.

In a subsequent research, the same David Plunkett expresses in a more concrete way what, in his view, represents the role of legal norms in the activity of social planning, this being an „organization of social relations within a given community[9].

As one of the most important authors in the specialized literature, Hans Kelsen, states, „the fact that the norms that make up a legal order derive from a fundamental norm is demonstrated by the fact that the specific norms are created in accordance with the rules established by the fundamental norm"[10].

However, „a distinction must be made between the act by which the norm is created and the norm created by that act. In other words, for example, the law as an act of Parliament is different from the norms contained in the respective law. The act by which the norm is created exists in time and space, it is the effect of certain causes, according to the law of causality. Its existence is a natural fact. On the other hand, taking into account the fact that the norm is not a fact, but a consequence of a fact, its existence is different from the existence of that fact". [11]

A consequence that we consider natural of the above thesis is that the existence of the norm „is given by its validity. But the validity of a legal order (and, also, of a set of norms) is given by a historical act such as a first Constitution, whose existence is validated by another norm"[12], usually of an extrajudicial nature, in our opinion.

We come, at this stage, to the definition of the actual activity of legislation. This, according to the author I. Bogdanovskaia, „represents the process through which the idea underlying a law is transformed into a law"[13].

According to the opinion of the quoted author, which we retain in our approach, the legislative activity „comprises, more or less, the following stages: the elaboration of a project or a legislative proposal, by the authorized institution, possibly in collaboration with the social partners, expert groups etc.; the adoption of the law in question, after going through certain stages specific to each legal order and, finally, publication in an official journal, since most legal orders do not admit the existence of legal effects of an unpublished act, except, of course, for acts subject to communication"[14].

As far as the EU is concerned, we consider that the planning activity we referred to above is carried out in this case as well, but we cannot talk about a general planning activity, over the entire spectrum of social relations, but about an activity of planning aimed at achieving certain objectives (stipulated in art. 3 TEU), within certain competences, according to certain procedures and in compliance with certain principles.

In order to achieve these objectives, art. 288 TFEU provides that „for the exercise of the powers of the Union, the institutions adopt r*egulations, directives, decisions, recommendations and opinions*"[15]. The adoption of some of these legal acts can be considered similar to a national legislative process both by the way it is carried out (in the case of the ordinary legislative procedure, the Parliament and the Council acting as a genuine bicameral legislature[16]), as well as by the content of the adopted acts (among which the regulation and the decision benefit from direct applicability).

However, in our opinion, we cannot consider that there is an overlapping relationship between the legislative process, in the national sense of this term, and what, for the purposes of this study, we understand by the decision-making process.

Thus, the Union currently knows the existence of two types of legislative procedures. The first is represented by the ordinary legislative procedure. According to art. 289 TFEU, this „consists of the joint adoption by the European Parliament and the Council of a regulation, a directive or a decision, on the proposal of the Commission"[17].

The second type is represented by special legislative procedures. As mentioned in the same article, para. (2), „in the specific cases provided for in the treaties, the adoption of a regulation, a directive or a decision by the European Parliament with the participation of the Council or by the Council with the participation of the

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[9] D. Plunkett, *The Planning Theory of Law II: The Nature of Legal Norms*, Philosophy Compass magazine no. 8/2 (2013), pp. 159-169.
[10] H. Kelsen, *General Theory of Law and State*, The Lawbook Exchange Ltd., Clark, New Jersey, 2007, p. 115.
[11] H. Kelsen, *On the Basic Norm*, California Law Review, vol. 47, issue 1, March 1959, p. 215.
[12] *Ibidem*.
[13] I. Bogdanovskaia*, The Legislative Bodies in Law-making Process*, f.a., extracted from *www.nato.int.*, accessed on 11.05. 2019, 19:00.
[14] *Ibidem*.
[15] Art. 238 TFEU.
[16] See A. Fuerea*, Legislativul Uniunii Europene între unicameralism și bicameralism,* in Dreptul no. 7/2017, pp. 187-200.
[17] Art. 289 para. (1) TFEU.

European Parliament constitutes a special legislative procedure"[18]. Next, art. 289 also provides that „legal acts adopted through legislative procedure constitute legislative acts"[19].

Also, decisions, when they are adopted through a legislative procedure, are considered legislative acts, in the sense given to this term by the legal order of the EU, even if, having individual applicability, the decision, for example, may not fall within the notion of law as it is known by the internal law of the member states, where it represents an act of general applicability.

Moreover, the Union does not only adopt legislative acts. A variety of other acts are adopted by its institutions in accordance with procedures laid down in the Treaties, although the acts in question do not fall into this category. For example, art. 290 provides that „a legislative act can delegate to the Commission the power to adopt non-legislative acts with a general scope of application, which complete or modify certain non-essential elements of the legislative act"[20].

In addition, art. 291 specifies that „if unitary conditions are necessary for the implementation of legally binding acts of the Union, these acts give the Commission powers of execution (...)"[21].

In other words, the above examples illustrate two categories of acts (delegated and implementing) which, within the EU legal order, are not considered legislative acts, although, if we were to compare them with similar acts in the legal orders internal, could be compared to some acts having legal nature, such as government ordinances or emergency government ordinances, respectively with administrative acts, such as Government Decisions or Ministerial Orders, intended to implement laws.

Union institutions also adopt acts aimed at implementing the objectives of the Common Foreign and Security Policy (CFSP), which cannot be considered legislative acts, nor can they be assimilated to laws or acts with the legal force of law in domestic law. In the same vein, the institutions of the Union adopt acts, such as decisions authorizing the opening of negotiations for the conclusion of international agreements, decisions to conclude agreements, acts within the procedure for appointing members of certain institutions, etc. We highlight the existence of applicable procedures within each individual institution, enshrined by acts of secondary law, with respect to which the acts of the respective institutions are adopted and which, according to the applicable procedures, become acts of the Union such as those analyzed above.

We also find it useful to mention the category of normative acts, mentioned by the EU Treaties, without being defined, however. Consequently, it was up to the Luxembourg court to make the necessary clarifications, in the context of the clarifications regarding the owners and the object of the annulment action. Thus, according to the decision of the Court no. T-18/10, *normative acts* are represented by *any act with general applicability, with the exception of legislative acts*[22], so non-legislative acts with general application (for example, delegated regulations that do not require enforcement measures, enforcement regulations, general binding acts adopted by the European Central Bank or general acts of the European Parliament or Council, EU bodies, offices, agencies, which are intended to produce legal effects vis-à-vis third parties).

Among the acts mentioned above, by their content, the decisions (as legislative acts or not), the delegated acts, the implementing acts, as well as some acts in the field of CFSP, together with the acts adopted by the bodies, offices and agencies of the Union through which carry out their duties and produce binding legal effects towards third parties represent as many expressions of the administration activity carried out at the level of the Union, activity which, in the view of specialized literature, essentially represents the action „through which the law is executed or public services are offered, within the limits of the law"[23].

We will refer exclusively to this activity (and the right associated with it, that of ***good administration***) throughout our study, and *not to the broader concept of 'governance*,'' of which we can consider the activity of administration to be a part.

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[18] Art. 289 para. (2) TFEU.

[19] Art. 289 para. (3) TFEU.

[20] Art. 290 para. (1) TFEU.

[21] Art. 291 para. (2) TFEU.

[22] We remind you that legislative acts (see art. 289 para. 3 TFEU), according to the amendments made by the Treaty of Lisbon, are those acts resulting either from the ordinary co-legislative procedure, which takes place either between the Parliament and the Council, or within special legislative procedures. This definition currently in force is different from the one provided by the historical CJEU jurisprudence which, in dec. no. 16/62, *Confédérations des Producteurs des Fruits et Légumes & Others v. CONS*, states that *legislative acts are any measure that is formulated in general and abstract terms.* In other words, non-legislative acts are of two types: delegated acts and implementing acts. The Treaty of Lisbon thus codified the hierarchy already existing in practice within the secondary EU law sources.

[23] V. Vedinaș*, Drept administrativ*, 5th ed., Universul Juridic Publishing House, Bucharest, 2009, p. 9.

Therefore, the activities of adopting the specified acts are affected by the provisions of primary law and jurisprudential findings regarding the right to good administration (a right which, for example, is not found, in the ECHR, one of the sources of inspiration for the EU Charter). But what does this right represent, how and when was it established?

3. The right to good administration. Establishment and jurisprudential development

Concerns regarding the establishment of jurisprudential coordinates for the protection of the rights of individuals against possible abuses by the administration have existed almost since the beginning of the existence of the Communities.

For example, in the *Algera*[24] *case*, the Court ruled that „it follows, from a study of comparative law, that in the legal systems of the member states, an act or an administrative measure that confers rights on a person cannot, in principle, be revoked, if it meets the condition of legality, because, in this case, the need to safeguard the legal certainty of the created situation prevails over the interests that determined the revocation of the respective act or measure, a fact also valid for the act of appointing an official"[25].

In the joint cases *Kuhner v. COM*[26], the Court established, perhaps for the first time, this right, stating „the existence of a general principle of good administration, having the effect that when an entity with administrative powers adopts acts or decisions, even legal ones, which cause significant damage affected persons, they must give the persons concerned the opportunity to express their views, except where there are serious reasons to omit this, but, further, it also decided that an act by which the applicant is given the opportunity to retain all the advantages of his rank and position does not fall within the scope of those for whom the above obligation is applicable"[27].

In another case from the same jurisprudential line, the Court ruled that, „in accordance with the principle of good administration, the Commission should periodically publish information regarding the main data considered for setting CIF prices (acronym for Cost, Insurance and Freight/Cost, insurance and transport) for certain grains, and that this obligation does not, however, include an obligation to respond to individual requests regarding the field in question"[28].

Another jurisprudential line from which we will quote further is very interesting, in which the Court admitted the possibility that „the principle of good administration confers rights on individuals, when it established that a special consequence of it is that, when an authority adopts a act or makes a decision regarding the situation of an official, it must take into account all the factors that could influence the adoption of that act or the taking of that decision and, in this process, take into account not only the interests of the respective entity, but also those of the affected officials, in what the Court categorized as a balance of mutual rights and obligations between entities and their employees, established by the acts regarding the staff status of the respective structures"[29].

In terms of proving the violation of such a right, a simple report of the European Ombudsman is not sufficient evidence, as the CJEU ruled in the Tillack judgment[30], where it is stated that the fact of „the classification of an act as one that violates the principle of good administration by the Ombudsman does not mean, in itself, that an OLAF conduct constitutes a sufficient violation of the rule of law, and, through the institution of the Ombudsman, the Treaties only conferred on citizens an alternative remedy to an action before the community courts, to defend one's own interests, which cannot, however, have the same force as the respective actions"[31].

In another case, the Court of Justice identified sources of the right to good administration both in the constitutional traditions of the member states and in the Charter, before its consecration at the level of primary law, which constitutes either a new expression of pluralism the sources of fundamental rights, or a new

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[24] CJEU dec. of 12.07.1957, C-7/56 and C-3/57-C-7/57, *Dinecke Algera, Giacomo Cicconardi, Simone Couturaud, Ignazio Genuardi, Félicie Steichen v. Joint Assembly of the European Coal and Steel Community*, EU:C:1957:7.

[25] *Ibidem*.

[26] CJEU dec. of 28.05.1980, 33/79 and75/79, *Richard Kuhner v. COM*, EU:C:1980:139, point 25.

[27] *Ibidem*.

[28] CJEU dec. of 15.03.1984, 64/82, *Tradax Graanhandel BV v. COM*, EU:C:1984:106, point 22.

[29] CJEU dec. of 04.02.1987, 417/85, *Henri Maurissen v. The Court of Auditors*, EU:C:1987:61, point 12.

[30] Court of First Instance, dec. of 04.10.2006, T-193/04, *Hans-Martin Tillack v. COM*, EU:T:2006:292, point 128.

[31] *Ibidem*.

assimilation of the Charter, before the Treaty of Lisbon, with the general principles of law recognized by the member states.

More precisely, the Court decided that the submission of sufficient diligence and the impartial treatment of requests are associated with the right to good administration (this time, in the wording „sound administration”, but the Romanian language does not differentiate between „good administration” and „sound administration” from the English language, so we will not differentiate either), which represents one of the general principles respected by states governed by law and is common to the constitutional traditions of the member states[32], being also provided for in art. 41 of the Charter.

As regards other components of the notion of good administration, a decision of the Tribunal[33], this time following the consecration of the Charter at the level of primary law, it stipulates that, "according to the jurisprudence of the Union court regarding the principle of good administration, in cases where the institutions of the Union would have a discretionary power, compliance with the guarantees conferred by the legal order of the Union within administrative procedures is, all the more, of fundamental importance. These guarantees include in particular the obligation of the competent institution to examine, carefully and impartially, all the relevant elements of the case"[34].

4. The right to sound administration in the Charter of Fundamental Rights of the European Union

4.1. Charter of fundamental rights of the European Union. Evolution. Legal status

Developed as a result of the political consensus on the need for such a document, reached on the occasion of the European Council in Cologne, from June 3-4, 1999, "in which it was considered that the stage of the development of the European Union at that time allowed the reunification, in a Charter, of the fundamental rights enshrined until that moment in the EU space, in order to give them greater visibility, in the context of the expansion of the Union's competences through the Treaty of Maastricht and the Treaty of Amsterdam and the expansion of the Union and also to compensate for the democratic deficit of the EU" and proclaimed by the President of the European Commission, the President of the European Parliament and the Council during the work of the European Council in Nice, on December 7, 2000, the Charter of Fundamental Rights of the European Union had, until the entry into force of the Treaty from Lisbon, an insufficiently clearly defined legal status, which the Court of Justice assimilated, in its jurisprudence a, the fundamental principles of law recognized by the member states and compatible with the legal order of the Union.

But this situation came to an end with the entry into force of the aforementioned Treaty, which introduced into the Treaty on the European Union the provision of its new art. 6 para. (1), according to which the Charter has the same legal value as the Treaties, becoming, therefore, part of the EU primary law.

4.2. The right to good administration in the regulation of the Charter

In this older jurisprudential context, which (partially) defined the concept of good administration at the EU level, identified some of its components and specified its legal effects, the Charter of Fundamental Rights enshrined it, taking over, in general terms, the existing jurisprudential solutions, in its art. 41, entitled „The right to good administration”, which provides that „every person has the right to benefit, in terms of his problems, from an impartial, fair treatment and within a reasonable time from the institutions, bodies, offices and agencies of the Union”[35]. The same article also includes a non-exhaustive enumeration (as suggested by the use of the wording 'mainly') of the components of this right, when it states that it mainly includes 'the right of every person to be heard before any individual measure is taken which may affect him infringes[,] the right of any person „to access their own file, respecting the legitimate interests related to confidentiality and professional and commercial secrecy [and] the administration's obligation to motivate its decisions”[36]. The same article also enshrines the right of any person „to reparation by the Union of the damages caused by its institutions or agents

[32] Court of First Instance, dec. of 30.01.2002, T-54/99, *Telekommunikation Service GmbH v. COM*, ECLI:EU: T:2002:20, point 48.
[33] Court of First Instance, dec. of 22.03.2012, T-458/09 and T-171/10, *Slovak Telekom a.s. v. COM*, EU:T:2012:145, point 68.
[34] *Ibidem*.
[35] Art. 41 (1) of the Charter of Fundamental Rights of the European Union.
[36] Art. 41 (2) of the Charter of Fundamental Rights of the European Union.

in the exercise of their functions, in accordance with the general principles common to the laws of the member states", as well as the right, having the same beneficiaries, to „address in writing to the institutions of the Union in one of the languages of the treaties and must receive a reply in the same language"[37].

Next, art. 42 of the Charter provides that „any citizen of the Union and any natural or legal person who resides or has its registered office in a member state has the right of access to the documents of the institutions, bodies, offices and agencies of the Union, regardless of the support on which these are located documents". We note that, in the case of this right, the scope of beneficiaries is limited to that of EU citizens, unlike the situations in art. 41, where the recipients of the rights we referred to were „any persons".

Citizens of the Union and natural and legal persons with residence or registered office in one of the member states) benefit from the rights enshrined in art. 43 of the Charter („any citizen of the Union, as well as any natural or legal person residing or registered office in a member state have the right to notify the European Ombudsman regarding cases of maladministration in the activity of institutions, bodies, offices or agencies of the Union, with the exception of the Court of Justice of the European Union in the exercise of its jurisdictional function") and 44 („any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to address petitions to the European Parliament").

We note, in this context, how the right to good administration, as enshrined in art. 41 *et seq.*, in fact, contains a series of other rights, which led the specialized literature, also based on the Court's jurisprudence, to consider it an „umbrella right"[38].

5. The European Code of Good Administrative Conduct

In all this context, of such a vast content of the notion of good administration, „the year 1998 brought a first attempt to codify the theory and practice related to this concept, by proposing the adoption of a European Code of good administrative conduct, belonging to the member of the European Parliament Roy Perry"[39].

As a result of the preparation, by the European Ombudsman, of a draft European Code of good administrative conduct, during September 2001, „the European Parliament approved the [mentioned] Code, which establishes the standards to be respected by the institutions and bodies of the European Union and by their employees in relations with the citizens of the European Union. It details the provisions of the Charter of Fundamental Rights of the European Union, bringing together material and procedural principles that govern actions taken at the level of European institutions and bodies. We find in this document provisions of a principled nature such as: legality, non-discrimination, proportionality, and impartiality of the actions of the officials within the EU institutions, the prohibition of the abuse of power, the independence, equity, kindness and objectivity of the employees of the EU bodies. Procedural rules regarding the receipt, evaluation, and transmission of responses to received requests are mentioned, rules regarding the hearing of persons whose interests may be affected by the decisions of the EU institutions and rules regarding decision-making regarding a request (reasonable term for adopting decisions, the obligation to motivate decisions and indicating the means of appeal of the decisions)"[40].

In turn, „the Treaty establishing a Constitution for Europe [dedicates] a significant space to the provisions relating to public administration and [established] a series of new principles with direct relevance to public administration, especially regarding the allocation of powers between states members and the [Union] (...) and regarding the different types (...)"[41] of legislative acts of the Union, largely taken over with the Treaty of Lisbon.

According to what is mentioned in the Code, it contains „the general principles of good administrative conduct, which apply to all relations between the Institutions and their administrations and the public, unless they fall under specific provisions". In fact, the very scope mentioned in the code confirms our statements related to the relationship between good administration and legislation, according to which it cannot violate the legislation, but it can target more aspects than it includes.

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[37] Art. 41 (4) of the Charter of Fundamental Rights of the European Union.

[38] H.C.H. Hofmann, B.C. Mihăescu*, The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as a Test Case*, European Constitutional Law Review no. 9/2013, pp. 73-101.

[39] European code of good administrative conduct, Office for Official Publications of the European Communities, Luxemburg, 2005, p. 6.

[40] E. Slabu*, Evoluția conceptului bunei administrări în Uniunea Europeană*, *www.umk.ro*, f.a., f.p.

[41] G.L. Chiric*, Principii ale administrației desprinse din Tratatul instituind o Constituție pentru Europa*, *www.proceedings.univ-danubius.ro*, f.a., f.p.

We observe how the Code explains that „in adopting decisions, the official will ensure that the measures taken are proportionate to the intended purpose and will avoid limiting the rights of citizens or imposing obligations on them, if these limitations or tasks are not in a reasonable relationship with the purpose of the pursued action. [Also,] in adopting decisions, the official (public servant) will respect the correct balance between the interests of private individuals and the interest of the general public”[42]. Therefore, the second principle established by the Code of Good Administration in the EU is that of proportionality, also found in the legislation of the member states.

In art. 7, the Code aims to limit the exercise of the administration's powers to the purpose in which they were conferred by the relevant provisions. In particular, says the Code, „the official [public servant] shall avoid using these powers for purposes which have no legal basis, or which are not justified by any public interest”.

From this article we deduce a reiteration of the principle of equality and the concern of combating the abuse of power, even if the actions that would have this character would not be expressly illegal or, even more so, punishable under the criminal law.

The code also provides aspects related to the conduct of the official [public servant] in the administration, such as that he „must show impartiality and independence, and refrain from any arbitrary action that negatively affects the public, as well as from any treatment preferentially granted on the basis of any reasons”[43].

Through these provisions, the Code reiterates some aspects mentioned in the Recommendations of the Council of Europe, but also includes an additional element, namely the fact that the official must not prove biased in any situation, even if it is not generated by a conflict of interests, but, perhaps, of a personal aversion or other unspecified reasons.

Furthermore, the Code establishes that officials „are bound to respect the legitimate and reasonable expectations of the public, according to the way the Institution has acted in the past”[44], and through this we observe a first consecration, in the matter of good administration, of the principle of legitimate expectations (hopes), regarding which there is, moreover, a rich jurisprudence, although this does not only concern the action of the administration.

Art. 11 of the Code stipulates that the union official must act in an impartial, fair and reasonable manner and try to give the public all possible support in solving their problems and will respond in the same manner, as well as promptly, to the correspondence received, phone calls or inquiries in any way, being as courteous as possible in dealing with the public.

According to the Code, „in cases related to the rights or interests of individuals, the official [public servant] will ensure that the right to defense is respected during each stage of the decision-making procedure. Every member of the public shall have the right, in cases where a decision affecting his rights or interests is to be adopted, to submit written notes and, whenever necessary, to present verbal comments prior to the adoption of the decision”[45].

We are, therefore, in the presence of the right to be heard before taking measures that affect the rights of the administrator, but, this time, the Code offers, in addition to the Recommendations, a series of indications regarding the concrete aspects associated with this right, which represents an additional step in its consecration.

Art. 18 includes the administration's obligation to mention the basis of the decisions adopted, which may negatively affect the rights or interests of a private person, with the mention of the grounds on which they are based, clearly indicating the relevant facts and legal basis of the decision. It will also avoid adopting decisions based on summary or vague grounds or that do not contain individual reasoning. This article must be corroborated with the next one, which mentions the fact that „decisions of the institutions, which could negatively affect the rights or interests of a private person, will contain an indication of the existing appeal possibilities for contesting the decision. In particular, it will indicate the nature of the means of appeal, the bodies before which they can be exercised, as well as the deadlines for exercising them”[46].

We mentioned this correlation because the motivation of a decision can be a decisive element in judging a case related to it and, for this reason, its quality is essential for the valorization of the essential rights of the administrator.

[42] According to art. 6 of the European code of good administrative conduct.
[43] Art. 8 and 9 of the European code of good administrative conduct.
[44] Art. 10 & the following of the European code of good administrative conduct.
[45] *Ibidem*.
[46] *Ibidem*.

In the same vein, art. 20 of the Code stipulates that the official [public servant] will ensure the written notification to the person or persons concerned, immediately after the adoption of the decision, of the decisions that affect their rights or interests.

This provision is also relevant for the exercise of appeals, which would be impossible, sometimes, in the absence of knowledge of the contested fact and, in addition, certain terms related to the actions against administrative acts that bring damage to the administrations must be exercised, to be admissible, within certain terms that run from the date of communication of the act. The code also provides for aspects related to access to documents, which, in turn, have an intrinsic connection with the aspects we referred to. Without stating them expressly, since they are based on provisions from the derivative EU law, and are applicable only to its institutions, we mention their existence and the fact that these rights are enshrined, in general, in the legislation of the member states.

6. The European Ombudsman - 'guardian' of sound administration in the EU[47]

Established by the Maastricht Treaty (1992), the first Ombudsman was elected by Parliament in 1995. Since then, at the beginning of each new term of office of the European Parliament, its members elect a new European Ombudsman for a term of office which coincides with that of the Parliament (5 years) and is renewable. Under a relatively symmetrical procedure, if the European Parliament decides that the Ombudsman no longer fulfils the conditions required for the performance of his or her duties or has committed one or more serious misconduct, it may refer the matter to the Court of Justice which, if it considers Parliament's arguments to be well founded, may dismiss the Ombudsman in plenary session.

Through its powers, the Ombudsman is placed in the same institutional framework in which similar institutions operate at national level, such as the Ombudsman, which can be considered both an element of specificity of the Union (differentiating it from other international organizations) and an element of its statehood.

For example, it is empowered[48] to receive complaints from any EU citizen or any natural or legal person residing or having its registered office in a Member State. The subject of such complaints is conduct by the institutions, bodies, offices or agencies of the Union[49] (with the exception of the Court of Justice acting in its judicial role) which can be characterized as maladministration. Complaints may be made directly or through a Member of the European Parliament. In understanding the concept of maladministration, the content of *the Guide to good administration at Union level* is particularly useful in that it designates the content of good administrative practice, behavior contrary to which constitutes maladministration. The European Ombudsman can also make inquiries *ex officio*.

After receiving complaints from citizens and the natural or legal persons mentioned or after having made a referral ex officio, the Ombudsman shall inform the institution, body, office or agency concerned of the fact that it is the subject of such a complaint. Subsequently, the Ombudsman[50] carries out all those inquiries or investigations which he considers justified in order to clarify the circumstances of the case or cases of maladministration in question and, on the basis of these, draws up a report describing the matters found. He shall be completely independent in the performance of his duties and may not seek or take instructions from any government, institution, body, office or agency.

Concrete examples of cases of maladministration can be found on the Ombudsman's website[51], for example: late payments, contractual disputes, problems with tendering procedures, lack of transparency/refusal of access to documents, unnecessary delays, violations of fundamental rights.

Even if the mediation activity and the personal authority of the Mediator are prerequisites that often lead to the success of his actions, the lack of binding legal force of the above-mentioned report raises, however, the question of the existence of real, effective remedies for the legal subjects affected by maladministration. These remedies are represented by the actions enshrined in the Treaty on the Functioning of the European Union, of which we shall present below the action for failure to act, *i.e.*, in the finding of inaction by the EU's institutional

[47] M.A. Dumitrașcu, *Dreptul Uniunii Europene I - curs universitar*, Universul Juridic Publishing House, Bucharest, 2021, pp. 125-126.

[48] Art. 228 TFEU.

[49] See, for further details, *Activity report of the European Ombudsman* - 2019, *https://www.ombudsman.europa.eu/ro/annual/ro/127393, 2019, accessed on 01.03.2022*.

[50] The terms *Mediator* and *Ombudsman* being, in the terminology of European Union law, interchangeable.

[51] *https://www.ombudsman.europa.eu/cs/publication/ro/27*, accessed on 3.03.2022.

structures, given that inadequate administration often takes the form of an omission which is not in conformity with the EU Treaties.

7. Action for failure to act - an instrument of judicial review to ensure the right to good administration[52]

According to the TFEU, „if, by infringing the provisions of the Treaties, the European Parliament, the European Council, the Council, the Commission or the European Central Bank abstain from acting, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have that infringement established”[53] , provisions applicable not only to the institutions, but also to bodies, offices and agencies which abstain from acting. Any natural or legal person may also, under the same conditions, bring an action before the CJEU for the failure of these passive subjects to address to it anything other than a recommendation or an opinion (given their lack of binding legal effect). The action is admissible, however, only on condition that a prior, pre-litigation procedure is carried out, in which the person who considers that his rights have been infringed is obliged to notify the institution, body, office or agency concerned and, by this notification, to request them to act.

The notice must be clear, precise, and warn the institution that continued inaction will lead to an action for failure to act. The request must also specify in the request the date from which the two-month period begins, within which the institution must put an end to its inaction. The notice can only be addressed to the institution competent to act and obliged to act, and it also sets out the limits within which the future action for failure to act may be brought. If the notified institution adopts a position, any subsequent action before the CJEU is without object.

If the institution, body, office or agency has not stated its position within this two-month period from receipt of the notification (which may include not acting in the way the complainant wishes, if the complainant's claims are considered unfounded, contrary to EU law, inappropriate, etc.), the complainant may initiate the contentious phase of the action by bringing the matter before the CJEU within a further two-month period.

According to the Court's judgment, the institution, body, office or agency whose act has been declared void or whose failure to act has been declared contrary to the Treaties is required to take the measures necessary to comply with the judgment of the CJEU.

As a means of judicial review, therefore, the action for failure to act plays an important role in guaranteeing the exercise of the EU powers conferred on the institutions by the founding Treaties and seeking to oblige the competent institution to act in areas where the institution, body, office or agency in question is competent to adopt acts. Its purpose is to obtain a judgment of the CJEU finding that the institution has acted unlawfully in failing to take a decision.

It follows from the scheme of the provisions of art. 265 TFEU that the Member States and the institutions, with the exception of the courts, have *locus standi* in actions for failure to act as preferred claimants, and natural or legal persons as non-preferred claimants. The consequence of the non-privileged status of the latter is the need to justify an interest, whether direct or indirect, in the issuing of the act in question.

The European Parliament, the European Council, the Council, the Commission, the European Central Bank and the bodies, offices and agencies of the Union shall have *locus standi* within the limits of their respective powers.

The basis for illegality of inaction is violation of the EU Treaties, and (invalid) inaction can concern any type of decision/measure in any area where the EU has competence: EU secondary legislation, EU international agreements, EU legislative proposals, EU budget, etc.

In view of the effects of the EU Court of Justice's judgment in the action for failure to act, we take the view that this is precisely the judicial 'supplement' to the possibility of referring the matter to the Ombudsman, producing binding legal effects which the latter does not possess. At the same time, for the sake of clarity, we would point out that the CJEU's judgment is only intended to establish that the failure in question is not in conformity with the Treaties and does not take the place of the act or measure in question. The competent

[52] M.A. Dumitrașcu, O.M. Salomia, *Dreptul Uniunii Europene II - curs universitar*, Universul Juridic Publishing House, Bucharest, 2020, pg. 105-108.

[53] Art. 265 TFEU.

institution, body, office must exercise the power conferred on it by the Treaties and act in accordance with it by adopting the act or initiating the measure required by the CJEU judgment.

8. Actions for annulment and actions for non-contractual liability as judicial means of ensuring compliance with the right to sound administration

Under the Treaty on the Functioning of the European Union, the Court of Justice has jurisdiction to review „the legality of legislative acts, acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties"[54]. It also exercises the same control of legality over „acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties"[55] .

The review in question is carried out by ruling on actions „brought by a Member State, the European Parliament, the Council or the Commission[56], on grounds of lack of competence, infringement of essential procedural requirements, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers"[57]. The same control is also exercised in the case of actions „brought by the Court of Auditors, the European Central Bank and the Committee of the Regions for the purpose of safeguarding their prerogatives"[58], this last specification making the above-mentioned claimants semi-privileged, given the need to justify the interest of safeguarding their own prerogatives.

Finally, the TFEU also mentions a third hypothesis concerning the bringing of actions for annulment, namely that where natural or legal persons bring „an action against acts addressed to them or which are of direct and individual concern to them, as well as against legislative acts which are of direct concern to them and which do not entail implementing measures"[59], these conditions confer on natural and legal persons the status of non-privileged applicants.

In order to facilitate the exercise of the right of non-privileged claimants to apply to the Court of Justice for a review of the legality of the aforementioned acts, the Treaties have established, for their benefit, the possibility for the constituent acts of Union bodies, offices and agencies „to lay down special conditions and procedures relating to actions brought by natural or legal persons against acts of those bodies, offices or agencies which are intended to produce legal effects vis-à-vis them"[60]. However, in order also to protect the general interest of maintaining the predictability of Union law and the legal certainty of the Union legal order, an action for annulment may be brought only „within two months, as the case may be, of the publication of the act, of its notification to the plaintiff or, failing that, of the date on which the plaintiff became aware of it"[61].

The effect of allowing the action for annulment is to declare the contested act null and void, which leads to its disappearance from the Union's legal order as soon as it is adopted. However, in order to protect certain legitimate interests, the Treaties have also provided for the possibility for the Court to indicate, „if it considers it necessary, which of the effects of the annulled act are to be regarded as irrevocable"[62], which leads to the possibility of maintaining (temporarily) the applicability of some of the effects of the annulled acts.

This legal remedy also applies to acts of the Union institutions, offices and agencies adopted in breach of the right to good administration, in all its aspects, in accordance with long-standing and constant case-law which predates by almost two decades the establishment of this right by primary legislation. For example, in one of the first cases decided by the Court of Justice in this regard, the Court held, with regard to the meaning of the right to sound administration, that it includes the existence of effective judicial review, which must be capable of covering also the legality of the statement of reasons for the contested acts, which generally means that the competent court may require the issuer of the act to communicate to it the statement of reasons in question. This is justified by the fact that, in order to guarantee the exercise of the rights of the defence, potential claimants

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[54] Art. 263 TFEU.

[55] Ditto.

[56] The latter being considered, by specialized doctrine, privileged plaintiffs, considering the lack of need to justify an interest when filing the action.

[57] According to art. 263 TFEU.

[58] Ditto.

[59] Ditto.

[60] Ditto.

[61] Ditto.

[62] According to art. 264 TFEU.

must have full knowledge of the relevant facts underlying the adoption of the contested act, since the decision whether or not to challenge the act before the competent court may depend on this knowledge[63].

In the same idea, the right of defence, in the case of a decision to sanction anti-competitive conduct (from which we can extrapolate to other matters) must be exercised from the stage of adoption of the sanctioning decision, and not only at the judicial stage, assuming that the decision in question will be challenged with an action for annulment[64], which only confirms the jurisprudential solution already expressed in the Judgment in Joined Cases 46/87 and 227/88 Hoechst v. European Commission[65], in which the Court also established the general rule on the protection of fundamental rights in the adoption of legal acts by the Union institutions, according to which provisions of Union law may not be interpreted in such a way as to give rise to results which are incompatible with the general principles of Union law and, in particular, with fundamental rights[66].

The obligation to state reasons for legal acts adopted by the Union institutions is also underlined in para. 32 of the Lisrestal judgment[67], based, however, on a legal basis (former art. 190 TEC) in the Fundamental Treaties, in the absence of the current Charter. However, as this is a primary legal basis, now shared by the Charter of Fundamental Rights of the European Union, we consider that this distinction has lost its relevance, and the substance of the Court's findings is now all the more valid. However, a mere inadvertence in the reasoning of a legal act on which a measure adopted pursuant to a regulation is based is not in itself sufficient for the Union to incur non-contractual liability[68], from which we deduce, per a contrario, the applicability of this second legal remedy specified throughout this paragraph, in addition to the action for annulment, in situations other than that excluded by the case-law finding mentioned above.

The constancy and topicality of the Court's case-law on the protection of fundamental rights enshrined in the Charter through the legal remedy of an action for annulment is demonstrated, for example, by a very recent judgment[69], following the fact that „in May 2019, the Republic of Poland brought an action for annulment before the Court, challenging the legality of the preventive measures established by art. 17 para. (4)[70] in relation to (...) the right to freedom of expression, which includes the right to information, laid down in art. 11 of the Charter of Fundamental Rights of the European Union[71]", in which the Court reiterated the need to review the legality of legal acts adopted by the Union institutions in relation to the provisions of the Charter of Fundamental Rights, including the right to good administration.

9. Good governance as a form of loyal cooperation [72]

As the author Marcus Klamert states in his paper[73], „this principle has been a constant element in the various EU treaties", starting with the very first treaty - the Treaty establishing the European Coal and Steel Community (hereafter referred to as the ECSC Treaty). „Its wording has essentially changed very little since the 1950s" and is now governed by art. 4(3) TEU; at the same time, it is pointed out that "What has evolved over the course of the amendments to the founding treaties are the general context and concrete situations in which the obligation of loyal cooperation is placed today" in the treaties governing the EU.

Currently, art. 4 para. (3) TEU[74] defines the principle of loyal cooperation as follows:

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[63] CJEU dec. of 15.10.1987, 222/86, *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v. Georges Heylens*, EU:C:1987:442, point 15.

[64] CJEU dec. of 18.10.1989, 374/87, *Orkem v. COM*, EU:C:1989:387, point 33.

[65] CJEU dec. of 21.09.1989, 46/87 and 227/88, *Hoechst AG v. COM*, EU:C:1989:337, passim.

[66] Ditto.

[67] Court of First Instance, dec. of 06.12.1994, T-450/93, *Lisrestal - Organização Gestão de Restaurantes Colectivos Ldª and others v. COM*, EU:T:1994:290.

[68] Court of First Instance, dec. of 18.09.1995, T-167/94, *Detlef Nölle v. CONS & COM*, EU:T:1995:169, point 37.

[69] CJEU dec. of 26.04.2022, -C401/19, *Republic of Poland v. European Parliament and Council of the European Union*, EU:C:2022:297.

[70] From Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the digital single market and amending Directives 96/9/EC and 2001/29/EC, published in OJ L 130 of 17.05.2019, pp. 92-125.

[71] J.P. Quintais, *Between Filters and Fundamental Rights. How the Court of Justice saved Article 17 in C-401/19 - Poland v. Parliament and Council*, VerfBlog, 2022/5/16, *https://verfassungsblog.de/filters-poland/*, 16.05.2022, accessed on 29.12.2022.

[72] M.A. Dumitrașcu, O.M. Salomia, *Principiul cooperării loiale - principiu constituțional în dreptul Uniunii Europene*, In Honorem Ioan Muraru - Despre Constituție în Mileniul III, Hamangiu Publishing House, 2019, p. 158-173.

[73] M. Klamert, *The principle of loyalty in EU Law*, Oxford Studies in European Law, Oxford University Press, 2014, p. 9.

[74] D.-A. Bantaș, *Considerations regarding the Choice, by the European institutions, of the legal basis of acts, during the legislative procedures overview of the case law of the Court of Justice of the European Union*, Challenges of the Knowledge Society, 11th-12th May 2018, 12th ed., ISSN 2359-9227 ISSN-L 2068-7796, p. 404.

„(3) In *accordance with the principle of loyal cooperation*[75], *the Union and the Member States shall* ***respect and assist each other*** *in the performance of their* ***tasks*** *under the* ***Treaties****.*

Member States shall adopt any general or specific measure to ensure fulfilment of the obligations arising out of the Treaties *or resulting from* action taken by the institutions of the *Union.*

Member States shall facilitate the *achievement of the Union's* ***tasks*** *and shall* refrain from *any measure which could jeopardise the attainment of the Union's* ***objectives****".*

Another reflection of the principle of loyal cooperation at EU level concerns inter-institutional cooperation and collaboration as regulated by **art. 13 (2) TEU,** according to which *„Each institution shall act within the limits of the powers conferred upon it by the Treaties and in accordance with the procedures, conditions and objectives set out therein. The institutions shall* ***cooperate with each other in good faith.****"*

The new article introduced by the Lisbon Treaty underlines the *horizontal* application of the loyalty clause, between the EU institutions[76]. Compared to art. 4(3) TEU, the same wording is used: loyal/synchronous cooperation[77], as well as recalling the principle of *conferral of* competence. In addition, in this context, loyal cooperation refers to another important principle of institutional activity, namely: the principle *of* institutional *balance*[78] (studied alongside the principle *of* institutional *autonomy*[79] and the *attribution of* competences). Loyal cooperation in the relationship between the institutions is particularly important in the context of the various procedures requiring institutional cooperation, such as the legislative procedure or the budgetary procedure, and is practically a way of ensuring good administration at EU level in any type of measure, action, legislative or non-legislative decision that this organisation might adopt.

Although the provision in the TEU refers expressly only to the *institutions*, according to case law, the same principle is of course applicable to the other components of the EU institutional structure (bodies, agencies, offices, etc.).

As we can see from the outline of the content of the two principles - *good administration of European affairs* and *loyal cooperation within the EU* (at the level of its institutional framework and beyond), in our opinion, cannot be conceived without each other; they are two perspectives that not only depend on each other, mutually reinforcing each other, but also ensure both the efficient functioning of the organization, the achievement of its objectives, according to the competences specified in the Treaties, and, at the same time and just as importantly! compliance with the values promoted by the EU Treaties, values which must infuse every type of EU action (including loyalty/trust). Loyal/sincere cooperation is one of the preconditions and prerequisites for good administration, and good administration is the consequence and proof that the institutional structures understand their competences well, and respect them without infringing the limits set by the Treaties, facilitating each other in the fulfilment of their tasks and objectives, in a context characterized by cooperation that favors not only autonomy, but also balance and, why not?, harmony.

10. Conclusions

As the specialized doctrine has expressed it, „the development of international relations between states has been manifested, after the Second World War, by the creation of important associations with a view to achieving common general objectives such as the maintenance of peace and international cooperation or specific objectives of a military, economic-commercial or scientific-cultural nature"[80], to which have been added, almost naturally, those derived from the need to protect fundamental rights, with the enumeration, content and scope specific to each legal order. In line with this practically worldwide trend, «the States of Europe have created a specific international intergovernmental organization with a view to maintaining peace and achieving economic integration which contributes to the „welfare of peoples"»[81], but economic objectives have relatively quickly and

[75] Codifying case C-2/88, Imm. Zwartveld, 1990 (access to information; loyal cooperation in the relationship between the EC institutions and the member states//COM - Netherlands).

[76] Two established examples of inter-institutional collaboration in which the principle of loyal cooperation and, implicitly, good administration, must be applied refer to the ordinary legislative procedure (art. 294 TFEU) and the budgetary procedure (art. 314 TFEU).

[77] M. Dony, *Droit de l'Union européenne*, septième édition revue et augmentée, Editions de l'Université de Bruxelles, Bruxelles, 2018, p. 231: „The Court is the first to pronounce the rule according to which, within the inter-institutional dialogue, the same mutual obligations of loyal cooperation as those regulating the relations between the Member States and the institutions of the Union are given".

[78] It includes the following concepts: separation of powers between institutions and, at the same time, collaboration between them.

[79] Institutions have their own internal organization regulations, they appoint their own officials, for example.

[80] O.M. Salomia, A. Mihalache, *Principiul egalității statelor membre în cadrul Uniunii Europene*, in Dreptul no. 1/2016, pp. 166-174.

[81] *Ibidem*.

naturally made their political-legal integration. In this context, faced with the fact that, under the major economic expansion, „patrimonial values and the criteria of efficiency and utility tend to diminish in importance or even replace essentially non-patrimonial values, such as social solidarity, civic engagement or equity, affecting the way resources are allocated at the level of society[82]", The Charter of Fundamental Rights of the European Union has come to enshrine rights, principles and values, such as „dignity as a fundamental human right"[83] and, relevant to our study, the right to good administration, already established by the Court of Justice of the EU in an important series of judgments which have enshrined this right in case law and defined its scope and content. Following these developments, supplemented by the European Code of Good Administrative Behavior, a non-binding document drawn up by the European Ombudsman, the EU institutions and citizens benefit from the regulatory, case-law and conceptual framework necessary for an administration that operates in accordance with the expectations of its recipients and with respect for their rights, interests and values.

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- CJEU dec., 15.10.1987, 222/86, Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v. Georges Heylens, EU:C:1987:442, point 15.
- CJEU dec., 18.10.1989, 374/87, Orkem v. COM, EU:C:1989:387, point 33.
- CJEU dec., 21.09.1989, 46/87 and 227/88, Hoechst AG v. COM, EU:C:1989:337, passim.
- Decision of the Court of First Instance, 06.12.1994, T-450/93, Lisrestal - Organização Gestão de Restaurantes Colectivos Ldª & others v. COM, EU:T:1994:290.
- Decision of the Court of First Instance, 18.09.1995, T-167/94, Detlef Nölle v. CONS & COM, EU:T:1995:169, point 37.

[82] M.F. Popa, *Ce nu poate să facă analiza economică în drept - capcane și implicații practice*, in Tribuna Juridică no. 11 (1)/2021.

[83] D.L. Rădulescu, D.M. Marinescu, *Gender discrimination. The influence of the Court of Justice of the European Union Jurisprudence*, in Perspectives of Law and Public Administration, vol. 8, issue 1, 2019, pp. 68-73.

- CJEU dec., 26.04.2022, C-401/19, Republic of Poland v. European Parliament and Council of the European Union, EU:C:2022:297.
- Court of First Instance dec., 30.01.2002, T-54/99, Telekommunikation Service GmbH v. COM, ECLI:EU:T:2002:20;
- Court of First Instance dec., 04.10.2006, T-193/04, Hans-Martin Tillack v. COM, EU:T:2006:292;
- Court of First Instance dec., 22.03.2012, T-458/09 and T-171/10, Slovak Telekom a.s. v. COM, EU:T:2012:145;
- CJEU dec. no. 16/62, Confederations des Producteurs des Fruits et Legumes & Others v. CONS;
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JURISPRUDENTIAL ASPECTS REGARDING THE APPLICATION OF THE *NE BIS IN IDEM* PRINCIPLE IN THE AREA OF FREEDOM, SECURITY AND JUSTICE WITHIN THE EUROPEAN UNION

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Abstract

The establishing of the Area of Freedom, Security and Justice represents one the main features which individualizes EU among other international intergovernmental organizations and it contributes to the integration of the Member States „with respect for fundamental rights and for the different legal systems and traditions of the Member States".

The Third Part of the Treaty on the functioning of the European Union, named „Area of Freedom, Security and Justice" (AFSJ), regulates the policies on border checks, asylum and immigration, judicial cooperation in civil matters, judicial cooperation in criminal matters and police cooperation which are covered by the shared competence of the Union with the Member States.

As it is stated in the Treaty, this field is regulated at European level taking into account the national systems of law, including common law principles and „traditions" of the Member States; one of these principles is ne bis in idem provided for by different types of rules within the EU Law on: the Area of Freedom, Security and Justice, the Schengen Area, the European Arrest Warrant, the EPPO, and also the provisions of the Charter of Fundamental Rights of the European Union.

These rules have been interpreted by the CJEU, which has established the content of the principle applied in the Area of Freedom, Security and Justice and, also, the conditions regarding the restrictions which could be brought to this principle.

The analysis of the jurisprudential findings underlines that the interpretation made by the Court of Luxembourg is compulsory for the European institutions, the Member States and the citizens and also the companies, and it is pronounced with the respect of the limits of the EU competencies and in line with the ECtHR decisions.

Keywords: *ne bis in idem principle, area of freedom, security and justice (AFSJ), shared competence, CJEU, restrictions.*

1. Introduction

The *ne bis in idem* principle represents a general legal principle found in various national legal systems, including EU law, which means that no one can be prosecuted or punished twice for the same crime.

Regarding the application in the EU law, we consider useful both the clarification regarding the wider context of its application, as well as the outline of the relevant CJEU jurisprudence. As it is stated, the interpretation given by the CJEU to the sources of EU law is binding *erga omnes* and represents itself an essential source of law, which will be connected with the interpreted rule or principle. Within the EU, which is an integration international intergovernmental organization, the CJEU holds the monopoly on the interpretation of EU law, being the unique benchmark for interpretation, so necessary in a system that is based on the integration method, which involves the harmonization of national rules and uniformity of application of the European rules and is based on the uniformity of the interpretation of EU law.

The principles represent a very important source of law for EU law, being, according to the jurisprudence of the CJEU, on second place in the hierarchy of sources of EU law, after primary law (EU Treaties)[1]. In this

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[1] M.-A. Dumitrașcu, *Dreptul Uniunii Europene I*, Universul Juridic Publishing House, Bucharest, 2021, p. 223-227.

framework, the *ne bis in idem* principle is a principle that comes from domestic and international law, having, at the same time, a specific representation in the matter of EU law.

Thus, through this paper, we aim to achieve the following aspects: underlining the type of competence that the EU has in the AFSJ and, implicitly, in the matter of the criminal cooperation; the legislative consecration of the principle in EU law and territorial application; correlation with the ECtHR jurisprudence; defining the content and establishing the conditions for restricting the application of this principle, the purpose being to identify the specificity of the interpretation of the CJEU from the perspective of EU competences in criminal matters.

2. Shared competence between the EU and the Member States in the AFSJ

The Treaty of Lisbon, entered into force in 2009, which eliminates the three-pillar structure of the Union, establishes, for the first time in an European Community/Union Treaty, the categories of the European Union[2] s competences to which it allocates a series of fields, the AFSJ being attributed to the shared competence of the EU with the Member States, according to art. 4 para. 2 lit. (j) TFEU. It has its origins in the 3rd pillar - *Justice and internal affairs* established by the Maastricht Treaty within a Union created initially without legal personality; this pillar of intergovernmental cooperation is similar with the one regarding the *Common Foreign and Security Policy* (CFSP), these two pillars being different from the community one (the first pillar) subject to integration. The Treaty of Amsterdam, entered into force in 1999, brings a first important change to the 3rd pillar, in the sense that it applies the integration method to a part of its domains, namely visa, asylum, immigration and cooperation in civil matters; consequently, only the police and judicial cooperation in criminal matters remains in the field of intergovernmental cooperation[3].

The shared competence is defined, according to art. 2 para. (2) TFEU, as follows: *„The Union and the member states can legislate and adopt legally binding acts in this field. Member States exercise their competence to the extent that the Union has not exercised its competence. Member States exercise their competence again to the extent that the Union has decided to stop exercising it".*[4]

However, as stated in the doctrine, „the nature of the sharing of competence between the EU and the Member States can only be discovered by examining the detailed provisions of the respective field. Sharing is not the same in all AFSJ domains"[5]; thus, the exact competence of the Union can only be identified by referring to the specific provisions of Title V, Third Part of the TFEU, entitled „Area of Freedom, Security and Justice" within art. 82 para. (1) is relevant in our analysis[6]: *„Judicial cooperation in criminal matters within the Union is based on the principle of mutual recognition of court judgments and judicial decisions. The European Parliament and the Council, deciding in accordance with the ordinary legislative procedure, adopt the measures regarding: (a) the establishment of rules and procedures to ensure the recognition, throughout the Union, of all categories of court rulings and judicial decisions; (d) facilitating cooperation between the judicial or equivalent authorities of the Member States in matters of criminal prosecution and execution of decisions*".

In conclusion, it can be noticed that „more and more fields, such as security, immigration, asylum issues (sensitive issues, also related to the sovereignty of the state and its royal functions) cease to be resolved by each state in isolation. With the progressive establishment of a Common Foreign and Security Policy and the Area of Freedom, Security and Justice, they are subject to common deliberative and decision-making procedures"[7] which lead to the adoption of legislative acts, at the Union level, binding for the Member States as a result of the attribution of competence to the EU.

[2] Exclusive competence (art. 3 TFEU), shared competence (art. 4 TFEU), coordination competence (art. 5 TFEU) and competence to support, coordinate and complement the action of the member states (art. 6 TFEU).

[3] A. Fuerea, *The European Public Prosecutor's Office in the institutional architecture of the European Union*, in *Challenges of the Knowledge Society*, Bucharest, May 20th 2022, 15th ed., *http://cks.univnt.ro/articles/16.html*, p. 270-271.

[4] M.-A. Dumitrașcu, O.-M. Salomia, *Dreptul Uniunii Europene II*, Universul Juridic, Publishing House, Bucharest, 2020, p. 52 *et seq.*

[5] P. Craig, G. de Búrca, *Dreptul Uniunii Europene. Comentarii, jurisprudenţă şi doctrină*, Hamangiu Publishing House, Bucharest, 2017, 6th ed., p. 1097.

[6] Craig, de Búrca, *Dreptul Uniunii Europene. Comentarii, jurisprudenţă şi doctrină*, 1106: „The Treaty of Lisbon has solved some problems regarding the EU's sphere of competence vis-à-vis criminal law, although there are still some difficult problems of interpretation. (...) Article 82 is currently the central provision in this field".

[7] V. Constantinesco, S. Pierré-Caps, *Drept constituțional*, Universul Juridic Publishing House, Eunomia Collection, Bucharest, 2022, p. 357.

3. Enshrining the principle - provisions regarding: Area of Freedom, Security and Justice, Schengen Area, and also the provisions of the Charter of Fundamental Rights of the European Union (CFREU)

At European level, under the Council of Europe rules, the establishment of the *ne bis in idem* principle was achieved through Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 22. XI.1984[8], whose art. 4 entitled *The right not to be tried or punished twice* provides that *„no one can be prosecuted or punished criminally by the jurisdictions of the* ***same State***[9] *for the commission of the crime for which he was already acquitted or convicted by a final decision according to the law and the criminal procedure of this State„*, as well as the fact that *„no derogation from this article is permitted under"* the Convention.

Subsequently, art. 54 of Chapter 3 entitled „Application of the *ne bis in idem* principle" of the *Convention implementing the Schengen Agreement of 14 June 1985* between the governments of the states of the Benelux Economic Union, the Federal Republic of Germany and the French Republic *on the gradual abolition of border controls common*, signed in Schengen on June 19, 1990 and entered into force on March 26, 1995 (OJ 2000, L 239, p. 19, special ed., 19/vol. 1, p. 183, hereinafter referred to as „CISA")[10] provides: *„A person against whom a final judgment has been rendered in a trial in the territory of a Contracting Party may not be the subject of criminal prosecution by another Contracting Party for the same acts, provided that, in the situation where a penalty has been rendered, it to have been executed, to be in the process of being executed or to be no longer enforceable according to the laws of the contracting party that pronounced the sentence.*"

Currently, alongside this EU primary law rule from the Schengen acquis, art. 50 CFREU, entitled *The right not to be tried or convicted twice for the same crime* enshrines the fact that „no one can be tried or convicted for a crime for which he has already been acquitted or convicted **within the Union**, by final court decision, in accordance with the law".

The granting the value of EU primary law of this principle is also accompanied by underlining the federative element of the EU construction because, if at the ECHR level, the principle is applied within **the same State**, the CFREU establishes the obligation to respect this principle **within the Union**, the territorial domain of application being extended to all Member States.

Regarding the application of the *ne bis in idem* principle based on the Schengen Convention, the Court of Luxembourg emphasized the fact that it „has been recognized as a fundamental principle of Community law by jurisprudence"[11].

At the national level, art. 6 CPP regulates the *ne bis in idem* principle, to which are added the provisions of art. 8 of Law no. 302/2004 on international judicial cooperation in criminal matters, republished, with subsequent amendments and additions, as well as art. 135 of the same law being part of the category of provisions for the implementation of the Convention of June 19, 1990 implementing the Schengen Agreement of June 14, 1985 on the gradual abolition of controls at common borders, Schengen: „(1) *A person in respect of whom a definitive judgment has been rendered on the territory of a member state of the Schengen area, it cannot*

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[8] *http://ier.gov.ro/wp-content/uploads/2018/11/Protocolul-nr-7.pdf*.

[9] The phrase „by the jurisdictions of the same state" limits the application of the article to the national level. Through therefore, the organs of the Convention declared inadmissible the heads of request regarding the repetition of the procedure criminal offenses in different countries [*Gestra v. Italy, Commission* decision; *Amrollahi v. Denmark* (Dec.); *Sarria v. Poland* (Dec.), § 24, *Krombach v. France* (Dec.), §§ 35-42].

In *Krombach v. France* (Dec.), the applicant had been convicted in France of crimes for which he claimed he had previously been acquitted in Germany. It also appreciated that the fact that both France and Germany are EU member states and that European Union law gives the *ne bis in idem* principle a trans-state dimension at the Union level does not affect the applicability of art. 4 of Protocol no. 7. Next, he emphasized that, pursuant to art. 53, the Convention does not prevent States Parties from granting more extensive legal protection to the rights and freedoms they guarantee, including in accordance with their obligations under international treaties or EU law. Through its mechanism of collective guarantee of the rights it enshrines, the Convention strengthens, according to the principle of subsidiarity, the protection offered at the national level, without imposing limits on this protection (point 39).

[10] CISA was included in Union law through the Protocol on the integration of the Schengen acquis within the European Union, annexed to the Treaty on European Union and to the Treaty establishing the European Community through the Treaty of Amsterdam (OJ 1997, C 340, p. 93, hereinafter referred to as the „Schengen Protocol"), with the title „Schengen acquis", as it is defined in the annex to the said protocol. See M.-A. Dumitrașcu, *Dreptul Uniunii Europene I*, *op. cit.*, p. 101.

[11] CJEU judgment of March 9, 2006, *Criminal proceedings against Leopold Henri Van Esbroeck*, C-436/04, ECLI:EU:C:2006:165, para. 40. See O.-M. Salomia, *Instrumente juridice de protecție a drepturilor fundamentale la nivelul Uniunii Europene,* C.H. Beck Publishing House, Bucharest, 2019, p. 86.

be prosecuted or tried for the same facts if, in case of conviction, the judgment has been executed, is in the process of being executed or can no longer be executed according to the law of the state that pronounced the sentence".

4. The content of the principle in the light of the CJEU jurisprudence

The analysis of the principle and, respectively, of its essence can be carried out according to the rules that established it, the Court of Luxembourg ruling by referring to it, but also to the entire legal system of the EU and to the ECtHR jurisprudence; also, the CJEU ruled both on what „bis" and „idem" means.

Thus, in a definition of this principle, «after examining the scope of the right not to be tried or punished twice for the same crime, as stated in various international instruments (International Pact on Civil and Political Rights, the Charter of Fundamental Rights of the European Union, the American Convention of Human Rights) and noticing that the approach that emphasizes the legal framing of the two crimes is too restrictive in terms of a person's rights, the Court of Strasbourg considered that art. 4 of Protocol no. 7 must be interpreted as prohibiting the prosecution or trial of a person for a second „crime", to the extent that it is based on identical facts or facts that are „essentially" similar to those that are at the origin of the first crime [points 79-82, see also *A and B v. Norway (MC)*, § 108]». [12]

4.1. The definition of" bis" by the Court of Luxembourg

The definition of „*bis*" is taken up by the CJEU in the judgment of March 22, 2022, *bpost SA v. Autorité belge de la concurrence*[13], issued in a request for a preliminary ruling on the interpretation of art. 50 CFREU. The dispute between bpost SA, on the one hand, and the Autorité belge de la concurrence, on the other, concerned the legality of a decision by which bpost was obliged to pay a fine for committing an abuse of a dominant position (art. 102 TFEU). In this case, the CJEU states that „from the findings made by the referring court it appears that the decision of the regulatory authority in the postal sector was annulled by a decision that acquired *res judicata* authority, according to which bpost was acquitted in the criminal proceedings in which it been judged, based on the postal sectoral regulation. Subject to verification by the referring court, it thus follows that the first procedure was completed by a final decision, in the sense of the jurisprudence mentioned in the previous point (point 30)".

In the conclusions of the Court of Luxembourg, at point 29, it shows that «as regards the condition „*bis*", in order to be able to consider that a court decision has been definitively pronounced regarding the facts that are the subject of a second procedure, it is necessary not only for this judgment to have remained final, but also for it to have been pronounced following a resolution on the merits of the case (see by analogy the Judgment of June 5, 2014, *M,* C-398/12, EU:C: 2014:1057, points 28 and 30)».

So, in order to define what „*bis*" means, **these two cumulative conditions** must be met, in our opinion: the trial of the merits of the case and the existence of a final decision, pronounced accordingly.

However, the analysis of the definition of „*bis*" cannot be limited only to the determination of these two conditions, but **the cumulation of sanctions** that can be pronounced, justifiably, without violating the essence of these notions, must also be highlighted.

Thus, influenced by the practice of some national courts that allows the joint imposition of administrative and criminal sanctions regarding the same conduct, the two Courts of Luxembourg and Strasbourg „revised their approach to the notion of *bis* and significantly reduced the protection offered by the principle *ne bis in idem*"[14]; thus, this interpretation was established by the judgment of the European Court of Human Rights in the case of *A and B v Norway*, followed by the judgment of the CJEU in the cases of *Menci, Garlsson and Di Puma and Zecca*. Under intense pressure from Contracting States defending their practice of two-track enforcement systems, in the case of *A and B v. Norway*, the Grand Chamber redefined the notion of *bis* and admitted that, in certain circumstances, a combination of criminal and administrative proceedings does not constitute a duplication of the procedures prohibited by art. 4 of Protocol no. 7 of the ECHR[15].

[12] ECtHR, Guide on art. 4 of Protocol no. 7 to the European Convention on Human Rights, The right not to be tried or punished twice, updated on April 30, 2020, p. 12, *https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_7_RON.pdf*.

[13] ECLI:EU:C:2022:202.

[14] G. Lasagni, S. Mirandola, *The European ne bis in idem at the Crossroads of Administrative and Criminal Law,* in *https://eucrim.eu/articles/european-ne-bis-idem-crossroads-administrative-and-criminal-law/*.

[15] *Ibidem*.

In the four Italian cases, the Court of Luxembourg is asked to interpret this principle within the VAT Directive (Council Directive 2006/112/EC of 28.11.2006 on the common system of value added tax) and the Financial Markets Directive (Directive 2014/65/EU of the European Parliament and of the Council of 15.05.2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU):

1) in case C-524/15, *Menci*, according to the factual situation, the Italian Financial Administration applied an administrative sanction to Mr. Luca Menci for non-payment of VAT for the year 2011; subsequently, Mr. Menci was prosecuted for the same acts before the Tribunale di Bergamo (Bergamo Court, Italy)".

„The objective of guaranteeing the full collection of the VAT due on the territories of the Member States is likely to justify an accumulation of procedures and sanctions of a criminal nature (*Menci* 44 and 63). As regards the national regulation that allows the initiation of criminal proceedings even after the application of a definitive administrative sanction of a criminal nature, the Court observes, subject to verification by the referring court, that this regulation allows in particular to ensure that the respective set of proceedings and sanctions it authorizes does not exceed what is strictly necessary to achieve the objective (*Menci* 57)" [16].

2) in case C-537/16, *Garlsson Real Estate and others* - in 2007, the Italian National Commission for Companies and Stock Exchange (Commissione Nazionale per le Società e la Borsa, „Consob") applied an administrative sanction to Mr. Stefano Ricucci for market manipulation, which challenged this decision before the Italian courts. In his appeal to the Corte Suprema di Cassazione, he argued that he had already been definitively sentenced in 2008 for the same acts to a criminal sanction that was extinguished by amnesty. Through requests for preliminary decisions, it is requested to assess the compatibility of the cumulation of procedures and sanctions with the *ne bis in idem* principle.

„In this judgment, the Court finds that the objective of protecting the integrity of the Union's financial markets and public confidence in financial instruments is likely to justify an accumulation of procedures and sanctions of a criminal nature (*Garlsson* 22, 46). However, it observes, subject to verification by the national court, that the Italian regulation sanctioning market manipulation appears not to respect the principle of proportionality"[17].

3)-4) in the joint cases C-596/16 and C-597/16, *Di Puma and Zecca* – in the factual situation, in 2012, the same competent authority Consob applied administrative sanctions to Enzo Di Puma and Antonio Zecca for misuse of information confidential; they showed that, in the criminal procedure for the same facts initiated in parallel with the administrative procedure, the criminal court found that the abusive uses of the confidential information were not proven. The Supreme Court of Italy asks CJEU to determine whether, taking into account the *ne bis in idem* principle, the Financial Markets Directive opposes such national regulation; this directive imposes for the Member States the obligation to provide effective, proportionate and dissuasive administrative sanctions for violations of the prohibition on the misuse of confidential information.

Thus, the Court ruled that „such a national regulation is not contrary to Union law, taking into account the principle of *res judicata* authority, which has a significant importance both in the legal order of the Union and in the national legal orders[18].

Moreover, previously, CJUE had ruled that „the *ne bis in idem* principle enunciated in art. 50 CFREU does not prevent a member state from imposing, for the same acts of non-compliance with declaration obligations in the field of VAT, successively, a sanction tax and a criminal sanction to the extent that the first sanction does not have a criminal character, an aspect that must be verified by the national court"[19].

In conclusion, in line with these judgements, it should be mentioned that Romanian specialized doctrine also states that this principle «is not limited only to judgments in criminal matters (...) As a result of the analysis

[16] Judgments in cases C-524/15 *Luca Menci*, C-537/16, *Garlsson Real Estate SA and others/Commissione Nazionale per le Società e la Borsa (Consob)* and joint cases C- 596/16, *Enzo Di Puma v Consob* and C-597/16, *Consob v Antonio Zecca*, *https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-03/cp180034ro.pdf*.

[17] Press Release no. 34/18, Luxembourg, Judgments in cases C-524/15 *Luca Menci*, C-537/16, *Garlsson Real Estate SA and others/Commissione Nazionale per le Società e la Borsa (Consob)* and joint cases C- 596/16, *Enzo Di Puma v Consob* and C-597/16, *Consob v Antonio Zecca*, *https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-03/cp180034ro.pdf*.

[18] Judgments in cases C-524/15 *Luca Menci*, C-537/16, *Garlsson Real Estate SA and others/Commissione Nazionale per le Società e la Borsa (Consob)* and joint cases C- 596/16, *Enzo Di Puma v Consob* and C-597/16, *Consob v Antonio Zecca*, *https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-03/cp180034ro.pdf*.

[19] CJEU, 26.02.2013, *Åklagaren v. Hans Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:105, para. 37.

of the indicated criteria, the scope of the notion of „accusation in criminal matters" and „criminal sanction" can be extended, for example, to problems of a fiscal or administrative nature».[20]

4.2. The definition of „idem" by the Court of Luxembourg

In the doctrine, it is emphasized that the element or notion «„*idem*" is conditioned by the identity of the facts, the identity of the offender and the identity of the legal interest protected by the respective norms being the same».[21]

In the *Kossowski* case[22], the Court considered that the decision of the public prosecutor's office (in Poland, in this case) to definitively terminate the criminal prosecution, subject to its reopening or cancellation, without any penalty having been applied, cannot be considered a final decision in line with art. 54 of the *Convention implementing the Schengen Agreement of 14 June 1985 between the governments of the states of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of controls at their common borders*, signed in Schengen (Luxembourg) on 19.06.1990, interpreted in accordance with art. 50 CFREU, if from the reasoning of this decision it follows that „the procedure was closed without a detailed investigation having been carried out; in that regard, the fact that neither the victim nor a potential witness was interviewed is an indication that no such investigation took place".

It could be considered that the Court of Luxembourg does not only define the notion of „*idem*", **but it also defines what a „deep criminal investigation" means**, *i.e.,* the hearing of the victim or a witness, which demonstrates the already exercise of the Union's shared competence in criminal matter and its limits.

«Very recently, in *Mihalache v Romania*, 13 this requirement of a detailed investigation has been taken up by the ECtHR as well for determining whether a decision to discontinue the proceedings constitutes an „acquittal" for the purposes of art. 4 of Protocol no. 7 ECHR[23]».

5. Restriction of the ne bis in idem principle. The CJEU jurisprudence

Article 52 CFREU provides that „any restriction of the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the substance of these rights and freedoms" and refers to the observance of the principle of proportionality as a fundamental principle of EU law [art. 5 para. (4) TEU].

The compatibility of art. 54 CISA with this provision is the subject of a preliminary request made by a court in Germany, in the *Spasic* case[24]; more precisely, «the referring court essentially asks to determine whether art. 54 CISA, which subjects the application of the *ne bis in idem* principle to the condition that, in the situation in which a sentence has been pronounced, it „has been executed" or to be „enforceable" or no longer enforceable (hereinafter referred to as the „enforcement condition"), is compatible with art. 50 CFREU, which guarantees this principle».

The Court of Luxembourg showed not only that art. 54 CISA is compatible with art. 50 CFREU, but also with art. 52 since „it is certain that it must be considered that the restriction of the *ne bis in idem* principle is provided by law, within the meaning of art. 52 para. (1) CFREU, since it results from art. 54 CISA" (point 57). „However, it must be verified whether the restriction implied by the condition on enforcement provided for in art. 54 CISA is proportionate, which makes it necessary to examine, first, whether this condition can be considered to meet an objective of general interest, within the meaning of art. 52 para. (1) CFREU, and, in the case of an affirmative answer, if it respects the principle of proportionality, within the meaning of the same provision" (point 60).

The court emphasizes that the general objective of establishing the Space of Freedom, Security and Justice, as provided by art. 3 para. (2) TUE and of art. 67 para. (3) TFEU, is ensured by art. 54 CISA, because „the condition regarding the execution provided for in art. 54 CISA is included in this context since it aims, as mentioned in point 58 of this decision, to avoid, in the area of freedom, security and justice, the impunity that could be enjoyed by persons convicted in a member state of the European Union through a final criminal judgment" (point 63).

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[20] A. Crișu, *Drept procesual penal. Partea generală*, 5th ed., Hamangiu Publishing House, Bucharest, 2021, p. 87.

[21] P. Harrison, M. Zdzieborska, B. Wise, *Ne Bis in Idem: The Final Word?,* (Sidley Austin LLP)/April 7, 2022.

[22] C-486/14, *Kossowski*, 26.06.2016, ECLI:EU:C:2016:483. See A.-M. Conea, *Politicile Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2019, p. 118.

[23] Lasagni, Mirandola, *The European ne bis in idem at the Crossroads of Administrative and Criminal Law*.

[24] CJEU Judgement, 27.05.2014, case C-129/14 PPU, *Zoran Spasic*, ECLI:EU:C:2014:586.

Also, after mentioning the main European instruments in the field of criminal cooperation, the Court underlines the fact that „as a result, the condition regarding the execution provided for in art. 54 CISA does not go beyond what is necessary to avoid, in a cross-border context, impunity persons convicted in a member state of the European Union by a final criminal decision” (point 72).

In the doctrine it is mentioned that „The existence of a legal basis [criterion (i)] was not considered especially critical in such cases, since all the examined systems were clearly provided for by national law (and, in the case of market abuse, also by EU legislation). The considerations of the Court with regard to the second criterion (ii), concerning the respect of the essence of the right at stake, appear in contrast rather more controversial for the value of the double jeopardy clause in EU law. Under this perspective, in fact, the CJEU seemed to deduce from the mere circumstance that national legislation allows for a duplication of proceedings and penalties „only under certain conditions which are exhaustively defined”, the consequence that „the right guaranteed by art. 50 is not called into question as such” and therefore is respected in its essential content. The Court thus appeared to overlook the fact that even limitations provided only upon specific conditions can transform the nature of the double jeopardy clause from an individual fundamental right to a mere organizational rule, and that this does represent a violation to the essence of the original scope of art. 50 CFREU. Especially interesting, in a comparative perspective with ECtHR jurisprudence, is the third criterion (iii) that describes the proportionality requirement[25]”.

In the judgments in the aforementioned cases *Menci* and *Garlsson*, CJEU specifies, in order not to restrict the principle that the national regulation that authorizes a combination of procedures and sanctions of a criminal nature must:

- „aim at an objective of general interest to justify such a cumulation of procedures and sanctions, these procedures and sanctions having to have goals complementary (*Menci* 44, 63; *Garlsson* 46);
- establish clear and precise rules that allow the litigant to foresee which acts and omissions can be subject to such a combination of procedures and sanctions (*Menci* 47; *Garlsson* 49);
- ensure that the procedures are coordinated with each other in order to limit them to what is strictly necessary the additional burden resulting for data subjects from an accumulation of procedures (*Menci* 53, 63; *Garlsson* 55), and
- ensure that the severity of the set of sanctions is limited to what is strict necessary in relation to the seriousness of the crime in question (*Menci* 55, 63; *Garlsson* 56)”. [26]

„At first glance, it may thus seem that in the *Garlsson* case the CJEU introduced a stricter proportionality requirement than that promoted by the ECtHR, with a kind of primacy of the criminal process over the administrative (punitive) one. The initiation of the criminal action after the imposition of an administrative (punitive) sanction, as in the case of *Menci*, on the contrary, was not considered problematic as such by the Court”.[27]

Consequently, according to the doctrine, if a second investigation or sanction imposed in respect of the same conduct does not take into account the first investigation and/or sanction, there may have been a violation of the *ne bis in idem* principle.

6. Conclusions

In line with the doctrine, it is obvious that the CJEU stated that „to ensure that robust *ne bis in idem* protection is properly administered, the authorities must cooperate to ensure that overall penalties imposed with respect to the same conduct are proportionate to the seriousness of any offences committed[28]”.

In any case, we agree that „the purpose of applying the *ne bis in idem* principle in judicial proceedings is to respect the security of legal relationships”.[29]

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[25] Lasagni, Mirandola, *The European ne bis in idem at the Crossroads of Administrative and Criminal Law*.

[26] Press Release no. 34/18, Luxembourg, Judgments in cases C-524/15 *Luca Menci*, C-537/16, *Garlsson Real Estate SA and others/Commissione Nazionale per le Società e la Borsa (Consob)* and joint cases C- 596/16, *Enzo Di Puma v Consob* and C-597/16, *Consob v Antonio Zecca*, *https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-03/cp180034ro.pdf*.

[27] Lasagni, Mirandola, *The European ne bis in idem at the Crossroads of Administrative and Criminal Law*. „Negative conclusions regarding the proportionality requirement were also drawn by the CJEU in the *Di Puma* and *Zecca* cases (again in the field of market abuse), where the possibility of bringing an action for a punitive administrative fine as a result of the acquittal in the criminal trial for the same behavior was also considered to exceed the necessity required by the principle of proportionality”.

[28] P. Harrison, M. Zdzieborska, B. Wise, *Ne Bis in Idem: The Final Word?, op. cit.*

[29] A. Crișu, *Drept procesual penal. Partea generală*, 5th ed., Hamangiu Publishing House, Bucharest, 2021, p. 87.

In our opinion, the principle of *ne bis in idem* is one the general principles having an European dimension which underlines the fact that „at present, the good administration of justice in the EU seems to be unavoidably linked to a multiple subsidiarity applied in the relationship between national courts, the European Court of Human Rights and the Court of Justice of the European Union"[30]. In the meantime, the application and the interpretation of this principle by the Court of Luxembourg could illustrate the extension in the future of the limits of the EU competences in the field of cooperation in the criminal matter.

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THE ROLE OF THE NICE TREATY IN THE EVOLUTION OF THE EUROPEAN UNION – ANALYSED 20 YEARS AFTER ITS ENTRY INTO FORCE

Augustin FUEREA*

Abstract

If we analyse the period between the adoption, signing and entry into force of the main amending treaties (the Single European Act, the Treaty of Maastricht, the Treaty of Amsterdam, the Treaty of Nice and the Treaty of Lisbon), we find that the shortest period was between the Treaty of Amsterdam and the Treaty of Nice. Almost seven years had passed between the Treaty of Nice and the Treaty of Lisbon, if we consider the date of entry into force, and the Treaty of Lisbon has turned out as one of the longest-lasting treaties (over 13 years), until at present. Referring to the dynamics of the domestic, European and international society, in the context of the acceleration generated by digitization (the access to information from the last decade[1]), with the consideration of previous periods, we can appreciate, without worrying of making a mistake, that the merits of the Treaty of Lisbon can be considerably enhanced. For Romania, the Treaty of Nice is particularly important, as it also is for the other 11 states in Central and Eastern Europe, because, with this treaty, for the first time, seats in the European Parliament were allocated to all those states, and also the votes within the Council of the European Union, and not only (if we consider the representation of all these states in all the institutions, bodies, offices and agencies of the European Union).

Keywords: *Treaty of Nice, the institutional system of the EU, reform.*

1. General aspects

Looking back, we find that the openness of the European Union (EU), the Council of Europe and the North Atlantic Treaty Organization (NATO) towards Central and Eastern Europe and, implicitly towards Romania, has started in the 90's. Since then, we have been witnessing the weakening, until disappearing, of the economic, political and military bipolarism, in the sense of annihilation, on the one hand, of the Council for Mutual Economic Assistance (CMEA) in the states from Central and Eastern Europe where there were members[2], and on the other hand, of socialism/communism, respectively of the military organization known as the „Warsaw Treaty"[3]. In this context, the concept of „globalization" has increasingly made its way into the political speech, without being defined, however, from the perspective of political-legal consequences or from the point of view of advantages vs. disadvantages, strengths or weaknesses, if we were to consider a possible SWOT analysis.

It is tempting to carry out multidisciplinary research of the transformations that have taken place in the last more than 30 years since the change of political regimes in many of the European states, research that is certainly being carried out currently, in specialized institutions, at national and international level. I say „currently", relating my statement to one of the most important characteristics of history, namely its *cyclicality* and dynamics. How else can we define cyclicality, other than as a repetition of processes, phenomena (economic, political, social and, why not, military) at a certain time interval. What would that time interval be? It can be shorter or longer, depending on the development of society as a whole. The more society experiences a more pronounced development, the greater the dynamics is, influencing thus, directly the cyclicality, and the history.

We do not propose, through our approach, to go into details regarding the multidisciplinary nature of a possible analysis. Our interest is circumscribed to the option clearly outlined at the level of the Romanian state,

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[1] „The European Commission recognizes that digital technology has an impact on every aspect of EU policy, influencing: the way we produce and consume energy, the way we move from one place to another, the way capital circulates throughout Europe" (A.-M. Conea, *Politicile Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2019, p. 190).

[2] The CMEA member states were: Union of Soviet Socialist Republics, German Democratic Republic, Bulgarian People's Republic, Polish People's Republic, Czechoslovak Socialist Republic, Hungarian People's Republic and Romanian People's Republic/Socialist Republic of Romania.

[3] The „Warsaw Treaty" included: the Albanian People's Republic, the Czechoslovak Socialist Republic, the Polish People's Republic, the German Democratic Republic, the Romanian People's Republic/Romanian Socialist Republic, the Hungarian People's Republic, the Bulgarian People's Republic, the Union of Soviet Socialist Republics.

since 1990, regarding its accession to the Council of Europe, NATO and the EU. This order is not accidental, and it represents the efforts made by our country, in all the fields, for the accession on January 1st, 2007 to the European Union. Thus, it was necessary for the Romanian state to join the Council of Europe (in 1993) and acquire the statute of state party to the European Convention for the Protection of Human Rights and Fundamental Freedoms (in 1994), in order to prove that the political criterion necessary for EU accession is fulfilled. The accession to NATO (in 2004) was necessary to convince the future partners among the EU member states that Romania was not just a security consumer (beneficiary), but also a security supplier. The revision and republication of the Constitution (in 2003), but also the acquiring, by Romania, in 2004, of the statute of a state with functional market economy, able to face the pressures generated by the existing competition at EU level (demand-supply ratio), represents concretization of the efforts necessary to fulfil the legal and economic criteria necessary for EU accession.

In fact, this is the very main objective of our research: identifying the evolutions in the rather generous approach of the successive statutes attained for EU accession: a) associated state; b) candidate state for accession; c) acceding state; d) member state.

It is important to identify, throughout this process, the place of the Treaty of Nice in the whole framework of amending EU treaties, from the perspective of the multiple reform elements that it grounded, some of which are relevant to the place that our country has currently, within the EU institutions and in the hierarchy of all EU member states. The Treaty of Nice „accomplishes an adaptation of the structure created for an organization that, at the beginning, had only six member states in its composition, to the realities imposed by a united Europe”[4], which, at the time, was believed to be counting 30 states.

2. The place of the Treaty of Nice (2001/2003) in the general legal order of the European Union

According to the criterion of the legal force of rules that make up the legal order of the European Union, the Treaty of Nice represents a primary amending source with fundamental legal force from which derogations can be done only by a similar legal instrument.

The amending character places it, in time, after the Treaties of Maastricht (1992/1993) and Amsterdam (1997/1999), both of which were preceded by the Treaty of Brussels (1965/1967) and the Single European Act[5] (1986/ 1987).

For us, taking into account the previously stated context, after 1990, the Treaty of Maastricht and the Treaty of Amsterdam are relevant, both preceding the Treaty of Nice, to which is added the Treaty of Lisbon which succeeds it. All this is of particular importance for the states of Central and Eastern Europe, including for our country.

After the general presentation of the reform elements achieved by the Treaties of Maastricht and Amsterdam, we shall analyse the reform elements envisaged by the Treaty of Nice, with concrete examples for our country.

2.1. The Treaty of Maastricht

Signed on February 7th, 1992 and entered into force after its ratification by the 12[6] EU member states, at that moment, on November 1st, 1993, is the first amending treaty that proposes, among others, the continuation of the process of community building, but in a new context determined by the stable strategy at that time, regarding the continuous EU expansion towards Central and Eastern Europe.

The merit of the Treaty of Maastricht, in its correct and complete name the Treaty on European Union (TEU), is that it has, for the first time, enshrined, by the will of member states, the name „European Union”, but not as a subject of international law with legal personality, and for a period of 16 years (1993-2009), just as a *sui generis* entity. The three European Communities[7] have still preserved the legal personality, specific to

[4] M.-A. Dumitrașcu, R.-M. Popescu, *Dreptul Uniunii Europene. Sinteze și aplicații*, 2nd ed., revised and added, Universul Juridic Publishing House, Bucharest, 2014, p. 29.

[5] The Single European Act „represents a particularly important moment in community building, because at the time of its adoption (1986), the last obstacles to free movement were removed, expanding at the same time the community competences” (L.-C. Spătaru-Negură, *Protecția internațională a drepturilor omului. Note de curs*, Hamangiu Publishing House, Bucharest, 2019, p. 73).

[6] France, Germany, Italy, Belgium, Netherlands, Luxembourg, Great Britain, Denmark, Ireland, Greece, Spain and Portugal.

[7] European Coal and Steel Community, European Economic Community/European Community; European Atomic Energy Community (EURATOM).

international organizations. EU is equipped with 3 pillars on which, until the Treaty of Lisbon (2007/2009), it had supported its existence and operation, namely: pillar I – the community integration pillar, made up of the three European Communities; pillar II – foreign and common security policy / and the 3rd pillar – justice and internal affairs (pillar of cooperation). In the specialized literature, it is considered „that the Treaty of Maastricht, although (...) representing a single international legal instrument, by its content, has a double value: it is an amending treaty in terms of the changes made to the original treaties and, at the same time, is also an original treaty”[8].

Pursuant to art. A para. (2) TEU, the European Union represents „a new stage in the process that creates a closer union between the peoples of Europe, in which decisions are made as close as possible to the citizens”, proposing as its mission, „the organization, in the most coherent and solidary way possible, of the relations between the member states and between their peoples”.

The most consistent changes, from the perspective of the name, objectives, community powers and institutions, concern the Treaty establishing the European Economic Community. With the entry into force of the TEU, the name of the European Economic Community and the treaty that established it, changed to „European Community”, respectively „Treaty establishing the Economic Community”.

Other new elements, in summary, are the following: the consecration of European Union citizenship, the establishment of the objective of achieving the Economic and Monetary Union (EMU) and the inclusion among the priorities of the European Union, of a political union between the member states, in the sense of a common foreign and security policy, which, on the long term, should also include defence policy, not ignoring the economic dimension of common defence/security.

The Treaty of Maastricht „has improved the functioning of the institutions and strengthened the powers of legislative co-decision and control of the European Parliament”[9].

Pillar II (common foreign and security policy) places particular emphasis on common positions and actions without an express dedication to the field of defence, which, however, we find to be very well outlined within the framework of the 3rd pillar, cooperation in the field of justice and internal affairs.

The treaties establishing the European Coal and Steel Community and the European Atomic Energy Community have undergone changes, exclusively from the institutional point of view, correlated with those of the Treaty establishing the European Economic Community.

2.2. The Treaty of Amsterdam

Treaty of Amsterdam (1997/1999) „contributed to the transformation (...) of Western and Central Europe into a confederal state, with a single European currency - the euro”[10].

Being included in the category of primary sources of European Union law and with amending character, the reasons for the adoption of that treaty concerned the developments recorded, on the one hand, in the rather large period that passed since the entry into force of the treaties establishing the European Communities and, on the other hand, in the shorter period that passed since the entry into force of the Treaty of Maastricht.

At the centre of attention of the decision-makers at that stage, was the need to update the objectives of the European Union, wishing to create institutions that would transpose the democratic nature of the actions undertaken and in which the citizen could fully express himself.

From institutional perspective, even if through the Treaty of Maastricht, the functioning of the institutions registered an important progress, the objective regarding the simplification of the activity, of the functioning of those institutions was far from taking shape (especially in a series of new areas, such as: the single currency and economic cooperation). Those aspects were taken into account by the Treaty of Amsterdam, especially in the part intended for the „simplification of Treaties”.

The Treaty of Amsterdam has remained in the history of evolution of the sources of EU primary law, also as the treaty through which the third pillar changed its name from „cooperation in the field of justice and home affairs” to „police and judicial cooperation in criminal matters”. The justification for this change is provided by the fact that the treaty enshrines the creation of an „area of freedom, security and justice”. The third pillar

[8] R.-M. Popescu, *Introducere în dreptul Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2011, p. 60.
[9] A. Fuerea, *Manualul Uniunii Europene*, 6th ed., revised and added, Universul Juridic Publishing House, Bucharest, 2016, p. 70.
[10] Al. Burian, *Geopolitica lumii contemporane*, 2nd ed., USM Editorial-Poligraphic Centre Publishing House, Chișinău, 2008, pp. 216-217.

narrows in terms of the fields that fall under its incidence, in the sense that some of these have been transferred to the first pillar (*e.g.*, migration and asylum).

In addition to the fact that the Treaty of Amsterdam has brought institutional changes, extending the co-decision procedure and the qualified majority to new areas, the powers of the Court of Justice have also been multiplied in direct proportion with the areas that have been transferred from the 3rd pillar to the 1st pillar.

Between1996 and 1999, Romania had (since 1995) the statute of associated state[11], which is why, of interest to our country, were also those changes regarding the conditions that states had to fulfil in order to adhere. The seat of the matter is represented by art. 49 TUE. Without changing the procedure followed, it is specified that the candidate states must be European states, accept the community acquis and comply with the principles established by art. 6 para. (1) TEU on: freedom, democracy, respect for human rights and fundamental freedoms and the rule of law.

When we refer to the Treaty of Amsterdam, we have in mind that, for almost a year, the negotiations for its finalization did not make much progress, mainly because of the obvious hostilities of Great Britain. In a context in which Euro-optimism was in free fall, giving way to Euro-sceptics, „The European Council in Amsterdam adopts, at 4 o'clock in the morning, on June 18th, 1997, the provisional version of the Draft Treaty of Amsterdam"[12]. „With minor changes, the respective text was definitively adopted on October 2nd, 1997 during the meeting of the Foreign Ministers of the Fifteen[13], organized also in Amsterdam"[14]. The text of the Treaty that entered into force in 1999, was unanimously recognized as an „absolutely disappointing text having as main feature, the postponement of the main decisions for an uncertain future"[15].

2.3. The Treaty of Nice

The Treaty of Nice (2001/2003) has the role of completing, in matters of reform, the institutional reform, the objectives proposed by the Treaty of Amsterdam and remained at the stage of objectives, but also of anticipating the successes of the Treaty of Lisbon.

One of the pending issues was that of the institutional reform, partly achieved by the Treaty of Nice. The partial solution of this problem is related to the largest expansion of the European Union (in 2004[16], 2007[17] and 2013[18]), from 15 states to 25, 27, 28 member states, from the point of view of a possible institutional blockage, taken into consideration by the Treaty of Nice and continued, under the aspect of compromise solutions, by the Treaty of Lisbon. Why? Because, naturally, the institutional system proposed by Jean Monnet was thought to respond to some needs regarding the existence and functioning of the European Communities, as international organizations that were formed of 6 states. Later, they expanded to 9, 10, 12 and 15 member states, which required some adaptations, especially to the decision-making mechanism (the system of unanimous voting, for example, being gradually replaced by that of majority voting, in areas that, also gradually, came under the exclusive competence of the European Union or in which the competence of EU was shared with that of the member states).

An inevitable question is that of the necessity of adopting the Treaty of Nice in 2001 (being signed only two years after the entry into force of the Treaty of Amsterdam), taking into account the fact that, from the entry into force of the Treaty of Nice (in 2003) and until the signing of a new Treaty (of Lisbon, in 2007) no more than 4 years had passed, and from the entry into force of the Treaty of Lisbon (December 1st, 2009) and until now, more than 13 years have passed.

We find the answer, also, in the doctrine of that stage, according to which „after the failure in Amsterdam, a new intergovernmental conference [was to be] launched in (...) March next year"[19] because „proposals abound,

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[11] Pursuant to the Agreement.

[12] ***, *Treaty of Amsterdam*, (Introduction, selection and translation by Th. Tudoroiu), Lucretius Publishing House, Bucharest, 1999, p. 11.

[13] France was the last country to ratify the Treaty of Amsterdam.

[14] ***, *Treaty of Amsterdam*, *op. cit*., p. 11 (footnote 4).

[15] *Idem*, footnote 5.

[16] The states that joined in 2004 are the following: Hungary, Poland, Czech Republic, Slovakia, Slovenia, Cyprus, Malta, Latvia, Lithuania and Estonia.

[17] Romania and Bulgaria joined that year.

[18] Croatia joined that year.

[19] ***, *Treaty of Amsterdam*, *op. cit*., p. 11.

already; in the last month alone, no less than four documents on the reform of community institutions[20] were drawn up"[21].

From the perspective of predictions, then, as well as now, more than 20 years after the entry into force of the Treaty of Nice, the questions, doubts and even uncertainties were and some still are more than obvious. Thus, even in 1999, it was appreciated that „it is very difficult to foresee (...) if the future negotiations will not have the fate of those in Amsterdam and if a new delay will not be resorted to, especially since the initial accession of a small number of new members and the extension of the accession procedures can leave a margin of manoeuvre of five, seven or even ten years, by virtue of the eternal principle *il est urgent d'attendre*"[22]. All this happened with the consideration of the political decision coming from the founding states of the European Communities.

Shortly, the Treaty of Nice „did the *homework* established by the Amsterdam points - left-overs- and created *the capacity for enlargement*"[23], the EU expansion.

The changes brought by „Nice", and considered to be essential, are multiple, starting from the aspects that were considered real failures of the Treaty of Amsterdam and culminating with those that anticipated the inevitable EU expansion, an expansion that was necessary to be correlated with the qualitative and quantitative developments registered by the dynamics specific to the 3rd millennium (it is the first EU treaty of this millennium), in general, and by the legislative one (aiming at the adoption of derivative legislation), in particular.

Analysed from a technical point of view, the Treaty of Nice (which has an appropriate structure for such a legal instrument of international law: preamble, substantive amendments, transitional and final provisions, 4 protocols and 24 declarations) aims at revising the Treaty on European Union.

The Treaty of Nice proposed as its main objective, the achievement of the institutional reform from the perspective of successive expansions that the European Union would experience. They mainly refer to: the weighting of votes within the Council of the European Union; the distribution of seats in the European Parliament, respectively in the composition of the EU executive. „These topics may seem dry, but debates on reform were often fierce, precisely because these issues raised broader considerations about the appropriate power of large, medium and small states in the Community and revealed controversial aspects of power relations between the EU[24] institutions", namely: the legislative power (the Council and the European Parliament), the executive power (the European Commission) and the judicial power (the Court of Justice). All these institutions, to which the Court of Accounts is added, represent, guarantee and defend 3 categories of interests, as follows: the interests of EU citizens (see here the citizens of the member states who also hold a complementary citizenship, that of the European Union), the interests of member states of the Union and, inevitably, the EU interests.

Upon a careful analysis of events taking place at the EU level, we notice that the Treaty of Nice overlapped, temporally, with the negotiations carried out for the adoption of the Treaty establishing a Constitution for Europe. From this perspective, the Treaty of Nice has another merit, this time not institutional, but substantive. „The main substantive development concerned the Charter of Fundamental Rights of the EU"[25], its binding nature being postponed until the Treaty of Lisbon. Over time, it has proven its importance, references being made, quite often by practitioners and legal theorists, similarly to the initial period of application of the Universal Declaration of Human Rights, from December 10th, 1948.

The Treaty establishing a Constitution for Europe aimed, among other things, to resolve some of the important issues regarding the future of Europe and, implicitly, the European Union. Realistically speaking, the decision-makers of that stage, given the „competition" between the Treaty of Nice and the Constitutional Treaty[26], for the Intergovernmental Conference of 2004, considered important four objectives, namely: „the

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[20] For details, see A. Fuerea, *The permanence of the process of institutional reform within the European Union*, in Romanian Journal of Community Law no. 2/2003, pp. 9-23.

[21] ***, *Treaty of Amsterdam*, *op. cit.,* p. 16.

[22] *Idem*, p. 17.

[23] G. Fábián, *Drept instituțional comunitar*, 2nd ed., with reference to the Treaty of Romania's Accession to the EU Constitution, the Civil Service Tribunal and Eurojust, Sfera Juridică Publishing House, Cluj-Napoca, 2006, p. 106.

[24] P. Craig, G. de Búrca, *Dreptul Uniunii Europene*. *Comentarii, jurisprudență și doctrină*, 6th ed., Hamangiu Publishing House, Bucharest, 2017, p. 18.

[25] *Ibidem*.

[26] By not entering into force, the treaty has never produced legal effects, its ratification procedure was interrupted by the negative vote given by France and the Netherlands.

delimitation of powers between the EU and the states members; the status of the Charter of Fundamental Rights; the simplification of treaties and the role of national parliaments”[27]. Now, 20 years after the entry into force of the Treaty of Nice, we appreciate that all those objectives were, in fact, real failures of the Treaty of Amsterdam, without denying, however also its successes.

3. The impact of provisions of the Treaty of Nice on the EU institutional system

3.1. The reform of the institutions that make up the bicameral legislature of the European Union

3.1.1. The European Parliament

„The Treaty of Nice emphasizes the role of co-legislator of the Parliament”[28].

The number of members of the European Parliament was re-evaluated, taking into account the expansion of EU from 15 member states to 27, including Romania, in the sense that it „cannot exceed 732”[29]. According to the rule proposed in point 3 of art. 4 of the Treaty of Nice, to replace art. 21 point 6 of the Treaty establishing the European Coal and Steel Community, „The European Parliament establishes the statute and general conditions for the exercise of the functions of its members, with the opinion of the Commission and the approval of the Council, deciding by qualified majority”. The same qualified majority system is not applied to rules or conditions relating to the tax regime of members or former members, as these must be approved unanimously.

For the first time, through the Treaty of Nice, seats in the European Parliament were allocated to Romania. The 33 seats that Romania received, could not be filled for the entire 2004-2009 legislature, considering the fact that our country joined on January 1st, 2007. For that reason, the 33 seats were redistributed to the member states since that date (25), and the same happened with those of Bulgaria (17)[30]. That redistribution resulted in an increase in the number of seats both for Romania (which received 35, instead of 33) and for Bulgaria (which received 18, instead of 17). Therefore, for the period 2007-2009, the European Parliament counted 785 seats (732 – as stipulated by the Treaty of Nice, to which the 53 seats allocated to Romania and Bulgaria were added).

3.1.2. The Council of the Union

The Council of the Union remains at the forefront of the legislative activity, side by side with the European Parliament, actively involved in the adoption of legal acts of the European Union. The most important changes aim at speeding up the adoption of decisions, in the conditions of the expected expansion to 27 member states, *i.e.*, the transition from unanimous voting to qualified majority voting in a significant number of areas regulated by the Treaty. The qualified majority materializes, with the entry into force of the Treaty of Nice, in the fact that an agreement could no longer be concluded without at least 14 member states, out of a total of 27 expressing their favourable vote. At the same time, it is easy to see that the demography of member states, in the sense of population, has a major influence in the adoption of decisions at the level of the European Union Council, because meeting the minimum number of states (14) that vote in favour of the decision is not enough. To this requirement, another one is added, namely: it is necessary for the 14 member states to bring together at least 62% of the total population found in the territories of the 27 member states, with the status of citizens of the European Union.

Equally, the Treaty enshrines, from the perspective of primary legislation, the possibility for the Council institution involved in the legislative process, to initiate the adoption of regulations regarding the funds allocated to political parties.

[27] Pursuant to Declaration 23 which was annexed to the Treaty of Nice.

[28] A. Fuerea, *The permanence of the process of institutional reform ..., op. cit*., p. 18.

[29] In this sense, see point 1 of Declaration 20 regarding the expansion of the European Union, annexed to the Treaty of Nice, as well as point 5 of art. 4 of the Treaty of Nice, pursuant to which „The number of members of the European Parliament cannot exceed seven hundred and thirty-two” (rule proposed to replace art. 20 para. (2) of the Treaty establishing the European Coal and Steel Community).

[30] The „big” states (France, Germany, the United Kingdom of Great Britain, Italy and Spain) were allocated 2 seats each, out of the 50 seats left unoccupied by Romania and Bulgaria, and the „small” states, one seat each.

3.2. The EU Executive

Regarding the executive of the European Union - the European Commission - as the engine of its operation, it was rightly appreciated, that in its composition, up to the time of Nice (when the member states were not designating the members equally), it had been quite difficult to still function.

In principle, the Treaty of Nice laid the foundations for the subsequent regulations, taken into consideration by the Treaty of Lisbon. More precisely, until the Treaty of Nice, the „big" states, members of the European Union, used to appoint two commissioners each, while the other states appointed one commissioner each.

The Treaty of Nice starts from the premise of enlargement of the European Union, which is carried out taking into account the increase, by default, in the number of members of the Commission, a fact that affects its proper functioning. Therefore, the maximum number of members of the Commission was set at 27, with the possibility, on the part of each state, to designate one member. It is for the first time that the states register, from this perspective as well, full equality, *i.e.*, „one state - one commissioner", in a composition of the European Union with 27 member states. Exceeding the number of 27 member states should have led to the application of the principle of rotation, a principle enshrined, moreover, by the Treaty of Lisbon (2/3 of the member states appointing one commissioner each), but which has not been, however, applied even until now, although during the period 2013-2021, the Union had 28 states in its composition.

The transition from unanimity to qualified majority also materialized, as for the appointment of the president, respectively of all the members of the Commission. The president acquires new powers, having the possibility to establish, for his 5-year mandate, the responsibilities for each individual portfolio, depending on the strategy he has in mind for this period. He also has the competence to appoint, with the approval of the college, the vice-presidents of the Commission or ask for the resignation, respectively the dismissal of a member. These prerogatives are likely to strengthen the power of the Commission president who has an important role in ensuring the independence and impartiality of Commission members, being responsible for their discipline, thus guaranteeing the interests of the European Union.

3.3. The EU judicial power

At the EU level, at the time of entry into force of the Treaty of Nice, the judicial power was fulfilled, hierarchically, by the Court of Justice (formed of one judge appointed by each member state and of general attorneys, in a smaller number , designated by the member states), to which is added the Court of First Instance[31] (having a similar membership, at that stage, to that of the Court of Justice, from the point of view of the number of judges, but without general attorneys). The novelty that the Court of Nice brings is the possibility of establishing specialized chambers in some fields. Thus, the Civil Service Tribunal could be established in an important field such as that of labour relations which, not infrequently, generate the appearance of disputes between civil servants of the European Union and its institutions, bodies, offices and agencies. As a result of the expansion of the European Union, this fact also determined, correlatively, the multiplication of public functions and the number of public servants, which also determined the establishment of the Civil Service Tribunal[32].

Given the increasing complexity of resolving disputes in the plenary of a Court of 25, 27, 28 judges (keeping the balance given by the possibility of each state to appoint one judge), for speed, an appeal was made, for that stage, to the solution of the establishment of a Grand Chamber made up of 13 judges that would replace the plenary session of the Court. Thus, an emergency procedure was provided for those *more sensitive prejudicial appeals*. At the same time, in order for the Court of Justice to be relieved of those large, time-consuming actions, *technical prejudicial appeals* were included among the powers of the Court of First Instance.

The EPPO, as body of the European Union, has known a special consecration, contributing to the protection of the Union's financial interests, pursuant to the Treaty of Lisbon.

[31] The current Tribunal, after the Treaty of Lisbon. Currently, the Tribunal, after taking the powers from the Civil Service Tribunal, is composed of 54 judges, two judges appointed by each member state of the Union.

[32] The Civil Service Tribunal ceased its activity in 2016, pursuant to Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 06.07.2016 on the transfer to the Tribunal, of the competence to rule in first instance on disputes between the European Union and its agents, published in OJ L 200, July 26, 2016.

3.4. Budgetary, economic and financial-banking activity

3.4.1. Court of Accounts

Consecrating its status as a subject of international law, perfected by the Treaty of Lisbon, by acquiring legal personality[33], the European Union pursues objectives, also of economic nature, paying particular attention to the Court of Accounts and its role in its institutional architecture.

In this case as well, the representativeness of all member states is preserved, even if the members of the Court of Accounts are actively involved in guaranteeing the interests of the EU, and not of the member states, during the 6-year mandate that they fulfil.

Decision-making flexibility is also found in the Court of Accounts from the point of view of appointments by the Council, knowing, in this case too, the transition from unanimity to qualified majority.

Even if it is not a jurisdictional court considering the duties it fulfils, the Court of Accounts borrows for good functioning, from the jurisdictional system, the organization within the Chambers aiming at the swiftness of the adoption of reports, respectively opinions.

Similar to the European Commission, in this case too, the president acquires increased prerogatives with the possibility of establishing a committee to ensure communication with similar institutions at national level. In this way, it is appreciated that the economic-financial objectives can be achieved[34].

3.4.2. European Central Bank

Pursuant to art. 5 of the Treaty of Nice, the Protocol relating to the Statute of the European System of Central Banks and the Statute of the European Central Bank is amended from the perspective of decisions adopted, respectively recommendations made by the European Central Bank which require a unanimous decision of the Board of Governors.

3.4.3. Advisory committees

Pursuant to art. 165 of the Treaty on the European Atomic Energy Community, the Economic and Social Committee is formed of „representatives of the various economic and social components of the organized civil society", who carry out a 4-year mandate with the possibility of renewal. The Committee includes representatives, appointed by the Member States, among producers, farmers, transporters, workers, traders and artisans of the liberal professions, consumers and the public interest.

The number of designated representatives is established pursuant to Declaration no. 20 regarding the expansion of the European Union, Romania being allocated 15 seats, in a Union with 27 member states.

By the Treaty of Nice, a total of 344 seats were allocated to the 27 member states, with no possibility of exceeding 350, after some reassessments. Its members cannot be subject to an imperative mandate, pursuing the interests of those who appoint them, and not of those of the European Union.

3.4.4. Committee of the Regions

In this case too, the number of members cannot exceed a total of 350, Romania being allocated 15 seats, similarly to the ones allocated within the Economic and Social Committee[35]. Their mandate is also of 4 years, with the possibility of renewal. It is formed of representatives of local and regional communities, holders of an electoral mandate and, by way of consequence, they are politically responsible in front of an elected assembly. An equal number of alternates is added to them, also proposed by the member states, with the possibility of renewing the mandate. The members of the Committee of the Regions must not be bound by any imperative mandate, exercising their job in complete independence, in the general interest of the Union.

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[33] Art. 47 TEU.

[34] See Declaration no. 18 regarding the Court of Accounts.

[35] Pursuant to Declaration no. 20 regarding the expansion of the European Union.

4. Conclusions

From the analysis of the treaties successively adopted and applied at the level of the European Union, it follows that the developments registered by the international society, composed of states located on the most different continents, reflect inevitably on the European construction.

The diverse context existing in this first century of the 3rd millennium is different from the one we used to know, more specifically that from the end of the last millennium. Why? Because, we are discussing, currently, of a context essentially marked by the conquests of science and technology (digitalization), to which the pandemic and the armed conflicts, not far from our country, the EU and NATO, are added. Next to these contextual components, we can add, from the perspective of consequences, which are increasingly dramatic, the energy crisis and, above all, the problems of the environment, to which we cannot relate indifferently, but responsibly[36]. Compared to all this, the economic-financial crisis remains in the background, without acknowledging that it also determines decisively a series of negative effects closely related to the evolution of mankind.

There are also many other things, added to all these which are likely to trigger some of the most profound reflections of decision-makers at international, universal, regional (European, and not only) level, but also domestically, nationally.

Upon a brief analysis, now that 20 years since the entry into force of the Treaty of Nice have passed, we can conclude that it has essentially achieved the transition from the Treaty of Amsterdam, more precisely from its failure, to the Treaty of Lisbon, which, by its content, constitutes an unequivocal success, especially after the failure of the Treaty establishing a Constitution for Europe. Thus, „over time, European integration has progressed with each new political compromise, materialized in the Single European Act, Maastricht, Nice, Lisbon”[37].

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[36] As one doctrinaire stated, „responsibility is a dimension of the human spirit, in its capacity as axiological entity (valuing and valorizing). Also, responsibility is inherent in the existence of the rule of law and this is necessary both internally and externally” (E.E. Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în Dreptul administrativ*, Pro Universitaria Publishing House, Bucharest, 2013, p. 12).

[37] M.-A. Dumitrașcu, O.-M. Salomia, *Dreptul Uniunii Europene II*, Universul Juridic Publishing House, Bucharest, 2020, p. 72.

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THE PRINCIPLE OF AUTONOMOUS INTERPRETATION AND LIMITS OF MEMBER STATES' COURTS IN INTERPRETING EU LAW

Marian GOCIU*

Abstract

As EU law has become richer in terms of quantity and quality, the number of disputes which fall within the jurisdiction of the Member States' courts has increased, as has the complexity of the issues raised by the parties to these disputes, in which provisions of Union law apply. Thus, the application of the provisions of EU law by national courts raises certain important issues, in particular with regard to the jurisdiction on interpreting EU law, which is a prerequisite for its application.

Under art. 267 TFEU, the CJEU has jurisdiction to render a preliminary ruling concerning the interpretation of the Treaties and of legal acts of the institutions, bodies, offices or agencies of the Union.

The aim of this study is to discover whether this article gives the CJEU exclusive jurisdiction to interpret Union law, or whether national courts also have such jurisdiction, in which cases they may interpret and apply Union law without resorting to the preliminary ruling mechanism. In the latter situation, we will identify the limits of this jurisdiction in relation to the principle of autonomous interpretation of Union law. The study can be a very useful instrument both for Romanian and Member States' courts and other practitioners.

Keywords: *interpretation of union law, the principle of autonomous interpretation, criteria, jurisdiction, limits.*

1. Introductory considerations

Referral to the CJEU for a preliminary ruling on the interpretation of a provision of EU law has the effect of prolonging the duration of the proceedings before the national courts for a considerable period of time, since the proceedings are suspended pending the ruling on the preliminary reference.

According to the Annual Activity Reports of the CJEU for the years 2019-2021[1], the average duration of preliminary rulings was 15.5 months for 2019, 15.8 months for 2020, and for 2021 only the average duration of all cases was mentioned as 16.6 months.

This issue, in the overall economy of the trial, may affect the parties' right to a fair trial from the perspective of the reasonable trial duration. Some of the litigant parties do not have an interest in finalizing the proceedings, thus resorting to various artifices to delay the trial, including the «new „El Dorado" of adjournment» represented by the application submitted to the national court to request the CJEU to deliver a preliminary judgment[2].

The aim of this paper is therefore to answer the question whether Member States' courts have jurisdiction on the matter of interpreting EU law and, in this case, if they can directly apply the principle of autonomous interpretation of EU law when they are called upon to settle a dispute to which provisions of EU law are applicable, without resorting to the preliminary ruling mechanism.

Furthermore, our objective is to identify the specific situations in which this principle can be applied and the limits of the Member States' courts in their interpretation of the provisions of EU law.

If national courts could apply directly the principle of autonomous interpretation of EU law, together with all the interpretation criteria laid down by the CJEU in its case-law, without having to refer the matter to the Court for a preliminary ruling, this would have the effect of shortning the duration of the proceedings before the national courts and relieving the CJEU of a significant number of preliminary ruling requests.

To answer the research hypothesis, we will first analyse some conceptual references, the origin of the principle of autonomous interpretation of EU law and historical references and, afterwards, we will pursue to examine the application of the principle of autonomous interpretation by national courts and the limits of such

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[1] The CJEU Annual Activity Reports for the years 2019-2021, available online at *https://curia.europa.eu/jcms/jcms/Jo2_11035/rapports-annuels*, last accessed on 24.02.2023.

[2] M. Şandru, M. Banu, D. Călin, *Procedura trimiterii preliminare*, C.H. Beck Publishing House, Bucharest, 2013, p. 610.

courts in interpreting EU law considering the delimitation of jurisdiction on interpretation of EU law between the CJEU and the Member States' courts. In the latter situation we will take into account the legal framework, the specialized doctrine and the case-law of the CJEU.

In the final part of the paper, we will conduct a case study regarding the practical application of the principle of autonomous interpretation of EU law by Romanian courts and draw the necessary findings.

2. Legal framework

Art. 19 para. (3) letter b) TEU states that the CJEU shall, in accordance with the Treaties, render preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions.

Under art. 267 TFEU, the CJEU „shall have jurisdiction to deliver preliminary judgments concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may request the Court to deliver a preliminary ruling, if it considers that a decision on the question is necessary to enable it to render a judgment.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose judgments there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."

Art. 344 TFEU provides that Member States may not submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in those Treaties.

Other provisions on the interpretation of EU law are to be found in art. 23 *et seq.* of Protocol no. 3 on the Statute of the CJEU, part of the Treaties, and in art. 93 to 118 of the Rules of Procedure of the CJEU, but these provisions focus in particular on procedural matters before the CJEU.

In connection with the subject-matter of the paper, the Recommendations of the CJEU to national courts and tribunals in relation to the initiation of preliminary ruling proceedings[3] are also important, but, as the very name of this document suggests, the recommendations are only guidelines (*soft law*).

3. Conceptual references

The application of a legal provision to a factual situation by a court necessarily implies a minimal interpretation of that provision. The national judge does not automatically apply a legal text without first understanding it and concluding that it corresponds to the factual situation in the pending dispute. Therefore, a national judge is an interpreter of legal provisions, including those of the EU. It remains to discover what are the limits of this interpretative power – jurisdiction on interpretation.

The principle of autonomous interpretation is a fundamental element of the interpretation of EU law and consists in interpreting a concept or provision of EU law autonomously, without reference to the national law of the Member States.

In this paper we chose to use the term *„principle*" of autonomous interpretation of EU law, taking into account the fact that all the methods of interpretation used by the CJEU relate to it, being a relationship of part - whole. The principle is characterised by its general application and is intended to guide the methods and rules of interpretation towards a single purpose - that the provisions under consideration should be interpreted autonomously, according to the specific nature of EU law.

We didn't use the concept of *„standard*", because it only implies the establishment of minimum requirements to be met, which is not the case when referring to the notion of principle.

Nor does the term *„rule"* fully describe the concept of „autonomous interpretation", as it requires a subject to comply with a certain conduct, being the equivalent of a rule.

In order for EU law to be applied uniformly, it must be interpreted autonomously (independently of concepts and terms in the national law of the Member States).

[3] Document published in OJ no. 380/01, from 08.11.2019.

In his paper *The principle of autonomous interpretation in European private international law: effects on the qualification of legal acts*[4], the author Sergiu Popovici has held that the principle of autonomous interpretation, in private international law, is the principle according to which „the interpretation of terms in European regulations of private international law [...] must be made uniformly and completely, independently of the meanings that the national legal systems of the Member States give to similar terms."

Our view on the matter at hand is that this principle is not restricted to the provisions of private international law regulated by the EU. It is applicable to the entire EU law, as it is clear from the case-law of the CJEU, cited in this paper. The CJEU has jurisdiction to interpret all legal acts issued by the institutions, bodies, offices or agencies of the EU, without exception[5].

In applying this principle, the CJEU has used, in its case-law, several methods of interpretation, such as the grammatical and logical interpretation, the systematic interpretation and the historical interpretation, but the most important one is the teleological interpretation (based on the aims and objectives of the interpreted act).

The methods of interpretation listed are not new, but have been taken over from the national legal systems of the Member States, given that the judges of the CJEU come from the Member States, but the way in which they have been used by the CJEU in the exercise of its power of interpretation is an innovation, leading to the creation of the principle of autonomous interpretation.

The CJEU is composed of the following courts: The Court of Justice, the General Court and specialised courts[6]. Under art. 256 para. 3 TFEU, the General Court has, in theory, jurisdiction over the preliminary ruling procedure in specific areas laid down by its Statute, but this jurisdiction has not been exercised so far by the General Court because there has been no transfer of jurisdiction in those certain areas from the jurisdiction of the CJEU[7].

We will therefore continue to use the term CJEU when referring to the court with jurisdiction to render a preliminary ruling under art. 267 TFEU.

4. The origin of the principle of autonomous interpretation of EU law. Historical references

The first form of the preliminary ruling procedure was provided for in art. 41 of the Treaty establishing the European Coal and Steel Community, whereby the signatory States gave the CJEU jurisdiction to deliver preliminary rulings only on the validity of acts adopted by the High Authority and the Council in a dispute pending before a national court[8].

Subsequently, art. 177 TEEC and art. 150 EURATOM extended the jurisdiction of the CJEU to the interpretation of the Treaties and to the validity and interpretation of all acts adopted by the Community institutions, while stating that national courts have the choice/obligation (depending on whether or not their judgments are subjected to appeal under national law) to request the CJEU to deliver a preliminary ruling if they consider that a ruling to that effect is necessary for the pending dispute.

In applying this preliminary procedure, by interpreting the Treaties teleologically (on the basis of their aims and objectives), the CJEU has developed a consistent body of case-law which has gradually determined the nature of the Community legal order[9].

In the Case *Costa v. Enel*[10], the CJEU held that Community law takes precedence, that the Member States have created a new legal order under international law, and that individuals may rely directly before national courts on rights conferred by that new legal order.

The purpose of the CJEU, under art. 177 TEEC, to ensure the uniform interpretation of the Treaty by national courts, was highlighted in the *Case van Gend & Loos*[11].

[4] S. Popovici, *Principiul interpretării autonome în dreptul internaţional privat european: efecte asupra calificării actelor juridice*, in Romanian Journal of Private Law no. 1/2019, p. 225.

[5] CJEU Judgment from 13.12.1989, *Salvatore Grimaldi v. Fonds des maladies professionnelles*, C-322/88, EU:C:1989:646, para. 8.

[6] See art. 19 para. 1 TEU.

[7] According to the Report drawn up pursuant to art. 3 para. (2) of Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16.12.2015 amending Protocol no. 3 on the Statute of the CJEU, para. 3, available online at *https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-01/ro_2018-01-12_08-43-52_600.pdf*, last accessed on 25.02.2023.

[8] I.-M. Larion, *Competența Curții de Justiție a Uniunii Europene de a se pronunța cu titlu preliminar*, doctoral thesis, „Nicolae Titulescu" University, Bucharest, 2021, p. 70.

[9] C. Lescot, *Institutions Européennes. Manuel*, Paradigme Publishing House, Orléans, 2011, p. 133.

[10] CJEU Judgment from 15.07.1964, *Flaminio Costa v. ENEL*, 6/64, EU:C:1964:66.

[11] CJEU Judgment from 05.02.1963, *N.V. Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der Belastingen* (the Dutch tax administration), 26/62, EU:C:1963:1.

Hence, the principle of autonomous interpretation of European Union law was created by the CJEU in its interpretative activity in the context of the preliminary rulings procedure, under art. 177 TEEC and under art. 150 EURATOM, from the need for uniform application of Community/European law.

After the *van Gend & Loos* judgment, the CJEU has consistently upheld this principle, albeit indirectly by using equivalent phrases: „terms and provisions of Community law which do not refer to the law of the Member States for the purpose of determining their meaning and scope must normally be given *an autonomous and uniform interpretation throughout the Community"*[12]; „in order to ensure equality and uniformity of the rights and obligations laid down in the Convention [...] the nature of the connection *must be determined autonomously"*[13] , „[...] the provisions of Union law *must be interpreted and applied uniformly* in the light of the versions existing in all the languages of the Union" [14].

In the Opinion no. 2/2013[15], the CJEU also clarified that the purpose of the preliminary reference procedure is to ensure the unity of interpretation of EU law, therefore making it possible to ensure its coherence, its full effect and its autonomy and, ultimately, the proper character established by the Treaties.

In view of this development of the concept of autonomous interpretation of EU law in the case-law of the CJEU, we can conclude that it has now acquired the status of a „principle".

5. The application of the principle of autonomous interpretation by national courts and the limits of such courts in interpreting EU law

5.1. Delimitation of jurisdiction on interpretation of EU law between the CJEU and the Member States' courts

5.1.1. Depending on the legal framework

In order to be able to distinguish the jurisdiction on interpretation in the manner proposed in this section, the first step is to retain the application of the principle of conferral of competences[16], whereby the CJEU acts within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them.

Next, under art. 267 TFEU, the CJEU has jurisdiction over the preliminary ruling procedure on the basis of which delivers judgments on interpretation of Union law, the national courts of the Member States having the right, if they consider that a decision on the matter is necessary for them to render a judgment, to request the Court to deliver such a ruling thereon.

This article also contains an obligation for national courts, whose judgments are not subjected to an appeal under national law, to refer questions to the CJEU for a preliminary ruling if EU law is applicable to the pending dispute.

Therfore, depending on the legal framework, both the CJEU and the national courts of the Member States have jurisdiction to interpret EU law, sharing this jurisdiction through the preliminary referral procedure.

5.1.2. Views of the specialized literature on the subject

In the specialized literature[17], it has been considered that the EU's courts exercise an assigned jurisdiction under the conditions and within the limits imposed by the Treaties, whereas the common (regular) law judges of the Community/European law are the national judges.

The opinion of the former President of the Court of Justice of the European Communities from 1994 to 2003, Mr. Gil Carlos Rodríguez Iglesias, is that the Union court „is not at the heart of the European judicial space,

[12] CJEU Judgment from 18.01.1984, *Ekro BV Vee-en Vleeshandek v. Produktschap Voor Vee-en Vlees*, 327/82, EU:C:1984:11, para. 11.

[13] CJEU Judgment from 27.09.1988, *Athanasios Kalfelis v. Bankhaus Schröder, Münchmeyer, Hengst and Co. and others*, 327/82, EU:C:1988:459, para. 10.

[14] CJEU Judgment from 08.10.1920, *Allmänna ombudet hos Tullverket v. Combinova AB*, C-476/19, EU:C:2020:802, para. 31.

[15] CJEU Opinion no. 2/13 from 18.12.2014, EU:C:2014:2454, para. 176.

[16] See art. 5 para. (1) and art. 13 para. (2) TEU.

[17] C. Lescot, *op. cit.*, p. 135.

since this area primarily concerns national courts and tribunals through cooperation and mutual recognition of judgments”[18].

The CJEU has an extremely important role in ensuring that Community/Union law is interpreted and applied in accordance with the Treaties, so that the judgment delivered by the Court is the only one valid and binding on all the institutions of the EU, the Member States and their nationals[19]. Other authors[20] have noted that uniformity of interpretation and application of the law could be the very reason of existence of the CJEU, being inherent in the nature of this European institution.

It has also been pointed out in the relevant doctrine[21] that the preliminary reference mechanism is „an example of shared jurisdiction between the Court of Justice and the national courts, which depends on mutual cooperation in order to ensure the success of the procedure”, since the Court only provides an interpretation of Union law and cannot advise the national courts on its application[22].

According to the author Thomas von Danwitz[23], the exclusive jurisdiction of the CJEU, laid down in art. 344 TFEU, to deliver a binding interpretation of EU law as a last resort, in particular in the context of preliminary ruling proceedings in dialogue with the courts of the Member States, is the main legal and historical argument, both for the requirements of uniformity of interpretation of EU law and for opening up the plurality of ways of complying with EU law.

We note from these clarifications, in addition to the conclusions stated in point (a) above, that the national courts are the common law courts in the application and interpretation of EU law to specific cases, with the obligation to interpret national law in accordance with EU law (the conformity principle), and that the CJEU has exclusive jurisdiction to render a binding judgment interpreting EU law that is uniformly applicable in all Member States.

We also observe that the provisions of the Treaties do not establish a hierarchy of courts in the Union's judicial system, except with regard to the configuration of the CJEU (as noted in the section „Conceptual references”).

On the use of the preliminary reference proceedings, the author Jan Komárek, in his work „*In the Court(s) We Trust? On the need for hierarchy and differentiation in the preliminary ruling procedure*”[24], highlighted the need to respect the hierarchy of national judicial systems and proposed, in this respect, that the use of this procedure should be limited to the courts of last instance as a rule and that, as an exception, lower courts should be able to refer a preliminary ruling request to the CJEU only when the validity of a Union act is in question.

The author's reasoning behind this proposal was, in principle, that the preliminary ruling procedure can never adequately serve the objective of uniformity and undermines national judicial hierarchies when it allows any court to enter into dialogue with the EU court. He also proposed that national courts should be given greater confidence so that they can be true parts of the EU judicial system.

We cannot agree with this point of view because, first of all, the preliminary ruling mechanism was designed as a form of direct cooperation (dialogue) between the CJEU and all national courts, which together exercise the function of interpreting EU law with the scope of ensuring uniform application throughout the EU. Under this mechanism, the Court's judgment establishing a particular interpretation of a EU provision is binding erga omnes, but the task of applying that interpretation to a specific factual situation falls to the national courts. The preliminary reference procedure is not an appeal available to the parties to a particular dispute and the CJEU is not a court hierarchically superior to the national court that used this procedure.

When a national court, whose judgment is subject to a remedy under national law, refers a question to the CJEU for a preliminary ruling, the domestic remedy against the judgment of that court is not abolished. The higher

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[18] Point of view mentioned in the book written by the authors P. Rancé and O. de Baynast, *L'Europe judiciaire. Enjeux et perspectives*, Dalloz Publishing House, Paris, 2001, p. 19.

[19] M.A. Dumitrașcu, *Dreptul Uniunii Europene I. Curs universitar*, Universul Juridic Publishing House, Bucharest, 2021, p. 22.

[20] M. Şandru, M. Banu, D. Călin, *op. cit.*, p. 1.

[21] M. Horspool, M. Humphreys, M. Wells-Greco, *European Union Law*, 9th ed., Oxford University Press Publishing House, Oxford, 2016, pp. 76 și 77.

[22] Also see CJEU Judgment from 30.06.1966, *G. Vaassen-Göbbels v. Management of the Beambtenfonds voor het Mijnbedrijf*, 61-65, EU:C:1966:39.

[23] Th. von Danwitz, *Uniform interpretation and primacy of Union Law in the dialogue of the Courts*, VerfBlog, 04.11.2022, available online at *https://verfassungsblog.de/uniform-interpretation-and-primacy-of-union-law-in-the-dialogue-of-the-courts/*, last accessed on 25.02.2023.

[24] J. Komárek, *In the Court(s) We Trust? On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure*, in European Law Review, Forthcoming, available online at *https://ssrn.com/abstract=982529*, last accessed on 26.02.2023.

national court hearing the appeal retains the power to verify the legality and the merits of the judgment passed by the first court and also how the interpretation of the Union's provision (delivered in the preliminary reference procedure) has been applied to the specific factual situation. If the higher national court still has doubts regarding that interpretation, it may refer the matter to the CJEU for another preliminary ruling.

In conclusion, the preliminary ruling mechanism does not interfere with the hierarchy of national judicial systems.

Secondly, it is precisely by preserving the possibility for all the courts of the Member States to have recourse to the preliminary ruling procedure that great confidence is placed in them, and the constant dialogue between the courts and the CJEU is essential to achieving the objective of uniformity.

The need not to overburden the CJEU with references for preliminary rulings cannot be satisfied by eliminating a significant part of the cooperation mechanism referred to above, since there are other effective ways, such as training programmes for national judges aimed at a thorough understanding of the preliminary procedure.

In support of our arguments, we also quote the opinion of the author Bruno Lasserre in the study „*Les juges nationaux et la construction européenne: unis dans la diversité*"[25], according to which the courts of the Member States, when resorting to the preliminary ruling procedure, are now adopting a partnership approach rather than a hierarchical one, in which their status as common law judges of EU law is fully affirmed.

5.1.3. According to the case-law of the CJEU

In order to clarify the specific way in which the Court shares the jurisdiction on interpreting EU law with national courts and to identify the situations in which the principle in question can be applied, as well as the limits of national courts in interpreting EU law, it is necessary to analyse the relevant CJEU case law.

In Opinion no. 1/09[26], the Court held that, together with the courts of the Member States, it ensures respect for the legal order and the judicial system of the EU and that it is for the Member States, in particular by virtue of the principle of cooperation in good faith, to ensure that EU law is applied and complied with in their territory. Thus, the national courts, in cooperation with the EU court, perform the function which is assigned to them jointly in order to ensure that the law is observed in the application and interpretation of the Treaties.

The answer to the second research hypothesis is to be found in the judgment of the CJEU in the *Cilfit case*[27].

In this case, the Supreme Court of Cassation of the Italian State requested the CJEU to deliver a preliminary ruling on the interpretation of the third paragraph of art. 177 TEEC [now art. 267 para. (3) TFEU], namely whether that paragraph provides „that where any question of the same kind as those listed in the first paragraph of that article is raised in a case pending before a national court or tribunal, against whose decisions there is no judicial remedy under national law, that court or tribunal must bring the matter before the Court of Justice, lay down an obligation so to submit the case which precludes the national court from determining whether the question raised is justified or does it, and if so within what limits, make that obligation conditional on the prior finding of a reasonable interpretative doubt?".

In the dispute pending before the Supreme Court of Cassation concerning the legality of the payment of a fixed fee laid down by Italian law for the veterinary inspection of wool imported from countries which are not members of the Community, the applicants submitted that the fee in discussion infringes Regulation (EEC) no. 827/68 of 28 June 1968.

The Italian Ministry of Health's opinion was that the interpretation of the Regulation in question is so self-evident that it removes the possibility of considering a doubt as to the interpretation and there is no need for a preliminary reference. The applicant companies stated that the Supreme Court could not evade its obligation to refer the matter to the CJEU.

The CJEU held that the obligation to refer a question using the preliminary ruling proceedings is part of the cooperation, established in order to ensure the proper application and uniform interpretation of Community law

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[25] B. Lasserre, *Les juges nationaux et la construction européenne: unis dans la diversité*, in Revue Européenne du Droit no. 3, available online at *https://geopolitique.eu/articles/les-juges-nationaux-et-la-construction-europeenne-unis-dans-la-diversite/*, last accessed on 26.02.2023.

[26] CJEU Opinion no. 1/09 (Plenary session) from 08.03.2011, issued according to art. 218 para. (11) TFEU – Draft Agreement - Establishment of a unified patent litigation system - European and Community Patent Court - Compatibility with the Treaties, EU:C:2011:123, para. 66-69.

[27] CJEU Judgment from 06.10.1982, *Srl CILFIT e Lanificio di Gavardo Spa v. Ministero della sanità*, 283/81, EU:C:1982:335.

in all the Member States, between national courts and the CJEU (para. 7, *Cilfit case*), and the courts referred to in the third paragraph of art. 177 TEEC have the same discretion as all other national courts to ascertain whether a decision on a question of Community law is necessary to pass a judgment (para. 10).

Hence, *the first criterion* is the usefulness of the decision of the CJEU on a provision of Community/EU law for the proper settlement of a dispute before the national court.

In para. 13 and 14 of the *Cilfit case*, the CJEU mentioned the *second criterion* which is such as to deprive the obligation for a national court, whose judgments are not subject to a judicial remedy, to have recourse to the preliminary reference procedure: the existence of case-law of the Court which has settled the point of law in question (the theory of the *„acte éclairé”*[28]).

Under this criterion there are two situations: either the question referred is identical to a question which has already been the subject of a preliminary ruling in a similar case, or the answer to the question referred derives from established case-law of the Court which has settled the point of law in question, irrespective of the nature of the proceedings which led to that case-law and even in the absence of strict identity of the questions at issue.

The case-law of the CJEU is a source of EU law, and its place in the hierarchy of sources of Union law is different, depending on the provision it interprets, since the interpretation and the legal provision or document interpreted form a whole[29].

Therefore, national courts must also carry out a minimum interpretation of the case law of the CJEU in order to assess the need to use the preliminary reference procedure.

The third criterion is that the correct application of Community/EU law is so obvious as to leave no reasonable doubt as to the manner in which the question raised is to be resolved (para. 16, *Clifit case*; the theory of the clear act – *„acte clair”*). The Court added that, as a matter of priority, the national court must be convinced that this is equally obvious to the national courts or tribunals of the other Member States and to the CJEU.

The existence of such a possibility must also be assessed in the light of the characteristics of Community law and the specific difficulties involved in its interpretation (para. 17, *Cilfit case*), namely the fact that Community law texts are drafted in several authentic language versions, so that an interpretation of a provision of Community law involves a comparison of the language versions (para. 18, *Cilfit case*). Community law uses its own terminology, even when there is full concordance between the language versions, and legal concepts do not necessarily have the same meaning in Community law and in the national law of the various Member States (para. 19, *Cilfit case*).

In para. 20 of the same judgment, the CJEU stated that the national courts must use the systematic, teleological and historical interpretation, in the sense that each provision of Community/EU law must be placed in its context and interpreted in the light of the provisions of that law as a whole, its objectives and the state of its development at the time when it is to be applied.

In developing the interpretative guidance concerning the comparison of language versions, the Court has stated that a purely literal interpretation of a legal provision based on the text of one or more language versions to the exclusion of others cannot prevail[30], since the provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all the languages of the EU[31].

It has been stated in the specialized doctrine[32], in relation to the requirement in para. 16 of the *Cilfit case*, that „the task of the national courts is so impossible as to amount to an obligation of reference in most cases”, since that requirement implies mastery of a legal vocabulary in several official languages other than those involving the judgment, mastery of terminology specific to EU law and knowledge of Union law, in general, sufficient to assess the legal provision applicable to the dispute pending.

All these interpretative criteria provided by the CJEU are in line with the principle of autonomous interpretation of EU law.

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[28] Theory initially mentioned in CJEU Judgment from 27.03.1963, *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v. Administration Fiscale Néerlandaise*, 28-30/1962, EU:C:1963:6.

[29] M.A. Dumitrașcu, *op. cit.*, p. 286.

[30] CJEU Judgment from 24.03.2021, *A. with the participation of Patentti - ja rekisterihallituksen tilintarkastuslautakunta*, C-950/19, EU:C:2021:230, para. 37.

[31] CJEU Judgment from 08.10.2020, *Allmänna ombudet hos Tullverket v. Combinova AB*, C-476/19, EU:C:2020:802, para. 31.

[32] B. Andreşan-Grigoriu, *Procedura hotărârilor preliminare*, Hamangiu Publishing House, Bucharest, 2010, p. 236.

As regards the jurisdiction to apply the principle of autonomous interpretation of EU law, the CJEU does not distinguish between national courts according to the criterion of the existence of a legal remedy under national law against their judgment.

Consequently, national courts do not interpret EU law when the CJEU's decision on a point of EU law is not useful/necessary for the resolution of the dispute before it, but they are obliged to interpret EU law in the other two cases analysed above in *Cilfit judgement* in order to decide whether or not to have recourse to the preliminary reference procedure, in which case they are obliged to apply the principle of autonomous interpretation and the interpretative criteria listed by the Court.

The limits of these courts in interpreting the provisions of EU law are precisely the three interpretative criteria analysed in the *Cilfit case*.

5.2. Case study regarding the practical application of the principle of autonomous interpretation of EU law by Romanian courts

a) By civil judgment no. 16180/02.11.2022[33], the Court of Buftea admitted the plea of lack of legal standing of the defendant C. SA and dismissed the claim brought by the plaintiff A. Inc., as being brought against a person without legal standing.

In this dispute, the plaintiff A. Inc. sued the defendant C. SA, requiring from him to pay the sum of 400 EUR by way of compensation under art. 7 para. (1) of Regulation (EC) no. 261/2004 of the European Parliament and of the Council of 11 February 2004[34], plus penalty interest. The applicant added that passenger A.P. had purchased an air ticket for flight X on 02.01.2022 and that the flight had been delayed for more than 3 hours.

The defendant C. SA argued that he is not an „operating air carrier" within the meaning of art. 2, para. (1) letter (b) of the Regulation, since he leased to A.C.H., as a user, an aircraft with crew capable of carrying out charter flights. He therefore refered the court the plea of lack of legal standing.

The national court, in examining the plea, held that the concept of „operating an air carrier" was clarified in the CJEU judgment of 4 July 2018, *Case Wolfgang Wirth and others v. Thomson Airways Ltd.*[35], according to which a carrier is to be regarded as operating an air carrier if, in the course of its passenger transport activity, it takes the decision to operate a specific flight, including the decision to determine its own itinerary and thus to create an offer of air transport to interested parties. The adoption of such a decision implies that the carrier bears responsibility for the operation of that flight, including, *inter alia*, for its possible cancellation or long delay on arrival.

The concept does not cover an air carrier which, like the one at issue in the main proceedings, leases an aircraft with crew to another air carrier under a wet lease, but does not bear operational responsibility for flights, even where the confirmation of reservation of a seat on a particular flight issued to passengers states that the flight is operated by that first carrier.

The Court of Buftea found that the factual situation in the dispute before it was similar to that in the case in which the CJEU had ruled in the judgment referred to it, so the court did not refer a question to the CJEU using the preliminary ruling procedure.

This case is a simple example of a Romanian court applying the principle of autonomous interpretation of EU law and finding that it was in the hypothesis of the theory of the clarified act (even if it did not expressly mention this), which is why the court proceeded to settle the dispute without resorting to the preliminary reference mechanism.

b) On 29.12.2022[36], the Tribunal of Constanța rejected as inadmissible the prosecutor's request for a preliminary ruling from the CJEU on four questions concerning the interpretation of EU law.

The Tribunal of Constanța listed the general conditions of the preliminary reference proceedings and, in analysing the condition of usefulness, it stated that it is not necessary for the court itself to share the doubts or not, it is sufficient that a party of the dispute presents serious doubts.

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[33] Judgement delivered by Buftea's Court in the case no. 12189/94/2022, unpublished.

[34] Regulation (EC) no. 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) no. 295/91 (OJ no. L 46, 17.02.2004, pp. 1-8).

[35] CJEU Judgment from 04.07.2018, *Wolfgang Wirth and others v. Thomson Airways Ltd*, C-532/17, EU:C:2018:527, para. 20 and 26.

[36] Judgment of 29.12.2022 delivered by the Tribunal of Constanța in case no. 6707/118/2018, unpublished.

It also stated that the national court, whose judgment is no longer subject to an appeal, will not interpret the EU legal provision, but will only verify whether the text of the provision is clear in itself and the correct application of that provision arises from the ordinary and natural meaning of the terms used. The Tribunal added that such a situation exists where the correct application of EU law is so obvious that there can be no room for any reasonable doubt. If it concludes that there is serious doubt as to the meaning of the legal provision, the court is obliged to refer the matter to the CJEU under art. 267 TFEU.

Finally, the Tribunal found that the question which may be referred by the national court relates exclusively to questions of interpretation, validity or application of Community law, and not to questions of national law or particular elements of the case before it, is not useful and relevant and there is no doubt as to the application or interpretation of a Community provision.

Reading the manner in which the Constanța's Tribunal reasoned its decision to reject as inadmissible the request to refer the four preliminary questions to the CJEU, we see, first of all, that the national court confused the requirement of usefulness with the third criterion on the basis of which a court could refrain from referring a case to the CJEU, as held in the *Cilfit case* (the theory of the clear act).

Secondly, the national court wrongly held that it was not necessary to share doubts as to the interpretation of the legal provision of Union law. The holder of the preliminary reference to the CJEU is the national court, as it is the only one in a position to apply the principle of autonomous interpretation of EU law and to determine whether the conditions of the theory of the clear act which allows abstention from recourse to the preliminary reference procedure are fulfilled. It is irrelevant in this procedure whether or not a party to the proceedings has doubts as to the interpretation of the provisions of EU law.

Thus, the national court must interpret the provision of Union law applicable to the dispute, using the principle of autonomous interpretation with its methods and the three criteria from the *Cilfit case*, and if it concludes that its interpretation is equally obvious to the national courts or tribunals of the other Member States and to the CJEU, only then are the conditions of the clear act theory fulfilled. Nor can we agree with the argument of the Constanța Tribunal that it must only verify whether the text of the rule is „clear" in itself, because it is contrary to para. 16-20 of the *Cilfit case* [discussed *supra*, section 5.1./5.1.3.].

Thirdly, the national court did not undertake an effective interpretation of the relevant provisions of EU law in order to ascertain whether the four questions referred are related to the pending litigation and whether they are clear and leave no room for reasonable doubt as to their resolution.

This case confirms the conclusions of the Research Note[37] drawn up in 2020 at the request of the CJEU, according to which the case-law developed in Romania on the obligation to refer a preliminary question to the Court does not appear to be uniform. In general, Romanian courts consider themselves competent to interpret EU law by simply finding that a certain interpretation resulting from an act of EU law appears to be self-evident. In this respect, in most cases, especially in cases where they refer to the clear act theory, these courts do not adequately explain why the solution they adopt is in line with the objectives of the provisions of EU law. Moreover, they do not always refer to the exceptions to the obligation to refer a question for a preliminary ruling, in particular to the criteria set out in the *Cilfit case*.

6. Conclusions

In this study we discovered that a national judge is an interpreter of legal provisions, including those of the EU.

The national judges are the common (regular) law judges of the EU law; therefore, they have the common law jurisdiction on interpretation of EU law.

The exclusive CJEU jurisdiction to deliver judgements on the uniform interpretation of Union law represents an exception from the rule stated above. In its activity as EU law interpreter, the CJEU stated the principle of autonomous interpretation with the methods of interpretation listed in *Cilfit case* (the grammatical and logical interpretation, the systematic interpretation and the historical interpretation, the teleological interpretation based on the aims and objectives of the interpreted act, the comparison of language versions) and three essential criteria to be used by national courts to assess whether to refer a preliminary question to the CJEU.

[37] Note de Recherche, *Application de la jurisprudence Cilfit par les juridictions nationales dont les décisions ne sont pas susceptibles d'un recours juridictionnel de droit interne*, available on the CJEU website at *https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-01/ndr-cilfit-fr.pdf*, p. 228, para. 32, last accessed on 26.02.2023.

Further on, the national courts have jurisdiction to interpret a legal EU provision by applying the principle of autonomous interpretation, together with the interpretative criteria set out in the *Cilfit case*, and if they still have doubts on the correct interpretation, they may resort to the preliminary reference mechanism (the „keystone” of the Union's judicial system[38]), with the courts of last instance being obliged to do so.

The application of the principle of autonomous interpretation is a *sine qua non* requirement and not an option for national courts, which cannot interpret EU law by reference to concepts or provisions of national law, but must comply with the interpretative criteria listed in the *Cilfit case* in the two cases analysed: the theory of the clarified act and the clear act theory.

A further conclusion is that the application of this principle by the courts of the Member States does not mean that the CJEU's exclusive jurisdiction on uniform interpretation has been infringed, since the Court, in the very grounds of the *Cilfit case*, has ruled that the national courts may interpret EU law and has provided the necessary criteria for interpretation so that they are able to make proper use of the preliminary reference procedure.

Moreover, the interpretation given by the national courts is binding only on the parties to the dispute, unlike the interpretation given by the CJEU which together with the provision interpreted form a whole and it is binding *erga omnes*.

We can conclude that the jurisdiction of national courts in the interpretation of EU law stops when they have a doubt over the correct interpretation of the EU provision, after applying the principle of autonomous interpretation and the Cilfit interpretative criteria. This is when the jurisdiction of the CJEU on interpretation begins, precisely in order to ensure a uniform interpretation throughout the EU and to avoid contradictory judgements delivered to similar situations due to different interpretations of the same legal EU text done by different national courts.

The limit of the jurisdiction of the national court in the interpretation of EU law is represented by the doubt in its own interpretation.

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[38] Expression used by the CJEU in Opinion no. 2/13 (Accession of the Union to the ECHR) of 18.12.2014, EU:C:2014:2454, para. 176.

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SHORT CONSIDERATIONS ON THE RIGHT TO COMPENSATION IN CASE OF MISCARRIAGE OF JUSTICE OR UNLAWFUL IMPRISONMENT – A STEP BEFORE THE ECTHR PROCEEDINGS

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Abstract

Pursuant to the provisions of art. 538 et seq. CPP, individuals who consider themselves to be victims of manifest miscarriages of justice or in cases of unlawful deprivation of liberty may bring an action against the Romanian State through the Ministry of Public Finance for damages for the unlawful deprivation of liberty they have suffered.

This study will attempt to analyse the conditions of admissibility of such claims, arising from unlawful deprivation of liberty, and to present elements of material and non-material damage that could be covered by the court.

But even if such actions were to be admitted and the court were to grant the claims referred to by the persons entitled, could the non-material damage be fully compensated, given that several fundamental human rights have clearly been infringed?

The issue is also approached from the perspective of the ECtHR rich case-law on this matter, which we consider relevant to the present topic.

Keywords: *action, compensation, damages, reparation, the Romanian State.*

1. Introductory considerations

Fundamental human rights must be respected, and when they are not voluntarily respected, their violation must be redressed. Among the individual human rights recognized to every human being the right to liberty and security of the person, enshrined in **art. 5** of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter *„**ECHR**”*) is part of the human rights hard core[1].

The provisions of **art. 5** ECHR are extremely important for a democratic society, as it regulates the protection of any person against arbitrary or abusive detention or arrest. The term *liberty* does not was chosen by chance, it refers to the very physical freedom of individuals. No person may not be deprived of his/her liberty in an arbitrary manner, but only in well-founded cases, provided for and executed according to the law, which are the protection of public order. Even in the case of a permitted deprivation of liberty by law, the person concerned must be assured that certain safeguards are respected. This right is inalienable and no one can waive it.

But what happens when the state violates this fundamental right in judicial proceedings, through manifest miscarriages of justice or unlawful deprivation of liberty?

Under the provisions of **art. 538 and 539** of Law no. 135/2010 (hereinafter *„**CPP**”*), individuals who consider themselves victims of manifest miscarriages of justice or unlawful deprivation of liberty (hereinafter *„**the persons entitled**”*) may bring an action against the Romanian State, through the Ministry of Public Finance[2], for compensation for damage caused by miscarriages of justice or unlawful deprivation of liberty.

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[1] Please see C. Bîrsan, *European Convention on Human Rights: Commentary per Articles*, C.H. Beck Publishing House, Bucharest, 2010, L.-C. Spătaru-Negură, *International Protection on Human Rights. Course Notes*, Hamangiu Publishing House, Bucharest, 2019, p. 138 and following, A. Fuerea, *Introduction to international human rights law: lecture notes*, Era Publishing House, Bucharest, 2000.

[2] With regard to the passive legal standing of the defendant Romanian State through the Ministry of Public Finance, the provisions of art. 541 para. (3) CPP recognizes *expressis verbis* the passive legal capacity.

The purpose of this study is to set out certain considerations relevant to actions seeking compensation for damages for unlawful deprivation of liberty suffered.

With regard to territorial, material and general jurisdiction, the court in whose district the person entitled to damages is domiciled, bringing a civil action against the state, which is summoned by the Ministry of Public Finance, has jurisdiction to rule on the action, pursuant to **art. 541 para. (3)** CPP.

By the judgment on the merits of the case, the court could be empowered by the persons entitled to order the Romanian State to pay:

- a sum of money to cover the **material damage** caused by the criminal case, consisting, for example, of lawyer's fees, legal expenses, amount of weekly packages, parental donations for the subsistence of the entitled person's family, and for the lost benefit, as appropriate;
- a sum of money to cover the **non-material damage** caused by the unlawful detention of the person entitled and the inhuman and degrading conditions of detention to which he/she was subjected during the period of his/her imprisonment and/or placed under house arrest, under judicial supervision;
- **interest** on the amount claimed from the date of the claim until full payment of the amount due;
- the person entitled costs incurred in the proceedings in accordance with **art. 453** CPC.

2. General considerations on the admissibility of such claims

Given that the persons entitled were the victims of an obvious miscarriage of justice in the criminal cases, they are entitled to compensation for damages for the harm suffered, pursuant to **art. 539** ***et seq.*** CPP.

Pursuant to the provisions of **art. 539** CPP: *„(1) A person who, in the course of criminal proceedings, has been unlawfully deprived of liberty shall also be entitled to compensation for damages.*

(2) The unlawful deprivation of liberty must be established, as the case may be, by an order of the public prosecutor, by a final decision of the judge of rights and freedoms or of the preliminary chamber judge, and by a final decision or final judgment of the court hearing the case.”.

Involvement of these persons entitled in criminal proceedings for alleged particularly serious offences [*i.e.*, the offence of setting-up an organised criminal group, provided for by **art. 367 para. (1)** CP, the offence of abuse of office in a continuous form, provided for in **art. 297 para. (1)** CP], offences which they did not commit, certainly damaged the persons entitled honour, moral credit, social position and professional prestige.

The measures ordered against such persons entitled have harmed the values that define human personality, values that relate to the physical existence of a person, to health and bodily integrity, to honour, dignity, professional prestige and other similar values. The seriousness of the effects produced is accentuated by the age of the persons at the time - for example, young people at the beginning of their careers, with well-defined professional and social prospects.

In case of certain persons entitled, even after their release from pre-trial detention centres, due to the media coverage of the unreal facts, which were presented in the national press, online and on national TV broadcasts, in which the respective persons were **portrayed as criminals**, they may end up being stigmatised in society and feel this trauma, even though it is obvious that miscarriages of justice were committed against them, because in the end **they were acquitted by the courts**.

Thus, the **principle of the financial liability** of the Romanian State for damage caused by errors committed in criminal proceedings is enshrined in **art. 52 para. (3)** of the Romanian Constitution and in accordance with the practice of the Romanian Constitutional Court, as well as with the provisions of **art. 3 of Protocol no. 7** to the Convention.

The **right to compensation** arises when it is premised on a miscarriage of justice, which leads to the conclusion that compensation for damages can be claimed in all cases where the state authorities committed abuses of law or manifested gross negligence. Even if the arrest or detention was qualified as lawful under national law, it could still be contrary to **art. 5** ECHR.

Individual liberty is a fundamental human right guaranteed by **art. 23** of the Romanian Constitution and by **art. 5** ECHR.

The European Court of Human Rights has consistently held that in cases of violation of **art. 5 para. 1** ECHR concerning unlawful deprivation of liberty, apart for the claims for material damage, claims for moral damages for the period of unlawful detention are also justified.

The measure of pre-trial detention of those persons entitled most probably caused them moral suffering, that it materialised in acute states of stress and depression which required a great deal of strength and willpower to overcome.

Thus, in the light of **art. 5** ECHR, the constitutional principle that **the state is financially liable for damage caused** by miscarriages of justice in criminal proceedings and must allow reparation for the damage caused both by wrongful conviction and as a result of unlawful deprivation of liberty during criminal proceedings, is embodied.

Judicial practice has defined **the conditions which must be met for the award of damages in an action for damages and miscarriages of justice** based on **art. 539** CPP, as follows:

- existence of an unlawful deprivation of liberty;
- the unlawful deprivation of liberty must be established, as the case may be, by order of the public prosecutor, by a final decision of the judge of rights and freedoms or of the preliminary chamber judge, and by a final decision or final judgment of the court hearing the case;
- the existence of damage suffered by the applicant, which is presumed;
- the lodging of the claim within 6 (six) months from the date of the final judgment of the court.
- We will detail further these conditions.

2.1. Existence of an unlawful deprivation of liberty

In the case of preventive measures in a criminal case, the existence of such preventive measures becomes unjust as a result of the decision to dismiss the criminal charge on the merits - for example, acquittal under **art. 396 para. (1) and (5)** CPP in relation to **art. 16 para. (1) letter (b) first thesis** CPP.

As the Constitutional Court pointed out in the dec. no. 136/2021 on the objection of unconstitutionality of **art. 539** CPP:

„37. Preventive custodial measures taken in the course of ***criminal proceedings represent a severe/major restriction of a person's individual liberty. Even if the constitutional text allows the limitation of individual liberty for the purpose of the proper conduct of the criminal proceedings, it does not mean that, regardless of the outcome of the criminal proceedings, the infringement of this liberty should not be redressed****. In other words, the outcome of the judicial process must be regarded as an* ***<u>essential criterion</u>*** *for compensating for the injustice suffered by the person concerned. (...)* ***Therefore, if it is proved, by a final order of dismissal/judgment, that the criminal charge against the person is unfounded, the severe limitations on his individual liberty must be compensated.*** *(...)*

38. If the State owes compensation for a preventive measure depriving a person of his liberty taken unlawfully, irrespective of the outcome of the criminal proceedings, precisely because it has infringed its own legal system, ***<u>so too does the deprivation of liberty of a person against whom the State, on examining the merits of the charge, fails to rebut the presumption of innocence give rise to a necessary right to compensation. Being deprived of liberty on the basis of the charge brought, a finding that the charge is unfounded/ inconsistent with reality has the effect of establishing that the deprivation of liberty measures taken against the person concerned in the course of the criminal proceedings are unjust</u>****. (...)* ***The failure to comply with legal procedures in the taking of a preventive measure involving deprivation of liberty or the unfoundedness of the criminal charge which led to the taking of the preventive measure involving deprivation of liberty are grounds which equally justify a right to compensation for the impairment of individual liberty, even if the grounds are different*** *[unlawfulness of the measure or unfoundedness of the charge].* ***The fact that the deprivation of liberty is found to be unjust and unfair only at the end of the criminal proceedings does not mean that it was not unjust and unfair at the very time it was ordered and that, therefore, the person subject to the measure was not wronged.***

(...)

44. Therefore, in view of the State's obligation to value justice, the violation of the inviolability of individual liberty in the present case ***constitutes a miscarriage of justice within the meaning of the first sentence of Article 52 para. (3) of the Constitution****, but not from the point of view of the judge's assessment of the case, which was based on the evidence in the case, but from the point of view of the outcome of the trial. Thus,* ***<u>it is inadmissible for an acquitted person to continue to bear the stigma of the deprivation of liberty to which he has been subjected, without being given the necessary material and moral reparation.</u>*** *(...)*

*45. Accordingly, the Court finds that, in the light of Articles 1 para. (3) and 23 para. (1) of the Constitution, **the deprivation of liberty ordered in the course of criminal proceedings resolved by application of Article 16 para. (1) letters (a)-(d) of the Code of Criminal Procedure causes harm to the person subject to that measure**, which entails the applicability of the first sentence of Article 52 para. (3) of the Constitution. Therefore, the Court holds that there is no congruence between the above-mentioned constitutional texts and the restrictive view of the Code of Criminal Procedure, which links the right to compensation associated with the unlawful deprivation of liberty to the violation of a legal rule in taking/extending/maintaining the preventive measure. Since a legal text cannot restrict the scope of application of constitutional provisions and cannot take precedence over a rule of constitutional rank, an acquittal/termination decision given in a criminal trial for the above reasons must be given **the same remedial purpose** since it demonstrates a violation of the same constitutional value - the inviolability of the individual's liberty - as in the case of failure to comply with the legal rules concerning the taking/extension/maintenance of the preventive measure depriving the person of liberty. **It is true that the situation under consideration is not a case of unlawful deprivation of liberty, but, given that both hypotheses are designed to protect the same constitutional values [justice, individual liberty, legality], it means that the person whose inviolability of individual liberty has been violated must be recognised and enjoy the same protection.** The Court therefore finds that the situation under consideration constitutes a case of unjust deprivation of liberty, in which case the individual's right to compensation cannot be extinguished. Therefore, **the juxtaposition of the two aforementioned hypotheses in the content of Article 539 of the Code of Criminal Procedure reflects the full and correct dimension of the provisions of Article 52 para. (3), first thesis, of the Constitution, their legal treatment in terms of the type and extent of compensation, as well as the action for compensation for damage, being thus identical**."*[3](s.n.).

The acquittal of such persons on the merits and/or (upholding it) on the effective remedies thus leads us to state that **the custodial measures ordered in these cases appear to be unjust measures by reference to the acquittal** ordered against the persons entitled, respectively to the recitals of the Constitutional Court Decision no. 136/2021.

2.2. The unlawful deprivation of liberty must be established, as the case may be, by order of the public prosecutor, by a final decision of the judge of rights and freedoms or of the preliminary chamber judge, and by a final decision or final judgment of the court hearing the case

In the case of such persons entitled, the acquittal, pronounced under the provisions of **art. 16 para. (1) para. (1) letters (a)-(d)** CPP, is sufficient to establish, in civil proceedings, the **unlawful nature of the measure of deprivation of liberty** ordered during the criminal proceedings, in the light of the considerations of the CCR dec. no. 136/2021.

We consider it useful, relevant and conclusive to point out that the entitled person's right to compensation is not conditional on the basis of acquittal – **art. 16 para. (1) letters a)-d)** CPP:

a) the fact does not exist;

b) the fact is not provided for by the criminal law or was not committed with the guilt provided for by the law;

c) there is no evidence that a person committed the crime;

d) there is a justifying or non-culpability cause - precisely because, otherwise, the presumption of innocence of the person provided for by **art. 23 para. (11)** of the Constitution.

It is a matter of principle that a final judgment of acquittal has the force of *res judicata* and results in the **preservation of the presumption of innocence**. To distinguish between the grounds for acquittal in order to determine whether or not the person concerned is entitled to compensation would be to maintain a shadow of doubt as to the presumption of innocence. It is unique and has the same effect irrespective of the basis of acquittal. Neither before nor after acquittal can different degrees of comparability of innocence be created.

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[3] CCR dec. no. 136/03.03.2021, published in the Official Gazette of Romania no. 494/12.05.2021. By this decision, the Court **admitted the exception of unconstitutionality** raised by Cristian Marius Niță in Case no. 5090/63/2017 of the Dolj Court - Civil Section I **and finds that the legislative solution contained in art. 539 CPP which excludes the right to compensation for damages in case of deprivation of liberty ordered during the criminal proceedings resolved by closure** (in Romanian „*clasare*”)**, according to art. 16 para. (1) letter a)-d) CPP, or acquittal is unconstitutional.**

Following a final acquittal, **it is no longer permissible to express suspicions as to the innocence of the accused person**.

Thus, the European Court of Human Rights considers that once an acquittal has become final - even an acquittal which gives the accused the benefit of the doubt under **art. 6 para. (2)** ECHR - the expression of any suspicion of guilt, including those expressed in the grounds for acquittal, is incompatible with the presumption of innocence[4].

The operative part of an acquittal decision must be respected by any authority which directly or indirectly concerns the criminal liability of the person concerned. The presumption of innocence means that, where there has been a criminal charge and criminal proceedings have resulted in an acquittal, the person who has been the subject of the criminal proceedings is innocent before the law and must be treated in a manner consistent with that state of innocence. In this respect, therefore, the presumption of innocence will subsist after the conclusion of the criminal proceedings to ensure that, in respect of any charge which has not been proved, the innocence of the person concerned is respected[5].

It follows from an examination of all these legal rules that **the responsibility for damage caused by judicial errors**, in relation to the person entitled, **is always and without exception, directly and without exception, incumbent on the state**, which is obliged to make reparation for any damage suffered by a person who is arrested or detained in violation of the legal provisions in question.

Thus, if it is established by a final judgment that the criminal charge against the person entitled is unfounded, it follows that the severe restrictions on that person's liberty must be compensated, since it is clear that he/she has suffered damage.

2.3. The existence of damage suffered by the person entitled, which is presumed

According to art. 539 CPP, a person who has been unlawfully deprived of liberty in the course of criminal proceedings is entitled to compensation for the damage suffered.

This text does not establish the categories of damage that can be compensated for unlawful deprivation of liberty, so the **general principle of full compensation for damage**, established by **art. 1349 para. (2)** and **art. 1357 para. (1)** CPC, includes both material and moral damages.

The honest citizen is not obliged to bear the moral and material consequences of the **malfunctioning of a criminal activity**, *i.e.*, the enforcement and distribution of justice in a democratic society. The state, as a responsible person, is liable for the damaging consequences of the conduct of specific judicial activities, but not for an act committed by another person, but as the guarantor of the legality and independence of the judicial process.

Liability will be incurred independently of any fault, on an objective basis.

The **justification** for this is the objective guarantee against the risk of judgments being handed down or measures being taken which, although not unlawful, do not meet the requirements of **art. 6** of the Convention and are likely to cause harm to individuals.

With regard to the nature and extent of the damage, please take into account the duration of the deprivation of liberty, the consequences for the person or his/her family, and the HCCJ case-law, which in the Civil Decision no. 457/27.01.2012 established that: *„The moral damage caused by the unlawful arrest (resulting from the acquittal decision) does not have to be proven, since this measure violates one of the most important attributes of human personality, the right to freedom, as an inalienable right of the human being and as a primary value in a democratic society, and the amount awarded by the court by way of compensation for the non-material damage suffered must be compensation for the damage done to his honour, health and reputation by the initiation of the criminal proceedings in which the restrictive measures were ordered and, ultimately, the acquittal of the person*."[6].

In this case, the arguments considered by the Supreme Court are applicable and the non-material damage caused by the unlawful custodial measures is **<u>indisputable</u>**.

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[4] Please see, for instance, the Judgment of 21.03.2000, in the case *Asan Rushiti v. Austria*, para. 31; please also see the Judgment of 25.08.1993, rendered in the case *Sekanina v. Austria*, para. 30.

[5] Please see, for instance, the Judgment of 12.07.2013, rendered in the case *Allen v. United Kingdom*, para. 103.

[6] The text of this decision is available at *https://legeaz.net/spete-civil-iccj-2012/decizia-457-2012*.

With regard to the amount of compensation, under **art. 540 para. (2)** CPP: „*In determining the amount of compensation, account shall be taken of the duration of the deprivation of liberty or restriction of liberty incurred and the consequences for the person or the family of the person deprived of liberty or of the person in the situation referred to in Article 538.*”.

Moreover, according to **art. 540 para. (3) and (4)** CPP, in choosing the type of compensation and its extent, the entitled person's situation in repairing the damage and the nature of the damage caused shall be taken into account, and if the victim was employed before the deprivation of liberty or imprisonment as a result of the execution of a custodial sentence or educational measures, the time during which he/she was deprived of liberty shall also be calculated, in relation to the length of service established by law.

Specifically, in assessing the amount of compensation, account may be taken of the following personal and family circumstances of the persons entitled, which are likely to increase the seriousness of the consequences, as follows:

- the respectability of the person entitled (*e.g.*, at the time of his/her detention and remand in custody, the person entitled was of a young age and enjoyed a good reputation);
- whether the entitled person's health had deteriorated and he/she was left with trauma from the detention centres;
- the respectability enjoyed by his/her family (*e.g.*, parents, spouse) and the extent to which his/her health was impaired;
- whether, at the time of pre-trial detention, he/she had minor children and whether there were any problems with their care and upbringing;
- problems relating to promotion at work.

2.3.1. Material damage

With regard to the material damage, we specify that this is the harmful consequence that has economic value, being able to be evaluated pecuniary, being primarily the consequence of the violation of the rights and economic interests of the person entitled.

Thus, it is necessary to quantify the amounts paid by the entitled person or his/her family by way of legal fees for the compulsory defence, legal costs, the estimated value of weekly food parcels, fruit and drinks, personal hygiene items received in the detention centres, any donations received by his/her family for subsistence (taking into account the absence of the person's income during the period of pre-trial detention and possibly even the suspension of employment or service), and the benefit not received (*e.g.*, the confidentiality bonus for clearance of national classified information[7], state secrets - „top secret” in the amount of 12% of basic salary).

We consider that all this material damage would be due because, if the Romanian judicial authorities had carried out their duties in a fair and lawful manner, **without abusing the legal provisions[8]**, the persons entitled would not have been put in the position of having to bear these expenses.

2.3.2. Moral damage

With regard to moral damage, the settled case-law of the High Court of Cassation and Justice has established that the monetary compensation awarded for reparation of moral damage must reflect a value concordance between the amount or/and the seriousness of the consequences whose reparation it is intended to contribute to. In determining the amount of non-material damages, regard must be had to the principle of full reparation of the damage caused by the wrongful act.

The issue of **determining compensation for non-material damage** is not limited to the economic quantification of non-patrimonial rights and values such as dignity, honour or the mental suffering suffered by the person entitled. It involves a complex assessment and evaluation of the aspects in which the harm caused is externalised and can thus be subject to the discretion of the courts.

[7] On classified information, please see V. Bărbățeanu, A. Muraru, *Right to a fair trial in the context of classified information. A survey in the light of CCR's case-law*, published in the proceedings of the Challenges of the Knowledge Society (CKS), „Nicolae Titulescu” Publishing House, 2022, pp. 210-219.

[8] Please see E.E. Ștefan, *Legality and morality in the activity of public authorities*, in Public Law Journal no 4/2017, Universul Juridic Publishing House, Bucharest.

Therefore, even if **moral values cannot be assessed in money**, the harm caused to them takes concrete forms and the court is thus able to assess their intensity and seriousness and to determine whether a sum of money and in what amount is appropriate to compensate for the non-material damage caused, assessing in fairness, in order to provide the victim with some satisfaction or relief for the suffering suffered.

According to the provisions of **art. 540 para. (2)** CPP - *Nature and extent of reparation*:

„(1) In determining the extent of reparation, account shall be taken of the duration of the unlawful deprivation of liberty and the consequences for the person, the family of the person deprived of liberty or the person in the situation referred to in Article 538.

(2) Reparation shall consist in the payment of a sum of money or the constitution of an annuity or the obligation that, at the expense of the State, the unlawfully detained or arrested person be placed in the care of a social and medical institution.

(3) In choosing the type of compensation and the extent thereof, account shall be taken of the situation of the person entitled to compensation and the nature of the damage caused.".

In such cases, there is no doubt that the arrest of a person for a period of time has caused moral damage both to that person and to his or her family, with the implicit damage to those attributes of the person that influence social relations - honour, reputation - and those that are in the emotional sphere of human life - relations with friends and relatives, damage that finds its most typical expression in the moral pain experienced by the victim.

The consequences of pre-trial detention have had an impact on the professional sphere, as these people are unable to carry out their professional activities due to their **reduced capacity for social relations**.

The whole family also feel the **negative impact of the arrest**, as the violation of the right to liberty made it impossible for them to see the spouse, children and parents, and they were unable to provide them with the necessities of life due to the lack of income.

In addition, in our experience, there are such people who have tried to keep their minors from finding out about the deprivation of liberty situation, not agreeing to come to detention and remand centres throughout the period of remand, with the minors subsequently finding out and **suffering a strong emotional shock**, being haunted by the idea that one of their parents has been arrested for a serious criminal offence.

Thus, clearly, they suffered on a family level, **being torn away from the family**, unable to enjoy their family for a long period of time, and the minor children being deprived of the upbringing and education they could have provided as parents.

Neither the persons entitled nor their families have found it easy to bear the negligence of the Romanian judicial authorities for acts they did not commit, as the unlawful deprivation or restriction of liberty measures have marked their existence as people in all aspects of their lives, feeling humiliated and unjust, and the inhuman conditions in pre-trial detention **have accentuated the nightmare** they have experienced.

The consequences of unlawful arrest have also most often had **consequences for the health of these people**, which has deteriorated greatly due to the inhuman conditions in detention and remand centres and the emotional stress, including the prospect of repeated postponement of the court's decision.

The moral damage caused to such persons cannot be overlooked in view of the long duration of criminal proceedings.

A. Criteria taken into account in determining the existence of non-material damage

According to its case-law[9], the Romanian High Court of Cassation and Justice has ruled that, in **determining the existence of non-material damage**, the character and importance of the non-patrimonial values to which the damage was caused, the personal situation of the person entitled, taking into account criteria such as his or her social environment, education, level of culture, standard of morality, psychology must be taken into account.

Since the damage is to values which have no economic content and the protection of rights relating to the protection of private life, within the scope of art. 8 ECHR, but also values protected by the Constitution and national laws, the existence of the damage is subject to the condition of a reasonable assessment, on a proper and fair basis, of the real and actual damage caused to the victim.

As regards proof of non-material damage, **proof of the unlawful act is sufficient, the damage and the causal link being presumed**, and the courts will infer the existence of non-material damage from the mere

[9] Please see, by way of example, HCCJ, 1st civ. s., dec. no. 153/27.01.2016 delivered on appeal on an action for damages.

existence of the unlawful act capable of causing such damage and the circumstances in which it was committed. The solution will be determined by the subjective, internal nature of the non-material damage, direct proof of which is practically impossible.

B. The conditions of pre-trial detention under which the suffering of such persons entitled can be assessed

Depending on the place where such entitled persons have been remanded in custody and detained, their **suffering can be very easily presumed**, some such places being known for their miserable conditions (*e.g.*, in Bucharest the Centre for Detention and Remand in Custody of the Central Prison, the Centre for Detention and Preventive Arrest no. 5, Rahova Penitentiary).

The conditions in these centres are renown to violate the mandatory minimum standards for accommodation conditions for persons deprived of their liberty, as laid down in the Order of the Minister of Justice no. 433/2010. In accordance with **art. 1** of this Order:

„(1) Premises intended for the accommodation of persons deprived of their liberty must respect human dignity and meet minimum health and hygiene standards, taking into account climatic conditions and, in particular, the living space, air volume, lighting, heating and ventilation sources.

(2) The accommodation rooms and other rooms for persons deprived of their liberty must have natural lighting, the necessary facilities for artificial lighting and be equipped with sanitary and heating facilities.

(3) Accommodation rooms in existing prisons must provide:

(a) at least 4 square metres (sqm) for each person deprived of liberty in the closed or maximum security regime;

(b) at least 6 cubic metres of air for each person deprived of liberty in the semi-open or open regime.

(4) Minors, juveniles, persons remanded in custody and persons for whom the enforcement regime has not been determined shall be subject to the provisions of para. (3) letter (a) shall apply.".

Thus, in these centres, the persons entitled claim to have experienced problems due to **overcrowding** (*e.g.*, although there is a limited number of beds in the cells, at any given time there can be many more people in the room, even posing the problem of receiving other detainees in the bed), the **lack of good sanitary conditions** (unhealthy conditions of the sanitary facilities, including lack of privacy due to the lack of doors to the sanitary facilities in the holding rooms, showers that were not separated from each other, lack of hot water - possibly rationed, unhealthy refrigerators, the presence of mould, prolonged exposure to cigarette smoke due to the fact that the detainees were forced to share a room with smokers) **and heating** (lack of heat in winter), **the presence of pests** (rats, bedbugs, cockroaches), as well as **the lack of daily walks or socio-cultural programmes**, which amount to **degrading and inhuman treatment** *per se*.

As for the so-called *„right to air*", initially considered insignificant, but later becoming the only daily concern during the period of detention, it materialized in the possibility, when weather conditions permitted, of access to a room of maximum 4 square meters, with concrete walls at least 3 meters high and a thick net on top, where prisoners were allowed to walk in the *„air yard*", but not more than one hour a day.

Furthermore, although the applicable legislation provided for the **separation of smoking and non-smoking prisoners in separate rooms**, in fact this did not exist, with non-smokers being placed in a position to breathe in near-permanent foul air tainted with cigarette smoke.

The conditions in these Romanian centres have been intensely debated, notorious and undeniable, as noted by:

- the representatives of the People's Advocate[10];
- the representatives of the Chamber of Deputies[11];
- the representatives of APADOR-CH[12] ;
- the consistent ECtHR case-law, in particular the judgment delivered in the pilot procedure in the case of

[10] Please see, for instance, *https://avp.ro/wp-content/uploads/2021/12/Raport-privind-vizita-desfasurata-la-CRAP-nr.-9-Bucuresti.pdf, https://avp.ro/wp-content/uploads/2021/10/raport-crap-nr-5.pdf, https://avp.ro/wp-content/uploads/2021/02/raport-penitenciar-rahova_2020.pdf*.

[11] Please see, for instance, *https://www.cdep.ro/presa/Raport.pdf*.

[12] Please see, for instance, *https://apador.org/raport-asupra-vizitei-in-penitenciarul-jilava/, https://apador.org/en/raport-privind-vizita-in-centrul-de-retinere-si-arestare-preventiva-nr-1-din-bucuresti/*.

Rezmiveș and others v. Romania[13]. Moreover, ECtHR has found and analysed the degrading material conditions in the Romanian penitentiaries on many occasions [*e.g.*, the Rahova Penitentiary in several of its judgments, among which we mention by way of example the judgment in the case of ***Apostu v. Romania***[14] of 03.02.2015 (no. 22765/12), para. 83; judgment in ***Iacov Stanciu v. Romania***[15] of 24.07.2012 (no. 35972/05), para. 171-179; judgment in ***Flămînzeanu v. Romania***[16] of 12.04.2011 (no. 56664/08), para. 89-100; judgment in ***Pavalache v. Romania***[17] of 18.01.2011 (no. 38746/03), para. 87-101].

These inhumane conditions clearly have a serious impact on the people's health, as they are detained in unsanitary conditions, on the edge of survival, images that remain deeply imprinted on their retinas and in their souls, often having nightmares and reliving those moments.

C. Reasonability of moral damages

The Romanian High Court of Cassation and Justice[18] has ruled that moral damages, in order to preserve their character of „just satisfaction", must be awarded in an amount that does not divert them from the aim and purpose laid down by law, so as **not to become an unfair material benefit**, without causal justification in the damage suffered and its consequences.

Thus, in order to ensure fair compensation for the suffering which injured third parties have suffered or may have to suffer, **the compensation awarded must be reasonably proportionate to the damage suffered.**

D. Establishment of non-material damage

The High Court of Cassation and Justice[19] has ruled that non-material damage represents harmful consequences of a non-economic nature resulting from infringements and violations of non-patrimonial personal rights and is determined by assessment, following **the application of criteria relating to the negative consequences suffered** by those concerned, **in physical, psychological and emotional terms**, the importance of the values damaged, the extent to which they have been damaged, the intensity with which the consequences of the damage were perceived.

In quantifying compensation for non-material damage, fairness is a fundamental criterion established by doctrine and case law.

From this point of view, the determination of such compensation undoubtedly involves a degree of approximation, but the court must strike a certain balance between the non-material damage suffered and the compensation awarded, in such a way as to allow the injured party to enjoy certain advantages which mitigate the non-material suffering, without, however, leading to unjust enrichment.

It has been unanimously held by both national and European courts that **any compensation for non-material damage could only have the role of mitigating psychological damage and not of covering it in its entirety**. However subjective the nature of moral damage may be by its very nature, only a **balanced assessment** could compensate for the difficulty of quantifying it, and the practice of the courts in this area offers a more concrete application of the criteria found in **art. 540** CPP for determining the type and extent of compensation.

On the other hand, the practice of the European Court of Justice recognises that States (including the national legislator) have a margin of appreciation in relation to certain limitations, without prejudice to the rights of the person claiming a certain conduct on the part of the State.

It follows from the combination of the two aforementioned legal texts that one of the requirements laid down by the law and to be taken into account by the court in order to determine the extent of reparation is proof of the consequences for the person or the family of the person deprived of liberty or whose liberty has been restricted as a result of the deprivation of liberty.

[13] The full text of the judgment is available at *https://hudoc.echr.coe.int/eng?i=001-176305*. Please also see M.-C. Cliza, M. Gorunescu, L.-C. Spătaru-Negură, *The Pilot Case of Rezmives and the Most Awaited Reform of the Romanian Penitentiary System*, in Journal of Legal and Administrative Studies, no. 2 (17) of 2017, pp. 27-45, *https://www.ceeol.com/search/article-detail?id=610275*.

[14] The full text of the judgment is available at *https://hudoc.echr.coe.int/eng?i=001-150781*.

[15] The full text of the judgment is available at *https://hudoc.echr.coe.int/eng?i=001-123577*.

[16] The full text of the judgment is available at *https://hudoc.echr.coe.int/eng?i=001-104498*.

[17] The full text of the judgment is available at *https://hudoc.echr.coe.int/eng?i=001-123797*.

[18] Please see, for instance, HCCJ, 1st civ. s., dec. no. 320/01.02.2018.

[19] Please see, for instance, HCCJ, 2nd civ. s., dec. no. 2/17.01.2017 given in recourse.

At the same time, it is imperative to take into account **the degree of violation of the right asserted, while respecting both the principle of proportionality[20] and the principle of equity[21].**

For that reason, the court seized of the matter of compensation for non-pecuniary damage must fix an amount necessary not so much to restore the injured person to a situation similar to that which he had previously enjoyed as to provide him with moral satisfaction capable of replacing the value of the damage of which he was deprived.

With regard to the ECtHR case-law, we would point out that the Court has ruled that **excessive formalism with regard to the burden of proving the non-material damage caused by unlawful detention cannot be compatible with the right to compensation covered by art. 5** ECHR[22].

E. Assessment of the non-material damage suffered by each person entitled

The attitude of these persons entitled towards family members after release usually changes a lot, as they isolate themselves and refuse to communicate with close people and friends, because they feel ashamed and stigmatised.

The accusations made have a negative effect on the community in which they live, and the community's attitude reflects on them, which is why they feel isolated and blamed within their community.

The public opprobrium to which they have been subjected for years during the criminal trial, the status of „convict" they still feel it even after the whole nightmare ends with the acquittal of the person concerned.

An interesting situation can be found in practice, namely when, in the context of the reintegration of the person entitled into work, the boss of this person is one of the prosecution's witnesses in the case, and it is obvious that this person's attitude towards the former 'convict' is not in line with the court's decision to acquit him, as it is obvious that such a person considers him guilty.

In practice, it has also been noted that even the spouses of such persons, under pressure from their colleagues, are forced to change their jobs, which also involves an emotional effort to adapt, despite being in a family crisis.

For all these reasons, the suffering of such entitled persons is inestimable and fair compensation for this non-material damage must be chosen by the court.

A compensation that is insignificant or disproportionate to the gravity of the violation does not comply with the provisions of **art. 5 para. 5** ECHR, since **the right guaranteed by this rule would become theoretical and illusory**[23].

Under the provisions of **art. 540 para. (5)** CPP, the compensation granted by the court in such cases is borne by the Romanian State, through the Ministry of Public Finance.

2.4. The lodging of the claim within 6 (six) months from the date of the final judgment of the court

In order for such a claim to be admissible, the action must be brought **within six months of the date on which the judgment** of the court and the order or decision of the judicial authorities finding the miscarriage of justice or the unlawful deprivation of liberty became final.

3. Final considerations

For all the arguments of fact and law set out above, we consider that in such cases, the legal conditions set out in art. 539 CPP for the State to incur civil liability in tort are met, objective liability, independent of the fault of the judicial bodies involved in taking the preventive measure against the persons entitled.

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[20] Regarding the principle of proportionality, please see M.-C. Cliza, C-tin.C. Ulariu, *Administrative Law. General Part*, C.H. Beck Publishing House, Bucharest, 2023, pp. 115-118.

[21] On matters regarding the general principles of law, the principle of equality and the responsibility principle, please see: E. Anghel, *General principles of law*, in Lex ET Scientia International Journal, XXIII no. 2/2016, pp. 120-130, available at *http://lexetscientia.univnt.ro/download/580_LESIJ_XXIII_2_2016_art.011.pdf*; C.B.G. Ene-Dinu, *History of the Romanian state and law*, Universul Juridic Publishing House, Bucharest, 2020, p. 288 *et seq.*; E. Anghel, *The responsibility principle*, published in the proceedings of the Challenges of the Knowledge Society (CKS), „Nicolae Titulescu" Publishing House, 2015, pp. 364-370.

[22] Please see the judgment renderend in the case of *Danev v. Bulgaria*, app. no. 9411/05, para. 34-35 or the short press release available at *https://hudoc.echr.coe.int/eng-press?i=003-3237041-3623296*.

[23] *Vasilevskiy and Bogdanov v. Russian Federation*, § 22 and 26; *Cumber v. United Kingdom*, decision of the Commission; *Attard v. Malta* (dec.)

Thus, *firstly*, such claims are admissible, being circumscribed to the legal hypothesis regulated by the provisions of **art. 539** CPP, in the light of the considerations of the CCR dec. no. 136/2021.

Secondly, please find that the only means of redress that the court can order is to grant the material and moral damages requested, since the unlawful nature of the deprivation of liberty measures was such as to restrict mental freedom, to cause real harm to physical existence, bodily integrity, health (due to health problems that have been triggered during this period, as a result of the severe stress to which the person entitled has been subjected), honesty, dignity and honour, but not least, the professional prestige of the person entitled.

In awarding the damages claimed and assessing the amount of damages, account must be taken of the negative consequences suffered by these persons, in family, physical and psychological terms, the age at which they suffered them, the public contempt and the other elements set out in this paper.

The deprivation of liberty measures has caused these persons great damage to their moral values and the harm done to them is immeasurable, and their family, professional and social situation has been seriously affected.

The distorted image after many years of criminal proceedings can never be repaired.

Therefore, in order to repair the genuine emotional shock experienced by these persons on a personal, professional and family level, which has had **irreparable consequences on their family members[24] life and on their professional life**, starting from the factual situation (*i.e.*, the way in which the criminal case was handled and the final decision handed down by the court), such claims must be admitted and the material and moral damage covered.

Obviously, in judicial proceedings, **evidence** must be given by documents and witnesses, as well as by any other evidence that may be necessary as a result of the debates. **Examples of such documents** include, for example, court judgments handed down in the criminal proceedings, arrest warrants, release papers, employment certificates, documents attesting to the medical condition of the persons entitled before and after conviction, invoices and receipts attesting to expenses incurred and claimed for material damage.

In addition, it is worth pointing out that, according to the provisions of **art. 541 para. (4)** CPP, such actions are **exempt from the payment of the judicial stamp duty**.

Moreover, it should be pointed out that, according to the provisions of **art. 541 para. (1)** CPP, such actions for damages may be brought by the person entitled to damages, and after his death may be continued or brought by the persons who were dependent on him at the time of his death.

It is also important to point out that, according to the provisions of **art. 542** CPP, in the event that reparation for damage has been granted according to **art. 541** CPP, as well as in the event that the Romanian State has been convicted by an international court for any of the cases provided for in **art. 538 and 539** mentioned above, the action for recovery of the amount paid may be directed against the person who, with bad faith or gross negligence, has caused the situation giving rise to damage or against the institution with which he is insured for compensation in case of damage caused in the exercise of the profession.

In such actions for damages, the Romanian State must prove, by means of a prosecutor's order or a final criminal judgment, that a state official has caused the miscarriage of justice or the unlawful deprivation of liberty **causing damage in bad faith or through serious professional negligence**.

We are curious in how many such cases the state will take recourse against the persons responsible with such actions for damages to recover the damage caused.

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[24] For information on the concept of 'family members' at the European level, please see Roxana-Mariana Popescu, *Opinion of Advocate General Wathelet and Judgment of the Court of Justice of the European Union in Case C-673/16, concerning the concept of 'spouse' in European Union Law*, published in the proceedings of the Challenges of the Knowledge Society (CKS), „Nicolae Titulescu” Publishing House, 2019, pp. 705-710.

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AREAS WITH SPECIAL STATUS IN EUROPEAN UNION COUNTRIES

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Abstract

In a unitary state, as a rule, the administrative-territorial organization is unitary to the same extent, at least from the perspective of the legal regime. However, every rule has an exception, which is why we can observe the same situation with regard to certain areas whose situation is expressly provided by the fundamental law of each state. It is also the case of several countries that we will study in the content of this article where we will exemplify the legal regime of areas with special status.

Keywords: *public law, European Union, administrative-territorial organization.*

1. Introduction

Areas with special status are specific geographical areas that benefit from a different legal and fiscal treatment than that applied in the rest of the country. These zones are usually established to encourage economic development in areas considered less developed or to attract foreign investment. The autonomy of special status areas in Europe is an important aspect of government decentralization and the promotion of cultural and linguistic diversity. These areas have a certain level of independence and control over their internal affairs and are recognized nationally through specific legislation. The autonomy of special status areas can vary by country and region, but generally refers to the power to make decisions in certain areas such as education, culture, local government, justice and the economy. These areas may have some level of control over local taxes and finances and may be funded by the national government or the European Union through special funding programs.

An important aspect of the autonomy of special status areas is the promotion of cultural and linguistic diversity. These areas can promote and protect the language and culture of local minorities and can be places where local traditions and customs are preserved and promoted. This can contribute to the enrichment of European culture and identity as a whole.

Autonomy of special status areas can also contribute to economic development and innovation. These areas can have a unique economic agenda and can promote tourism and local business through their special policies. Examples of special status zones include free zones, special economic zones, industrial development zones, tourist zones and rural areas. In some parts of the world, these areas have been criticized for failing to genuinely improve economic conditions and for their impact on the environment and local communities.

However, it is important to mention that no confusion should be created between free zones and zones with special status, the latter belonging to the regulations regarding the administrative-territorial organization of a state. Thus, we will analyze the administrative and territorial organization of some member states of the European Union in which we will find situations specially regulated by administrative law regarding territories or their subdivisions that enjoy a separate organization and special laws.

2. Territories with special status belonging to France

France has a very complex territorial-administrative organization, being made up of the metropolitan French territory, being the territory located in Europe and hierarchically divided into regions, departments, arrondissements, cantons and communes, overseas regions and overseas collectivities[1]. There are four overseas regions that enjoy a territorial and administrative organization similar to metropolitan France and are divided into arrondissements, cantons and communes.

These regions are Guadeloupe, French Guiana, Martinique and Réunion and they obtained the status similar to metropolitan regions in 2003. However, the overseas communities are the areas with special status

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[1] C.L. Popescu, *Local autonomy and European integration*, All Beck Publishing House, Bucharest, 1999, p. 157.

both from the point of view of administrative organization and from the point of view of the legal regime, respectively of the different regulations in the fiscal, customs and administrative fields[2].

Thus, there are three overseas collectivities namely French Polynesia, Wallis and Futuna located in the Pacific Ocean and Saint Pierre and Miquelon located in the Atlantic Ocean. It is important to mention that until 2011 there was also a fourth overseas community, namely the island of Mayotte, located in the Indian Ocean. As of March 31, 2011, Mayotte became the 101st French department[3]. French Polynesia is organized according to the model of a parliamentary democracy, having a separate government and parliament and is led by the President of French Polynesia[4]. Since 2004, this territory has obtained the status of an overseas collectivity, thus granting it's autonomy. From the point of view of institutional organization, the Parliament is unicameral and consists of 57 members for a 5-year mandate. The French government is represented in French Polynesia by a high commissioner of the republic. What we can consider unusual is the fact that, despite a fairly vast autonomy, public order and social security is maintained by the French army, which has numerous bases on the territory of this local community.

The next community that we will analyze is represented by the Wallis and Furtuna Islands, located in the Indian Ocean. Similar to French Polynesia, the political system is representative parliamentary democracy, but the head of the territorial parliament is also the head of government. However, what distinguishes the Wallis and Furtuna Islands from the rest of France's overseas collectivities is the fact that they are divided into three kingdoms, having a territorial parliament made up of 20 members elected for a 5-year term[5]. The representative of France at the territorial level is called a superior administrator whose main objective is to approve decisions in the field of civil and financial law. This, together with the three kings who govern each kingdom form an institution called the Territorial Council which has an advisory role.

In the islands of Wallis and Furtuna, justice is carried out through the court located in the capital Mata-Utu and the Court of Appeal located in New Caledonia, according to the rules of French law. At the local level, the situation is different. Thus, in the island of Furtuna there are two kingdoms that coexist and regroup villages, while in the island of Wallis we find three districts that manage the territory with the help of a municipality[6]. We observe special regulations regarding the common property, in the manner in which there is no private property, being only the right of use of a land obtained by the head of the family from the leader of the village to which he belongs. Each kingdom is a legal entity under public law, with its own budget and is administered by a council presided over by the king, which has the obligation to negotiate with the representative of France in order to obtain funding, in addition to the annual donation granted for the salary of village heads as well as administrative workers. We thus note a decentralization of powers on the territory of this community, in order to optimize the administration of the territories as well as the maintenance of public order.

Saint Pierre and Miquelon is the third overseas collectivity that belongs to France and is located in the Atlantic. The administrative organization is similar to the other collectivities, the political system being in the form of a representative parliamentary democracy. The executive power of France sends to the islands of Saint Pierre and Miquelon a prefect, representative of the Government, and the latter have representatives in the French Parliament, respectively a deputy and a senator. The local authority is represented by a General Council and is made up of 19 members elected for a three-year term[7]. This public institution exercises prerogatives in matters of taxation, customs control and urban planning. This French collectivity was noticed in 1992 through a rather heated dispute with Canada regarding the delimitation of the Exclusive Economic Zone, in which France demanded rights over the marine territory for 200 nautical miles citing the United Nations Convention as a legal basis.

This conflict was ended by the Decision of the International Court of Arbitration[8] which ordered France to be granted a continuous zone of 12 nautical miles around the islands, plus a zone of 24 nautical miles towards west and a lane 10.5 nautical miles wide and 200 nautical miles long to the south, representing 18% of French claims.

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[2] C. Debbasch, *Institutions et droit administratif*, vol. I, PUF, Paris, 1976, p. 326.

[3] „Mayotte devient le 101e département français le 31 mars 2011" on the Ministère de l'Outre-Mer website.

[4] J. Moreau, *Administration regionale, departamentale et municipale*, Dalloz, Paris, 2004, p. 199.

[5] *Idem*, p. 204.

[6] J.C. Douence, *Le statut constitutionnel des collectivites territoriales d'outre mer*, in Revue Française de Droit Administratif no. 3/1992, p. 462.

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[8] EU Regulation 2020/123 of the Council of 27.01.2020.

3. The legal regime of Mount Athos, a self-governing region on the territory of Greece

In Greece we find a territory with a special status well known globally, which benefits from a unique legal regime, enshrined in history since the time of the Roman Empire. We will therefore analyze, in the content of this article, the administrative organization and the legal regime that this symbol of religion, spirituality and history benefits from. The first manifestation of legal protection on Mount Athos was realized by the Treaty of San Stefano in 1878 and which had effects exclusively on the Russian monks[9]. In addition to this treaty, during the same year the Treaty of Berlin was adopted, it recognized the state of this region equally, but the legal effects were effective this time, on all the monks, regardless of their origin. From the point of view of organization, Mount Athos is a region based on self-government, on certain degrees to be analyzed.

Therefore, self-government of the first degree is exercised by independent monasteries[10], these being 20, a number that cannot be changed by any nature alongside hierarchical order or dependent domains such as cells, hermitages and so on. It is interesting to note that these monasteries are divided into cenobitic monasteries and idiorhythmic monasteries, depending on the way in which its members live together. For example, in cenobitic monasteries there is no personal property, life with all its necessities being lived in common among all its members. Totally anti-theistic is the organization of idiorhythmic monasteries within which monks are allowed to own and manage their own fortunes, as well as support their private lives from their own resources. It is important to note that idiorhythmic monasteries can change into cenobitic monasteries, but the reciprocal is not valid. Currently there are 19 cenobitic monasteries and only one idiorhythmic monastery.

Regarding the regulations in each monastery, they operate on the basis of a regulation in which aspects regarding the management of the monastery, the election of the representative, the rules of coexistence and the management of assets are provided[11]. The second step in the governance hierarchy at Mount Athos is represented by second-degree self-government whose regulations have effects on all persons located on that territory, monks, priests or laymen. The members of the self-governing bodies of this level are elected by the monasteries, independent of the will or preference of the state, and are the only authorities that can resolve any matter in this region[12]. The main body is represented by the Holy Council and is based in Karie, the capital of Mount Athos, and is made up of 20 members for a one-year term, each representing the monastery to which they belong[13]. However, the Greek state is represented by a governor who can participate in the meetings organized by the Council, having the capacity of consultant. The Holy Council itself represents the executive power, being a permanent supreme body, also having the role of a tribunal. He exercises his power through the Holy Epitropia made up of four monks, who by rotation ensure the representation of each monastery once every 5 years[14].

An interesting and worth mentioning aspect is represented by the fact that the Holy Council exercises police and public order prerogatives ensuring the maintenance of the Karie capital in optimal conditions in terms of sanitation, public lighting, food prices as well as the operating hours of shops in accordance with feasts and fast days, monitor the behavior of monks and laymen and watch over the observance of prohibitions on gambling, smoking on the main streets, the prohibition of the sale and consumption of meat on Wednesdays and Fridays, and the like[15].

At the same time, Saint Epitropia has the power to command the police forces and, in case of emergency, can invoke the help of the state police, according to art. 37 of the Charter of Mount Athos. From the point of view of the judicial power, the courts are represented by the monastic tribunals, the Holy Council, the Holy Epitropia and the Ecumenical Patriarchate and the Extraordinary Biennial Assembly of the Twenty. As a rule, disputes regarding the property of monasteries as well as non-compliance with agreements between monasteries and their dependent domains are judged by the Athonite courts. We note that the Holy Council has the ability to fulfill the role of both a court of first instance and a court of appeal.

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[9] G. Noradounghian, *Recueil d'actes internationaux de l'Empire Ottoman*, vol. III, Paris, 1902, p. 192.
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[13] N. Antonopoulos, *op. cit.*, p. 402.
[14] Ch. Papastathis, *op. cit.*, p. 56.
[15] N. Antonopoulos, *La condition internationale du Mont Athos*, Venice, 1963, p. 385.

4. The legal regime of Sicily, a region with special status that belongs to Italy

In Italy there are five regions with special status that benefit from a form of autonomy provided for by the Constitution of 1948, namely Sicily, Sardinia, Friuli-Venezia Giulia, Trentino-South Tyrol and Valle d'Aosta. In this subchapter we will analyze the situation of Sicily from the point of view of administrative, economic and judicial organization[16]. Thus, Sicily is a region that benefits from legislative, fiscal and administrative autonomy provided for by constitutional regulations whose special status is stipulated in art. 116[17] from the fundamental law. This region has exclusive jurisdiction over cultural matters, aspects related to fisheries, agriculture, tourism, local authorities, environment or forest police, the consequence being that employees in these work sectors are subordinate to the region.

With regard to taxation, all taxes collected in Sicily are intended exclusively for this island according to art. 36 *et seq.* of its statute, respectively Constitutional Law no. 2 of February 26, 1948, which grants the Sicilian region full financial and fiscal autonomy. Each year, the Italian state will be required to provide an amount determined by a plan that is reviewed every 15 years from the public funds of other regions, according to article 38 of the statute of the Sicilian region, to finance Sicily. The State will pay annually to the Region, as an act of national solidarity, an amount intended to be used, based on an economic plan, for public works[18]. This amount will be adjusted to balance the difference between labor income in the region and the national average. A 15-year review of this mission will be carried out based on the data previously taken to calculate the amount.

According to the statute, the legislative power in Sicily belongs to the Sicilian Regional Assembly, while the executive power belongs to the president of the Sicilian region and the regional council made up of 12 regional councilors, who cannot be elected to the Sicilian Regional Assembly since 2001. As of May 25, 1947, fifteen legislatures were elected, initially lasting four years and then five years from 1971[19]. The Regional Assembly of Sicily was first elected in May 1947. As of 2017, it is composed of 70 deputies elected by direct universal suffrage, compared to the previous 90. The Regional Assembly is located in Palermo, in the Norman Palace. The Sicilian Parliament, founded in 1130, is considered the oldest in Europe.

Since 2001, the president of the Sicilian region is elected directly by the citizens, not by the regional assembly. The current president, Nello Musumeci, took office on November 18, 2017 and has the seat of the region's presidency in the Orleans Palace in Palermo.

Initially, the statute also provided for the existence of a High Court with judicial powers to judge the constitutionality of regional and national laws under the statute, but in 1957 the Constitutional Court declared it obsolete and its abilities were absorbed by other institutions. Before 2014, the State Commission for the Sicilian Region exercised preventive control over the constitutional legality of the laws of the Regional Assembly, but in 2014, by decision no. 2553, this function was abolished due to the extension of the *a posteriori* control provided by article 127 of the Constitution, for regions with ordinary status[20]. In Sicily, there is also the Council for Administrative Justice (CAJ), which performs at the local level the functions of the Council of State, as well as the autonomous sections of the Court of Accounts, with powers in the jurisdiction and appeal of administrative justice.

To date, some statutory prerogatives have not been implemented due to the lack of appropriate regulations implementing the statute, which must be issued by the Joint State-Regional Commission, according to Article 43 of the statute. This body consists of two members appointed by the Council of Ministers and two by the Regional Council and is responsible for issuing decrees for the application of statutory provisions[21].

5. Conclusions

Special status areas in Europe are a form of regional autonomy that gives local and regional communities a certain level of independence and control over their affairs. These areas are nationally recognized and governed by specific legislation that gives them unique powers and responsibilities. In general, these areas are created to protect the rights and interests of local and regional communities, as well as to promote cultural and linguistic

[16] C.L. Popescu, *Local Autonomy and European Integration*, All Beck Publishing House, Bucharest, 1999, p. 158.

[17] Constitution of the Italian Republic, approved by the Constituent Assembly on 22.12.1947 and entered into force on 01.01.1948.

[18] A. Cuva, *The financial autonomy of the Sicilian Region*, Palermo, 1999, p. 42.

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diversity. These areas can be found in many European countries such as Spain, Italy, France, Belgium and the UK. Legislation governing Special Status Areas varies from country to country, but there are some commonalities. In this regard it is important to note that these areas have a certain level of autonomy regarding decisions related to their internal affairs, such as education, culture, local administration and sometimes justice. These areas also usually have some degree of control over their local economy and the taxes collected. In many cases, these areas are financed and supported by the national government or the European Union, through special funding programs.

Moreover, special status areas in Europe play an important role in promoting cultural and linguistic diversity, as well as protecting the rights and interests of minorities. They also provide a platform for innovation and economic development, particularly by promoting tourism and local businesses.

In conclusion, Special Status Areas legislation in Europe is an important way for local and regional communities to protect their rights and interests and promote cultural and linguistic diversity.

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- N. Antonopoulos, *La condition internationale du Mont Athos*, Venice, 1963;
- P. Georges, *Organization constitutionnelle et administrative de la France*, Sirey, Paris, 1988;
- P. Viola, G. Fiume, A. Mastropaolo, L. Azzolina, *Two Centuries of Politics in Sicily*, in Annals of Brittany and Western Countries, Touraine, 2004, p. 117;
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UNDERSTANDING REGIONAL INTEGRATION VARIATION AND THE ADOPTION OF NEW TECHNOLOGY: EU AND ASEAN LEGAL FRAMEWORK ON ELECTROMOBILITY IN COMPARATIVE PERSPECTIVES

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Abstract

Climate change has a significant impact on multiple aspects of human life. The transportation sector, dominated by conventional vehicles, is one of the sources of carbon dioxide emissions that lead to climate change. Therefore, electric vehicle (EV) innovation is one of the prospective possible solutions. Multiple international organisations have adopted legal frameworks to encourage their member states to promote EV deployment within the energy transition framework and climate change adaptation. EU and ASEAN are two regional organisations that have adopted legal frameworks on electromobility. Furthermore, this study will discuss the variation and comparative influence of EU and ASEAN regional integration on adopting new technologies, namely EVs, in the context of climate change adaptation. The research method adopted in this study is comparative law by comparing two different legal systems with the same implementation period and circumstances. Moreover, this study aims to understand the effect of diverse regional integration on electromobility through adopting various legal instruments by regional organisations. A comparative study between the EU and ASEAN is still relevant due to the strengthening relationship between both organisations. Furthermore, in climate change, the EU has also been recognised as a global actor influencing many climate policy developments worldwide. Therefore, comparing the EU and ASEAN as regional organisations with their respective maturity and characteristics will provide a new perspective to analyse the development of electromobility. In addition, this study will also provide new research opportunities, particularly comparative law related to climate policy adopted by regional organisations.

Keywords: *ASEAN, EU, comparative, electromobility, new technology, regional integration.*

1. Introduction

The impacts of climate change are evident and could be significantly worse if there are no concrete actions to mitigate and manage it. The Intergovernmental Panel on Climate Change (IPCC) report released in 2022 explains that climate change poses significant human risks. Each region has its risks; Europe, for example, is at risk of increased temperatures that can cause crop failure and even human mortality.[1] The Asian region has different risks and a broader dimension. Climate change increases the risk of reduced biodiversity, crop failure, loss of renewable energy sources, and lack of clean water sources.[2]

Various approaches are being taken at the national and international levels to mitigate and cope with the impacts of climate change. One of these efforts is to reduce the generation of carbon emissions from various sectors. The energy and transport sectors contribute to 73.2% of global emissions.[3] Therefore, reducing emissions from the energy and transport sectors will greatly affect efforts to mitigate the impacts of climate change. Transitioning fossil-fuelled vehicles to electric vehicles (EVs) is considered one of the solutions to reduce carbon emissions effectively.[4] Various jurisdictions are starting to adopt various legal instruments to create an electromobility ecosystem that will catalyse EV development. The development of electromobility will not only

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[1] B. Bednar-Friedl *et al.*, *Europe*, in Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, ed. H-O Pörtner *et al.* (Cambridge and New York: Cambridge University Press, 2022), p. 1817-1927, *https://doi.org/10.1017/9781009325844.015*.

[2] R. Shaw *et al.*, *Asia*, in Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, ed. H-O Pörtner *et al.* (Cambridge and New York: Cambridge University Press, 2022), p. 1457-1579, *https://doi.org/10.1017/9781009325844.012*.

[3] H. Ritchie, M. Roser, *Emission by Sector*, 2022, *https://ourworldindata.org/emissions-by-sector*.

[4] A. Dall-Orsoletta, P. Ferreira, G. Gilson Dranka, *Low-Carbon Technologies and Just Energy Transition: Prospects for Electric Vehicles*, in Energy Conversion and Management: X 16, no. December 2021 (2022), *https://doi.org/10.1016/j.ecmx.2022.100271*.

catalyse the use of EVs, but will also reform charging infrastructure, conversion of power generation energy sources to renewable energy sources, and even transformation of transport management.[5]

In its development, efforts to develop electromobility are not only conducted at the national level. Regional organisations such as the EU and ASEAN have also taken the initiative to support the transition of energy and transport to become more environmentally friendly. This initiative aims to accelerate its member countries to develop electromobility in each national jurisdiction. Various legal instruments at the regional level, whether hard or soft law, are adopted to mitigate and cope with climate change's impacts. However, the different forms and variations of regional integration affect the speed, cohesiveness and harmonisation of legal instruments governing electromobility.

The EU and ASEAN are known as regional organisations with two different integration variants. Therefore, studies on the EU and ASEAN, especially in climate and energy policy, have been conducted by many scholars. Studies on renewable energy cooperation between the EU and ASEAN include Indeo and Huck et al.[6] These two studies focus on aspects of renewable energy cooperation to address climate change. Another study has been conducted by Diaz-Rainey *et al.*, which examines the ASEAN energy policy.[7] This study compared the EU's experience integrating energy security and decarbonisation policies. The three studies mentioned above discuss energy and climate change policies adopted by the EU and ASEAN from the perspective of cooperation and partnership.

This paper offers novelty from a comparative aspect, especially comparative law and policy. In addition, this paper also considers that the EU and ASEAN integration model is a variant that affects the adoption of legal instruments on new technologies. Therefore, this study will discuss and analyse the variant of regional integration and its influence on adopting new technologies such as electromobility. The EU and ASEAN legal instruments will be the subject of this comparative study. This study is important because of the increasingly significant role of regional organisations in climate policy. For example, climate change legal instruments adopted by regional organisations such as the EU become standards for other jurisdictions.

To address this topic, this paper is organised as follows. After the introduction, the paper discusses the EU integration model and the development of electromobility. First, the analysis covers the development of EU integration in times of crisis and the emergence of electromobility in the climate crisis. Next, it analyses ASEAN's compromise integration and electromobility development initiatives. Next, the discussion covers the ASEAN integration process and the role of ASEAN legal instruments in developing electromobility in member states. The last section will discuss the climate change commitment and consensus of regional organisation member states in two variants of regional integration. Finally, the conclusion section will complete this paper at the end.

2. EU Integration Model and The Development of Electromobility

This section will discuss the EU integration model and how it relates to the adoption of legal instruments on electromobility. The study argues that crises play an important role in regional integration. The first subsection will explain the EU integration in various crises that it has gone through, including the climate crisis. Furthermore, it will discuss the development of electromobility as a response to the climate crisis. To analyse the crisis experienced by the EU, this study adopts Ferrara and Kriesi's typology of crisis-decision making scenarios.[8] The indicators of the typology are the existence of symmetrical or asymmetrical pressures on member states and the stronger or limited competence of the EU in the crisis issue.

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[5] T. Altenburg, E.W. Schamp, A. Chaudhary, *The Emergence of Electromobility: Comparing Technological Pathways in France, Germany, China and India*, in Science and Public Policy 43, no. 4 (2016), p. 464-475, *https://doi.org/10.1093/scipol/scv054*.

[6] F. Indeo, *ASEAN-EU Energy Cooperation: Sharing Best Practices to Implement Renewable Energy Sources in Regional Energy Grids*, in Global Energy Interconnection 2, no. 5 (2019), p. 393-401, *https://doi.org/10.1016/j.gloei.2019.11.014*; W. Huck *et al.*, *Framework and Content of Energy Transition in Southeast Asia with ASEAN and the EU*, in The Journal of World Energy Law & Business 15, no. August (2022), p. 396-408, *https://doi.org/10.1093/jwelb/jwac023*.

[7] I. Diaz-Rainey *et al.*, *An Energy Policy for ASEAN? Lessons from the EU Experience on Energy Integration, Security, and Decarbonization*, in ADBI Working Paper, 1217 (Tokyo, 2021), *https://doi.org/10.2139/ssrn.3807085*.

[8] F.M. Ferrara, H. Kriesi, *Crisis Pressures and European Integration*, in Journal of European Public Policy 0, no. 0 (2021), p. 1-23, *https://doi.org/10.1080/13501763.2021.1966079*.

2.1. Integration in the Middle of Crisis

The EU integration model is categorised as a political union characterised by formal institutionalisation and division of functions between organs that have been defined in the founding treaty.[9] It also has a centralised structure with clear jurisdictions.[10] However, this form of integration was not achieved in a short time. The EU needed several decades to achieve the political union variant of integration with a supranational organisational form. One of the moments that shaped regional integration was the crisis that occurred and was experienced by the majority of member states. The response of EU member states to overcome the crisis by giving greater authority to EU organs became one of the instruments to strengthen integration.[11]

Crises play an important role in shaping EU integration as a regional organisation. This study argues that at least four crises have shaped EU integration in the last two decades. These are the Eurozone, the refugee crisis, the COVID-19 pandemic and the climate crisis. Ferrara and Kriesi include Brexit as one of the crises affecting EU integration.[12] However, this paper does not include Brexit as one of the crises with the argument that the EU has predicted the Brexit crisis. It is different from other crises because of the uncertainty of its form and solution.

The Eurozone crisis occurred in 2009 due to the inability to manage debt experienced by several EU member states, especially Greece. The crisis also revealed that despite its strong competence, the EU's monetary and fiscal institutional architecture still has limitations.[13] In addition, the Eurozone crisis also proved that the EU needed stronger integration and that there were constraints in the distribution of political power at the supranational level.[14] The crisis's outcome was the Euro's survival as a strong currency and a strong demand to reform regional monetary and fiscal institutions and systems.[15] According to the typology of crisis decision-making scenarios, the Eurozone crisis falls under high EU competence with asymmetric pressure on EU member states. This pattern results in dissensus among EU member states.[16]

Refugees coming from outside Europe have also caused a crisis for the EU. The rising tide of refugees from North Africa and the Middle East began in 2015. This crisis caused internal conflicts between member states due to the EU's incompetence in handling the refugee crisis immediately.[17] The refugee crisis put unsymmetrical pressure on EU member states. For example, Italy and Germany, the destination countries for most refugees, have stronger pressure than Slovenia or Hungary, where refugees cross.[18] In addition, the EU has quite limited competence in refugee affairs. Although the EU has adopted the Return Directive (2008/115/EC),[19] it still requires further regulation in the national jurisdiction of each EU member state. However, in its development, the EU adopted some soft laws because it is considered more likely not to be rejected by member states.[20]

The following crisis is the COVID-19 pandemic that has hit Europe since 2020. At the inception of this health crisis, it was apparent that the EU was poorly prepared to address the crisis due to its limited competence in public health.[21] All member states experienced the same pressures in this crisis due to the borderless nature of the pandemic. The EU's limited competence and the symmetrical pressure on all member states led to a common

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[9] C. Closa, L. Casini, O. Sender, *Comparative Regional Integration: Governance and Legal Models*, Cambridge: Cambridge University Press, 2016.

[10] R. Wong, *Creeping Supranationalism. The EU and ASEAN Experiences*, in Drivers of Integration and Regionalism in Europe and Asia: Comparative Perspective, ed. Louis Brennan and Philomena Murray, London and New York: Routledge, 2015, p. 235-251.

[11] Z. Lefkofridi, Ph.C. Schmitter, *Transcending or Descending? European Integration in Times of Crisis*, in European Political Science Review 7, no. 1 (2015), p. 3-22, *https://doi.org/10.1017/S1755773914000046*.

[12] F.M. Ferrara, H. Kriesi, *Crisis Pressures and European Integration, op. cit.*

[13] D. Katsikas, *Reforming Under Pressure: The Evolution of Eurozone's Fiscal Governance During a Decade of Crises*, in New Challenges for the Eurozone Governance: Joint Solutions for Common Threats?, ed. Jose Caetano, Isabel Vieira, and Antonio Caleiro, Cham: Springer, 2021.

[14] Ph. Genschel, M. Jachtenfuchs, *From Market Integration to Core State Powers: The Eurozone Crisis, the Refugee Crisis and Integration Theory*, in Journal of Common Market Studies 56, no. 1 (2018), p. 178-196, *https://doi.org/10.1111/jcms.12654*.

[15] D. Katsikas, *Reforming Under Pressure: The Evolution of Eurozone's Fiscal Governance During a Decade of Crises, op. cit.*

[16] F.M. Ferrara, H. Kriesi, *Crisis Pressures and European Integration, op. cit.*

[17] L.A. Pertiwi, *Kompleksitas Rezim Di Uni Eropa: Upaya Penanganan Pengungsi Dan Pencari Suaka*, in Jurnal Ilmu Sosial Dan Ilmu Politik 19, no. 3 (2016), p. 218-233.

[18] Ph. Genschel, M. Jachtenfuchs, *From Market Integration to Core State Powers: The Eurozone Crisis, the Refugee Crisis and Integration Theory, op. cit.*

[19] Directive 2008/115/EC of the European Parliament and of the Council of 16.12.2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

[20] P. Slominski, F. Trauner, *Reforming Me Softly–How Soft Law Has Changed EU Return Policy since the Migration Crisis*, in West European Politics 44, no. 1 (2021), p. 93-113, *https://doi.org/10.1080/01402382.2020.1745500*.

[21] A. Alemanno, *The European Response to CoviD-19: From Regulatory Emulation to Regulatory Coordination?*, in European Journal of Risk Regulation 11, no. 2 (2020), p. 307-316*, https://doi.org/10.1017/err.2020.44*.

consensus.[22] In fact, the EU adopted various legal instruments both soft and hard law to cope with the crisis caused by the COVID-19 pandemic. The EU's limited competence in the field of public health does not prevent efforts to respond. The legal instruments adopted include travel restrictions and the use of information technology during the pandemic.

Climate change is also leading to a deeply threatening crisis. For this crisis, the EU has strong competencies amidst the impacts faced by all member states. The EU is recognised as one of the key actors promoting mitigation and coping with the impacts of climate change globally. One of the efforts made by the EU to address the climate change crisis is to reduce emissions from the energy and transport sectors. To this end, the EU has adopted several legal instruments, both soft and hard law, to support electromobility development. This study notes that the EU adopts at least eleven legal instruments to tackle the climate crisis by strengthening the electromobility ecosystem. These legal instruments include energy efficiency, vehicle emission standards, renewable energy, building standards, and EU commitments to reduce emissions from various sectors.

The four crises have contributed to the EU's regional integration to the present day. The existence of regional legal instruments will directly or indirectly harmonise laws at the national and regional levels. Integration in the form of legal harmonisation, especially related to the adoption of new technology, is essential for the development of technology itself. Without harmonisation, the conditions will be resistance and disharmony of policies to overcome the climate crisis.

2.2. Climate Crisis: Rise of Electromobility

Climate change in the European region affects the agriculture, tourism, forestry, energy, health and infrastructure sectors.[23] In general, Europe is more resilient to climate change than other regions. However, this resilience has limits, so it is crucial to mitigate and address the impacts of climate change. This paper argues that the development of electromobility is one of the impacts of solid EU regional integration to address the climate crisis. There are at least three reasons that support this argument. Firstly, the EU mostly adopts hard laws to develop electromobility. Eleven main legal instruments form the basis for the development of electromobility in the EU region. The legal instruments are as follows:

Hard Law

- Regulation (EU) 2019/631 of the European Parliament and of the Council of 17.04.2019 setting CO2 emission performance standards for new passenger cars and for new light commercial vehicles;
- Regulation (EU) 2020/852 of the European Parliament and of the Council of 18.06.2020 on establishing a framework to facilitate sustainable investment;
- Regulation (EU) 2021/1119 of The European Parliament and of the Council of 30.06.2021 establishing the framework for achieving climate neutrality;
- Regulation (EU) 2022/869 of The European Parliament and of the Council of 30.05.2022 on guidelines for trans-European energy infrastructure;
- Regulation (EU) 2018/842 of the European Parliament and of the Council of 30.05.2018 on Binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement;
- Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11.12.2018 on the Governance of the Energy Union and Climate Action;
- Directive (EU) 2018/2001 of The European Parliament and of The Council of 11.12.2018 on the promotion of the use of energy from renewable sources;
- Directive 2012/27/EU of the European Parliament and of the Council of 25.10.2012 on energy efficiency;
- Directive (EU) 2018/844 of the European Parliament and of the Council of 30.05.2018 amending Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency.

Soft Law

- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: a European Strategy For Low-Emission Mobility COM (2016) 501 of 20.07.2016;

[22] F.M. Ferrara, H. Kriesi, *Crisis Pressures and European Integration, op. cit.*
[23] B. Bednar-Friedl *et al., op. cit.*.

- Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions (European Green Deal) COM (2019) 640 of 11.12.2019.

The eleven legal instruments mentioned contain nine hard laws with regulations and directives. While soft law in the form of communications from the European Commission. Adopting hard and soft laws to build electromobility has advantages and disadvantages. The advantage is that legal instruments in the form of regulations and directives can harmonise laws at the regional and national levels.[24] Under these conditions, it is expected that the purpose of adopting these legal instruments can be achieved immediately. On the other hand, the disadvantage is the limited flexibility of member states to choose the method or mechanism of implementation in their national jurisdiction.[25]

The adoption of soft law also has advantages and disadvantages. The advantages of soft law are flexibility and the possibility of implementation innovation to achieve legislative objectives.[26] However, it needs to be recognised that its weakness is the absence of binding legal force and has no legal consequences if the legislation is not implemented. Nevertheless, soft law still has legal relevance to the substance it regulates.[27] Moreover, soft law can also guide the establishment of hard law at the level of national jurisdiction. Therefore, adopting soft law to build electromobility is complementary to hard law.

The second argument is that the development of electromobility reinforces the climate change law adopted by the EU. EU legislation has evolved significantly with ambitious climate targets. The existence of electromobility will strengthen efforts to achieve these targets, especially emission reduction in the energy and transport sectors. This is partly because the EU has a strong constitutional basis for achieving climate targets. The Treaty of the Functioning of the European Union (TFEU) has mandated the use of renewable energy and implemented a supportive legal framework.[28] In addition, most climate and electromobility legal instruments adopted by the EU that are hard law in character also support the achievement of climate targets.

The development of electromobility also aligns with EU climate targets, especially the European Green Deal, which targets Net Zero emissions by 2050. This target will be achieved if the use of electric vehicles continues to increase in line with renewable energy as a primary energy source. Therefore, the development of electromobility and achieving climate targets support each other. Furthermore, the massive use of electric vehicles in EU member states will facilitate the achievement of climate targets. In this condition, legal instruments with a hard law character are expected to be a catalyst for electromobility.

Regional integration in the context of the EU is closely related to the type of character of legal instruments adopted to regulate new technologies such as electromobility. The climate crisis, considered a common problem and its impact can be experienced by all EU member states, makes adopting hard law instruments logical. The EU's strong competence in climate change also reinforces its dominance in setting climate targets that must be achieved together.

3. ASEAN Compromise Integration and Electromobility Development Initiatives

This section will discuss ASEAN integration and electromobility development initiatives. Firstly, a discussion will be presented on the ASEAN integration process since 1967. Then, this discussion will focus on elaborating on four legal instruments that influenced ASEAN integration. These are the Bangkok Declaration (1967), the Declaration of ASEAN Concord (1976), the Treaty of Amity and Cooperation in Southeast Asia (1976), and the ASEAN Charter (2008).[29] Furthermore, the role of ASEAN legal instruments in adopting new technologies, especially the development of electromobility in the Southeast Asian region, will be discussed.

[24] R.D. Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union*, *Nucl. Phys.*, vol. 13, Cambridge and London, Harvard University Press, 2011.

[25] *Ibidem*.

[26] E. Ferris, J. Bergmann, *Soft Law, Migration and Climate Change Governance*, in Journal of Human Rights and the Environment 8, no. 1 (2017), p. 6-29, *https://doi.org/10.4337/jhre.2017.01.01*.

[27] *Ibidem*.

[28] Art. 194 of the consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47.

[29] E. Yong Joong Lee, *Legal Development of the ASEAN Community Building*, in ASEAN International Law, ed. Eric Yong Joong Lee, Singapore: Springer Nature Singapore, 2022.

3.1. ASEAN Integration In the Making

ASEAN has experienced a slow evolution of regional integration. This regional organisation in Southeast Asia was established in 1967 by the five founding countries of Indonesia, Malaysia, the Philippines, Singapore and Thailand through the Bangkok Declaration. Its establishment's original purpose was to strengthen cooperation in economic, security, cultural, educational, agricultural, fisheries, and other objectives for mutual benefit.[30]

The Bangkok Declaration officially embarked on the evolution of Southeast Asian regional integration through the establishment of ASEAN. This article argues that the declaration did not actually have a significant impact on ASEAN's regional integration.[31] The arguments are that the purpose of the declaration is too broad, the organisational architecture lacks a permanent character, and the relationship between member states is not sufficiently clear in the declaration. The selection of the word 'declaration' for the name of the document also shows that there is a soft law character that is not legally binding for the ASEAN founding countries.

The progress of ASEAN regional integration continued with adopting the Declaration of ASEAN Concord or Bali Concord I. This document differed greatly from the Bangkok Declaration as it included more specific areas of cooperation. This document has many differences from the Bangkok Declaration as it lists more specific areas of cooperation. The areas of cooperation are political, economic, social, cultural and information, security, and improvement of ASEAN Machinery.[32] Although it remains a 'declaration' document, there is a strong commitment among member states to adopt a permanent organisational design with specific areas of cooperation and objectives. Another difference is that the signatories of Bali Concord I are the Head of State or Head of Government of the member states, not the Foreign Minister as in the 1967 Bangkok Declaration.

The first hard law legal instrument adopted by ASEAN was the Treaty of Amity and Cooperation in Southeast Asia (TAC) in 1976. The TAC also included fundamental principles that influenced ASEAN integration for at least three decades afterwards. These principles are mutual respect, the right of state sovereignty, non-interference, peaceful settlement of disputes, renunciation of the threat or use of force, and effective cooperation.[33] The TAC was amended several times with the adoption of the first (1987), second (1998), and third (2010) protocols. After the third protocol was adopted, the scope of the TAC expanded even to non-Asian countries such as Australia, New Zealand, the United States, and France.[34]

However, with these three legal instruments, it is still quite challenging to classify the model of regional integration initiated by ASEAN. The integration model leads to the community type with intergovernmental organisational forms and consensus decision-making. The Bangkok Declaration, Bali Concord I, and TAC did not establish a specific integration model. ASEAN attempted to become a community by adopting the ASEAN Charter in 2008.[35] This legal instrument marked a new era for ASEAN as a regional and legal entity. The ASEAN Charter is also an attempt by member states to provide a legal basis for more stable and sustainable regional cooperation.[36]

Desierto argues that there are five significant differences in ASEAN post the ASEAN Charter's effective force in 2008.[37] Firstly, the ASEAN Charter recognises regional legal instruments that apply in ASEAN. Each member state must endeavour to implement ratified ASEAN legal instruments within its jurisdiction.[38] Second, the ASEAN Charter establishes an ASEAN bureaucracy as well as a clear hierarchy of decision-making mechanisms. The ASEAN Charter determines that the highest decision-making is in the ASEAN Summit forum attended by heads of state or government of member states.[39] Third, the ASEAN Charter formalises and limits the authority of

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[30] The ASEAN Secretariat, *The ASEAN Declaration (Bangkok Declaration)*, 1967, *https://agreement.asean.org/media/download/20140117154159.pdf*.

[31] S. Chesterman, *Does ASEAN Exist: The Association of Southeast Asian Nations as an International Legal Person*, in Singapore Year Book of International Law and Contributors 12 (2008), p. 199-211.

[32] The ASEAN Secretariat, *Declaration of Asean Concord (Bali Concord I)*, 1976, *https://asean.org/the-declaration-of-asean-concord-bali-indonesia-24-february-1976/*.

[33] The ASEAN Secretariat, *Treaty of Amity and Cooperation in Southeast Asia*, 1976, *http://agreement.asean.org/home/index/3.html*.

[34] E. Yong Joong Lee, *Legal Development of the ASEAN Community Building*, *op. cit.*

[35] C. Closa, L. Casini, O. Sender, *Comparative Regional Integration: Governance and Legal Models, op. cit*.

[36] I. Deinla, *The Development of the Rule of Law in ASEAN: The State and Regional Integration*, University of New South Wales, 2009.

[37] D.A. Desierto, *Pre-Charter and Post-Charter ASEAN: Cross-Pillar Decision-Making in the Master Plan for ASEAN Connectivity 2025*, in ASEAN Law and Regional Integration: Governance and The Rule of Law in Southeast Asia's Single Market, ed. Diane A Desierto and David Cohen, New York, Routledge, 2021.

[38] Art. 5(2) ASEAN Charter.

[39] Art. 7(2) ASEAN Charter.

member states holding the ASEAN Chairmanship.[40] Before the ASEAN Charter, each ASEAN Chair would organise themes aligned with their national interests.[41] This is considered to interfere with the principle of ASEAN centrality and the continuity of ASEAN priority programmes.

The other difference is that the ASEAN Charter has stated that ASEAN is a legal entity that also adopts ASEAN (legal) instruments in the form of treaties, conventions, agreements, concords, declarations, and protocols. Therefore, the implementation of ASEAN instruments is an obligation of member states to use the ASEAN Charter principles. [42] Finally, the ASEAN Charter prioritises the principle of ASEAN primacy, especially concerning external politics and economic cooperation. Efforts towards a more solid regional integration are highly visible in the ASEAN Charter. Therefore, it can be said that the ASEAN Charter is a big leap for ASEAN towards the Community in 2025. Adopting the ASEAN Charter has completed some of ASEAN's major work towards more solid regional integration.[43] However, more important work must be done to realise the grand vision of ASEAN as a regional organisation with a special place in global politics, especially on climate change issues.

3.2. Role of ASEAN (Legal) Instruments in Electromobility Development

Southeast Asia is one of the most vulnerable regions to climate change.[44] This global phenomenon affects Myanmar, the Philippines, Thailand and Vietnam the most. The impact of climate change also has consequences in the economic sector.[45] ASEAN member countries are slowly experiencing economic losses as climate change disrupts agricultural production, fisheries, infrastructure development, energy, and transport.

The ASEAN region tends to gain less attention from the international community, especially regarding emission reduction targets.[46] However, ASEAN has adopted several ASEAN instruments to address climate change under its framework.[47] The term ASEAN instruments used in this paper refers to the definition in the protocol to the ASEAN Charter on Dispute Settlement Mechanisms, namely *„any instrument which is concluded by Member States, as ASEAN Member States, in written form, that gives their respective rights and obligations in accordance with international law.”*[48] Based on this understanding, it can be understood that the ASEAN instrument is a legal instrument adopted by ASEAN and imposes certain obligations on member states based on international law.

ASEAN has adopted ASEAN instruments that directly or indirectly support the development of electromobility as a response to mitigate and cope with the impacts of climate change. This paper notes at least fourteen ASEAN instruments with hard and soft law characters adopted in the era before and after the 2008 ASEAN Charter. These ASEAN instruments are:

Hard Law

- ASEAN Agreement on the Conservation of Nature and Natural Resources 1985;
- Agreement on the Establishment on the ASEAN Centre of Biodiversity 2005;
- ASEAN Agreement on Transboundary Haze Pollution 2002;
- Agreement on ASEAN Energy Cooperation 1986;
- Agreement on the Establishment ASEAN Centre for Energy 1998.

Soft Law

- Jakarta Resolution on Sustainable Development 1987;
- ASEAN Joint Statement on the Conference of the Parties to the United Nations Framework Convention on Climate Change (2009, 2011, 2014, 2016, 2017, 2018, 2019, 2020, 2021, 2022);

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[40] Art. 32 ASEAN Charter.

[41] D.A. Desierto, *Pre-Charter and Post-Charter ASEAN: Cross-Pillar Decision-Making in the Master Plan for ASEAN Connectivity 2025, op. cit.*

[42] Art. 2(2) ASEAN Charter.

[43] S. Chesterman, *Does ASEAN Exist: The Association of Southeast Asian Nations as an International Legal Person, op. cit.*

[44] I. Overland *et al.*, *Impact of Climate Change on ASEAN International Affairs: Risk and Opportunity Multiplier*, 2017, *https://nupi.brage.unit.no/nupi-xmlui/handle/11250/2465067*.

[45] R. Rasiah *et al.*, *Climate Change Mitigation Projections for ASEAN*, in Journal of the Asia Pacific Economy 23, no. 2 (2018), p. 195-212, *https://doi.org/10.1080/13547860.2018.1442145*.

[46] I. Overland *et al.*, *The ASEAN Climate and Energy Paradox*, in Energy and Climate Change 2, no. November 2020 (2021): 100019, *https://doi.org/10.1016/j.egycc.2020.100019*.

[47] R. Letchumanan, *Climate Change: Is Southeast Asia up to the Challenge? Is There an ASEAN Policy on Climate Change?*, London, 2010, *http://www2.lse.ac.uk/IDEAS/Home.aspx*.

[48] Art. 1(a) Protocol to the ASEAN Charter on Dispute Settlement Mechanisms.

- ASEAN Socio-Cultural Community Blueprint 2025;
- ASEAN Plan of Action for Energy Cooperation 2016-2025;
- Roadmap for Energy-Efficient Buildings and Construction in ASEAN;
- ASEAN Transport Strategic Plan 2016-2025 (Kuala Lumpur Transport Strategic Plan);
- ASEAN Regional Strategy on Sustainable Land Transport;
- Phnom Penh Declaration on Sustainable Urban Mobility;
- ASEAN Taxonomy for Sustainable Finance.

Based on the aforementioned ASEAN Instruments, the majority are soft law that does not have legally binding force. Nevertheless, these soft law instruments still have legal relevance to the national jurisdiction of each member state. Based on the ASEAN Charter, the basic principles in ASEAN decision-making are consultation and consensus. Thus, the configuration of the majority of legal instruments characterised as soft law has also gone through a process of consultation and consensus among member states. Culturally, this principle of consultation and consensus is known as „The ASEAN Way", which emphasises informality, trust and good working relationships.[49]

Another perspective is that the hard and soft law classification in the ASEAN legal ecosystem is irrelevant. Instead, this opinion argues that ASEAN embraces flexible participation in its legal instruments.[50] Flexible participation means that even in instruments characterised as hard law, it still requires a voluntary ratification process by member states. This condition makes the applicability of ASEAN hard law instruments still challenging for implementation in all member state jurisdictions.[51] Another challenge is the monitoring of ASEAN Instruments that lack a standardised mechanism. [52]

The principles of consultation, consensus, informality, trust, good cooperation, flexibility and voluntariness in adopting ASEAN instruments also influence the development of electromobility in the region. Public adoption of electric vehicles in ASEAN tends to be low, although there is a significant upward trend.[53] Each member country has ambitions to get the public to use electric vehicles massively.[54] Indonesia, Malaysia, and Thailand are ASEAN countries with big electromobility ambitions. By 2030, Indonesia targets an electric vehicle population of 15 million units, Malaysia targets more than 200,000 electric vehicle units with 125,000 charging stations, and Thailand targets electric vehicle penetration to reach 30% nationwide.[55]

In general, the ASEAN Instrument does not directly incentivise the development of electromobility in member states. However, the ASEAN legal framework provides relevant environmental and climate change guidance to achieve their respective national targets. This condition is under the culture of avoiding conflict and in accordance with the original purpose of establishing ASEAN to strengthen cooperation. In other words, ASEAN has chosen a compromise integration in climate change and electromobility.

4. Variations of Regional Integration: Legal Commitment and Consensus in the Electromobility Development

The development of electromobility is closely related to the commitment and consensus of regional organisations to mitigate and address the impacts of climate change. In the previous section, this paper has explained the influence of the EU integration model and ASEAN compromises integration on electromobility development in each region. Electromobility development as a response to the climate crisis is implemented differently by member states of regional organisations with the Political Union and semi Communities integration models. The question then arises, does the regional integration variant affect regional organisations' commitment and legal consensus towards electromobility development?

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[49] W. Huck, *Informal International Law-Making in the ASEAN: Consensus, Informality and Accountability*, ZaöRV 80 (2020), p. 101-138, *http://www.zaoerv.de*.

[50] Y. Fukunaga, *Use of Legal Instruments in the ASEAN Economic Community Building*, in Journal of Contemporary East Asia Studies 10, no. 1 (2021), p. 65-82, *https://doi.org/10.1080/24761028.2021.1905199*.

[51] K.Y. L. Tan, *ASEAN Law: Content, Applicability, and Challenges*, in ASEAN Law and Regional Integration: Governance and The Rule of Law in Southeast Asia's Single Market, ed. Diane A Desierto and David Cohen, New York, Routledge, 2021, p. 39-56.

[52] *Ibidem*.

[53] I. Overland *et al.*, *The ASEAN Climate and Energy Paradox, op. cit.*

[54] R. Safrina *et al.*, *ASEAN Decarbonisation Pathway: A Policy Review on Variable Renewable Energy, Electric Vehicle, and Smart Microgrid*, Jakarta, 2022, *https://aseanenergy.org/asean-decarbonisation-pathway-a-policy-review-on-variable-renewable-energy-electric-vehicle-and-smart-microgrid/*.

[55] *Ibidem*.

By comparing the EU and ASEAN, the answer is yes. However, the legal commitment and consensus must be observed from the internal mechanism of each regional organisation. The EU, with a political union integration model, has the characteristics of legal instruments that can be interpreted specifically and clearly, and there is a clear mechanism for dispute resolution through the courts.[56] Meanwhile, ASEAN, with a semi-community integration model, has the characteristics of legal instruments that cannot be interpreted clearly, and there is no dispute resolution mechanism through the courts.[57]

The EU integration model can harmonise laws to accelerate the development of electromobility. This harmonisation can also become a uniformity of laws and regulations that do not provide a space for innovation for member states. This model will be very effective and efficient in accelerating the development of electromobility as a new technology. On the other hand, ASEAN is a regional organisation that continues to evolve, including structuring its legal structure. The principles of consultation, consensus, mutual trust, and informality will likely remain the main preferences in responding to climate change and electromobility issues. Crises affecting all or most member states, such as the 1998 economic crisis, the 2004 tsunami disaster, and even the climate crisis, have not accelerated ASEAN regional integration. The development of electromobility still relies on the national legal initiatives of member states while following the guidelines contained in ASEAN legal instruments.

Legal instruments that support and accelerate electromobility development can be categorised as climate adaptation laws that promote new technologies as solutions. These laws promote initiatives on key adaptation objectives, science-based decision-making, risk and vulnerability assessment, incentive and disincentive policies, public education, and monitoring and evaluation.[58] The role of regional organisations and their member states in promoting this instrument is significant. Therefore, the role of the EU and ASEAN is strategic to catalyse and accelerate the development of electromobility within the legal framework of climate change adaptation. Member states also have a role to play in electromobility development because national legal and policy instruments will ultimately determine the speed of electromobility development and climate change adaptation.

5. Conclusions

Variants of regional integration influence the adoption of legal instruments to promote new technologies such as electromobility. For example, the EU integration model adopts more hard law than soft law, while the ASEAN integration model adopts the opposite. The advantage of adopting more hard laws is that it will effectively harmonise laws to achieve the ambition of agreed climate targets. However, this model can only be implemented in regional organisations that have achieved political union integration. At the same time, regional organisations with the community integration model will be able to catalyse and promote the adoption of new technologies by using soft law as a relevant guide in forming national laws.

The approaches adopted by the EU and ASEAN to electromobility adoption can be understood as a variation of regional organisational policies. The form of integration, values and principles the member states adopt influence this situation. Adapting to climate change by adopting new technology policies such as electromobility is essential. The choice of legal instruments of regional organisations largely determines the progressivity and speed of technological penetration. The fact that the EU prefers hard law is a reality that in climate policy, the EU has strong legal competence and is supported by the impact of climate change felt by all member countries. On the other hand, ASEAN considers that soft law is the best legal instrument to encourage its member states to adopt legal instruments that promote electromobility in each national jurisdiction.

Further studies on the variants of regional integration between the EU and ASEAN can be conducted using interdisciplinary or multidisciplinary approaches. Statistical and economic approaches would be beneficial to understand further the influence of the periodic adoption of legal instruments on the growth of electric vehicle use in the EU and ASEAN regions. The differences and similarities that arise by comparing numbers will bring a better understanding of the comparative study of these two regional organisations.

[56] N. Limsiritong, *The Problems of Law Interpretation under ASEAN Instruments and ASEAN Legal Instruments*, in MFU Connexion 5, no. 2 (2016), p. 136-155.

[57] *Ibidem*.

[58] J. McDonald, Ph.C. McCormack, *Rethinking the Role of Law in Adapting to Climate Change*, in Wiley Interdisciplinary Reviews: Climate Change 12, no. 5 (2021), p. 1-21, ***https://doi.org/10.1002/wcc.726***.

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THEORETICAL ASPECTS REGARDING THE APPLICATION OF TREATIES IN TIME AND SPACE

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Abstract

Treaties in force, more precisely those not affected by a cause of nullity or not expired, must be applied by the parties in good faith. The application of a treaty implies the obligation to introduce it into the internal legal order of each state party and raises the issue of the relationship between international law and the internal law of the states. The application in time of treaties is governed by the principle of non-retroactivity of conventional provisions. In principle, a treaty is applied on the territory or with regard to the territory of the contracting parties. There are, however, cases in which the treaty can only be applied to a part of their territory or it can have an „ultra-territorial" application, that is, it is intended to be applied on the territory of third countries.

Keywords: *treaty, territorial application, application in time, state party, third state.*

1. Introductory considerations

The adoption of the text of the treaty marks the completion of negotiations, but that does not mean that the treaty becomes legally binding for the states that signed it. As a rule, the binding effect of the treaty results only after the state that signed the treaty, expresses its consent to be bound by it, unless the parties agreed otherwise. However, a state the representative of which signed the adopted text of a treaty is no longer in the same situation as a state that did not sign the negotiated text[1]. According to the International Court of Justice (ICJ), „signed but unratified treaties may constitute an accurate expression of the understanding of the parties at the time of signature".

Although not bound by the treaty, the signatory state acquires, by virtue of signature of its representative, certain rights and obligations. Codifying a long practice, art. 18 of the Vienna Convention on Treaties, from 1969, provides that „a state must refrain from committing acts that would deprive a treaty of its object and purpose: a) when it signed the treaty (...) as long as it did not show its intention of not becoming a party to the treaty".

This provision, which derives from the principle[2] of good faith in international relations, does not mean that the signatory state is obliged to comply with the substantive provisions of the treaty, but the respective state cannot adopt a behaviour that would render its subsequent commitment without substance, after it expresses its consent to become a party to the treaty.

It results from art. 18 of the Vienna Convention that the state must examine the text of the treaty in good faith in order to determine its future position regarding that treaty. Thus, an obligation of behaviour emerges, and the signatory state has the possibility to express or not its consent to become a party to the treaty.

The status of the state that signed the text of the negotiated treaty implies certain rights in its favour. Having the capacity to become a party to the treaty, the signatory state is the recipient of various communications regarding the fate of the treaty, made by the depositary of the treaty. Moreover, the respective state can make certain objections regarding the reservations formulated by other states.

By their nature and object, the final clauses[3] of the treaty are considered to be applied immediately. Art. 24 para. 4 of the Vienna Convention supports this statement: „the provisions of a treaty that regulate the

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[1] Point 89 of the judgement of 16.03.2001, case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain - Qatar v. Bahrain*. See, in this sense, D. Popescu, *Drept internaţional public*, „Titu Maiorescu" University Publishing House, Bucharest, 2005, p. 179; R.M. Beşteliu, *Introducere în dreptul internaţional public*, 3rd ed., revised and added, All Beck Publishing House, Bucharest, 2003, p. 296.

[2] „The principles of law represent a stability factor and, also, a source of unity, coherence, consistency and efficiency for that legal system" (E. Anghel, *Justice and Equity*, LESIJ no. XXIII, vol. 2/2016, p. 120). At the same time, it must be remembered that the principles of law are „the fundamental prescriptions that channel the creation of law and its application" (E.E. Ştefan, *Legalitate şi moralitate în activitatea autorităţilor publice*, in Revista de Drept Public no. 4/2017, p. 95).

[3] These clauses refer to aspects such as: the methods of authentication of the text, the expression of consent by the parties, the entry into force of the treaty etc.

authentication of texts, the establishment of the consent of the states to be bound by the treaty, the modalities or the date of entry into force, the reservations, the powers of the depositary, as well as other issues that are necessarily raised before the entry into force of the treaty, they are all applicable as soon as the text is adopted".

A treaty becomes binding on the states that expressed their consent to become parties, from the moment of its entry into force. The moment of entry into force of a treaty is when all the parties or a minimum necessary number of parties, provided by the treaty, have expressed their consent to become a party to them.

As a rule, the parties provide in the content of the treaty, a general formula that allows the formalities for entry into force to be adapted to the procedure regulated in the internal law of each state[4].

Bilateral treaties at state level enter into force on the date of the modification of the instruments of ratification, at the time provided by the treaty or by another method provided by it.

Multilateral treaties usually provide that they enter into force at a certain time after the deposit of a certain number of instruments of ratification or accession[5].

The registration of the treaties is a particularly important operation in terms of the publicity and opposability to third parties of the text contained in the treaty[6]. According to art. 102 of the Charter of the United Nations[7] (UN), member states have the obligation to send international treaties and agreements to the UN General Secretariat for registration. This is the one which also ensures their publication. The non-registration of the treaties does not affect the binding legal force for the parties, but only lacks opposability towards the UN bodies[8].

According to art. 26 of the Vienna Convention, treaties in force, more precisely, those not affected by a cause of nullity or not expired, must be applied by the parties in good faith (the fundamental principle of international law - *pacta sunt servanda*).

The application of the treaty implies the obligation to introduce it into the internal legal order of each state party. Thus, the competent state bodies must take the necessary measures for this purpose. A party cannot invoke the provisions of its internal law to justify the non-execution of a treaty.

The application of treaties in the internal legal order of a state raises the issue of the relationship between international law and the internal law of states.

According to the monist theory - with the primacy of international law over internal law - from the moment the treaty enters into force, it will be applied immediately and directly, without the intervention of legislative bodies, even if it were in contradiction with an internal law, in which case, the internal legal act would cease to produce effects. This theory has been criticized, as it minimizes the role of the state as a subject of international law. In the case of the monist theory with the primacy of internal law over international law, the treaty acquires legal force to the extent that it would be provided by internal law, and in case of conflict between internal and international legal rules, priority is given to the application of the internal normative act.

The dualist theory, which supports the clear distinction between the two systems of law - internal and international - states that it is necessary to adopt an internal act by which the treaty is transposed from the international order into the internal order, acquiring the nature of the act in which it was transposed (internal law). Currently, the tendency is to give priority to international rules over internal rules, but the two theories subsist.

Therefore, the application of provisions of a treaty in the internal legal order of the states-parties is not carried out uniformly, being determined by the method of reception by each state, of the legal rules of international law.

After 1919, with the emergence of the League of Nations, the fundamental laws of the states have confirmed the principle of the subordination of internal norms to international norms. However, it can be noticed that there are several „*degrees*" of constitutional recognition of this primacy. Thus, some Constitutions limit

[4] A. Năstase (coord.), *Legea nr. 590/2003 privind tratatele comentată şi adnotată*, edited by the Ministry of Foreign Affairs and the Association of International Law and International Relations, printed at C.N.I. Coresi S.A., Bucharest, 2004, p. 48.

[5] For example, for the entry into force of the Statute of the International Criminal Court in Rome (1998), it was necessary to submit 60 instruments of ratification; likewise in the case of the Montego Bay Convention on the Law of the Sea (1982) etc.

[6] N. Ecobescu, V. Duculescu, *Dreptul tratatelor*, Continent XXI Publishing House, Bucharest, 1995, p. 52. See also D. Popescu, *Înregistrarea tratatelor internaționale*, in S.C.J. no. 4/1964, pp. 44-53.

[7] „In 1945, the representatives of fifty states signed, in San Francisco, the Charter of the United Nations" (A. Fuerea, *Dreptul Uniunii Europene. Principii, acțiuni, libertăți*, Universul Juridic Publishing House, Bucharest, 2016, p. 14).

[8] D. Popescu, A. Năstase, *Drept internațional public*, Şansa Publishing House and Press, Bucharest, 1997, p. 218.

themselves to affirming the principle of the subordination of internal law to international law[9], while others enshrine the incorporation of international law rules into internal law, requiring the legislator to achieve a balance between its provisions and the international ones. However, if some Constitutions talk about international law, in general, others refer only to „treaties”. In this sense, the Constitution of the United States of America, in art. VI, recognizes *„self-executing”* treaties as superior to previous internal laws. In case there is a contradiction between an internal provision and a provision from a higher law, priority will be given depending on the will manifested by the Congress. Regardless, however, of what will be established, the treaty can never derogate from the constitutional provisions.

Most of the European states have provided in their Constitutions the recognition of international norms as part of their internal system. Such a reception system can be found in Austria, Italy, France and Germany.

2. The application of treaties in time

The application of treaties in time is governed by the principle of non-retroactivity of conventional provisions[10]. According to the Vienna Convention, art. 28, „if a different intention does not result from the treaty or it has not been provided otherwise, the provisions of the treaty do not bind a party regarding an act or a fact prior to the date of entry into force of this treaty regarding the respective party, or a situation which ceased to exist at that time”.

The execution of treaties in time raises the issue of their concurrent application and solutions in case of conflict between the norms of successive treaties[11].

Subject to the provisions of art. 103 of the UN Charter, art. 30 of the Vienna Convention establishes two general rules, namely:

- „when a treaty specifies that it is subordinated to a previous or subsequent treaty or that it should not be considered as incompatible with the other treaty, its provisions shall apply in preference”;
- „when all the parties to the previous treaty are also parties to the subsequent treaty, without the previous one having expired or the application having been suspended in accordance with art. 59, the previous treaty is only applied to the extent that its provisions are compatible with those of the subsequent treaty”.

According to art. 59 of the Vienna Convention, „a treaty is considered to have come to an end if all the parties to this treaty subsequently conclude a treaty on the same subject”. In this situation, the new treaty will apply, provided that its provisions show the intention of the parties to replace the old treaty or if its provisions and those of the old treaty are incompatible to such an extent that it is impossible to apply both treaties at the same time[12]. If the states party to the previous treaty are not all parties to the newly concluded treaty, art. 30 para. 4 of the Vienna Convention provides the following:

- in the relations between states that are not parties to both treaties, the previous treaty applies only to the extent that its provisions are compatible with those of the previous treaty;
- in the relations between a state party to the two treaties and a state party to only one of these treaties, the treaty to which both states are parties regulates their mutual rights and obligations.

3. The territorial application of treaties

According to art. 29 of the Vienna Convention, „if a different intention does not emerge from the content of the treaty or if it is not established in another way, a treaty binds each of the parties with respect to its entire territory”.

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[9] For example: The Preamble of the French Constitution, dated October 27, 1946 stated: „The French Republic, faithful to its traditions, submits to the rules of public international law” (point 14 - *https://www.conseil-constitutionnel.fr/sites/default/files /2021-09/constitution.pdf*, accessed on April 5th, 2023); Art. 1 para. (2) of the Constitution of Greece, dated June 11th, 1975 states that „Greece, adhering to the generally recognized norms of international law, seeks to consolidate peace and justice, as well as to encourage friendly relations between peoples and states” [Șt. Deaconu (coord.), *Codex Constituțional. Constituțiile statelor membre ale Uniunii Europene*, Monitorul Oficial R.A. Publishing House, Bucharest, 2015, *https://codex.just.ro/Tari/EU*, accessed on April 2nd, 2023].

[10] Nevertheless, there are treaties that contain clauses with retroactive application. Thus, we mention the Lausanne Treaty of 1923 (Treaty of Peace with Turkey), according to which Turkey's renunciation of its rights over Sudan and Egypt and the annexation of Cyprus by Great Britain were considered to have had effects since November 5th, 1914 (art. 14 and 20), *https://wwi.lib.byu.edu/index.php/Treaty_of_Lausanne*, accessed on April 2nd, 2023.

[11] Gh. Moca, *Dreptul internaţional public*, Era Publishing House, Bucharest, 1999, p. 435.

[12] R.M. Beşteliu, *op. cit*., p. 304.

In principle, a treaty applies on the territory or with regard to the territory of the contracting parties. There are, however, cases in which the treaty can only be applied to a part of their territory or it can have an *„ultra-territorial”*[13] application, that is, it is intended to be applied on the territory of third countries[14].

As a general rule, the international treaty produces effects on the entire territory subject to its state sovereignty[15]. However, the territorial application, even if it constitutes the principle, it does not have an absolute character and includes some exceptions. Thus, in the case of mutual assistance treaties, for example, the territories were sometimes determined with respect to which the contracting parties agreed to grant the benefit of the assistance regime. Also, „from the perspective of territorial application, it should be noted that, under the protocols annexed to the Treaty on European Union, Denmark [and] Ireland (...) benefit from non-participation clauses”[16] regarding some provisions[17] of the Treaty.

On the other hand, it is possible that the political activity of the state does not fall under the commitments assumed by the treaty. This is the case of the Treaty of Accession of Cyprus to the European Union, which entered into force on May 1st, 2004. With the entry of this state into the EU, theoretically, the Union legislation should apply to the entire Cypriot territory. However, due to the political problems that exist in this state, namely the problem of the inhabitants of the south and the north of the country, it was agreed that the treaty should apply only to the territory inhabited by the Cypriot population, following that, with the accession of Turkey to the EU, the territory inhabited by the Turkish population will be subject to the rules of the Union. In other words, the application of EU treaties is suspended in areas where the Cypriot government (Government of the Republic) does not exercise effective control.

The treaty can contain clauses that limit the territorial application and leave the state party to the treaty, the right to determine the territories that will be subject to the treaty (*colonial clause*[18]) or subordinate the extension of the treaty to the consent given by the local authorities that have powers in the area of the treaty (*federal clause*[19]). It is possible that the scope of a treaty exceeds the state territory or the metropolitan territory of the contracting states, including territories not subject to the sovereignty of that state[20]. In the case of overseas territories, the treaty may not apply to the state's insular dependencies, even if they are not colonial dependencies[21].

In practice, *the colonial clause* appears in three different forms, namely: the first form envisages an optional application of the treaty to the dependent territories of the contracting states. Thus, the treaty does not apply to those dependent territories, unless the contracting states decided to this effect; the second form of the colonial clause provides for an optional exclusion from the application of the treaty for the dependent territories of the contracting states (in this case, the treaty applies to the dependent territories, unless the contracting parties explicitly excluded them); the third form of the colonial clause envisages the automatic application of the treaty to the dependent territories of all the contracting parties.

There is a controversy, within the United Nations, regarding the form of the colonial clause that should be included in multilateral instruments or whether such a clause should be inserted[22]. In this sense, there is an

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[13] I.M. Anghel, *Dreptul tratatelor*, vol. 2, Lumina Lex Publishing House, Bucharest, 2000, p. 663.

[14] In this sense, see the Treaty of Versailles, from 1919, concluded between the Main Allied and Associated Powers (the United States of America, the British Empire, France, Italy and Japan) and Belgium, Bolivia, Brazil, China, Cuba, Ecuador, Greece, Guatemala, Haiti, Hejaz, Honduras, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Romania, Serbia-Croatia-Slovenia, Siam, Czechoslovakia and Uruguay on the one hand, and Germany on the other. However, the Treaty provided some rights in favour of Denmark and Switzerland (Section XII, art. 109-114), *https://www.census.gov/history/pdf/treaty_of_versailles-112018.pdf*, accessed on April 5th, 2023.

[15] Art. 26 of the Vienna Convention.

[16] A.M. Conea, *Politicile Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2019, p. 126.

[17] It is about those aspects specific to the field dedicated to the area of freedom, security and justice.

[18] The colonial clause can be found in the Convention for the Prevention and Punishment of the Crime of Genocide (1968), art. XII: „any contracting party may, at any time, by a notification addressed to the Secretary-General of the United Nations, extend the application of this Convention to any territory or to any of the territories with which it conducts external relations” and in the Convention on the Status of Refugees (concluded in Geneva, 1951), art. 40 para. (1): „Any state will be able, at the time of signing, ratification or accession, to declare that this convention will extend to all the territories it represents internationally or to one or more of them”.

[19] The federal clause can be found in the Convention on computer crime (Budapest, 2001), art. 41 para. (2): when a state formulates a reservation provided for in para. (1), „a federal state will not be able to use the terms of such a reservation to eliminate or substantially reduce its obligations under chapter II. In any case, it will use extended and effective means that will allow the application of the measures provided for in the mentioned chapter”.

[20] For example, France and the Principality of Monaco, Switzerland and the Principality of Liechtenstein.

[21] The Treaty of Versailles (1919) was not extended to the Anglo-Norman islands until 1935, when economic sanctions were applied against Italy.

[22] I.M. Anghel, *op. cit*., p. 669.

opinion for the inclusion of a colonial clause by which the dependent territories should not be included *ipso facto* in the scope of the application of treaties, but they should be given the option to accede. At the same time, there are supporters of the version according to which the dependent territories must not be deprived of the benefits of multilateral conventions.

The federal clause gives the federal state the ability to reserve the right to accept certain obligations in accordance with the principles governing the relationship between the central government and the federated or territorial entities, provided that the federated entities can fulfill their treaty obligations[23].

4. The application of treaties in Romania

Article 11 para. (2) provides that the treaties ratified by the Parliament, according to the law, are part of the internal law. Next, para. (3) stipulates that, if a treaty to which Romania is to become a party includes provisions contrary to the Constitution, its ratification can only take place after the revision of the Constitution. This paragraph must be corroborated with the provisions of art. 1 para. (5), according to which „in Romania, compliance with the Constitution, its supremacy and the laws, is mandatory". Thus, the ratification of a treaty can only take place if it does not include provisions contrary to the Constitution. Paragraph (3) must be interpreted as expressing a dualistic position, since treaties, the provisions of which are in conflict with constitutional norms cannot be implicitly amended by the law of ratification. Only following the amendment of the Constitution, in accordance with the treaty, it can be incorporated into the internal law"[24].

Article 20, at para. (1), establishes the rule according to which the internal rules regarding the rights and freedoms of citizens must be interpreted and applied in accordance with the Universal Declaration of Human Rights[25], the pacts and other treaties to which Romania is a party. Paragraph (2) of the same article regulates the situation in which there are inconsistencies between pacts and treaties regarding fundamental human rights, to which Romania is a party, and internal laws. The solution proposed by the Constitution comes close to the monist interpretation of the existing relationship between the international legal order and the internal legal order, in the sense that the rule established is that, in such cases, the international regulation has priority in application (therefore, we are in the presence of the monist theory with the primacy of international law over internal law), and the exception is given if the Constitution or internal laws contain more favourable provisions, in which case the latter apply (monist theory with the primacy of internal law over international law).

A special situation is given by the EU constitutive treaties, as well as the other binding EU regulations. The specificity of the application of these legal instruments of the Union in internal law has its basis in the CJEU jurisprudence. Thus, according to the Luxembourg Court, the Union „constitutes a new legal order of international law in favour of which the states have limited their sovereign rights, even if in a limited number of fields, and whose subjects are not only the member states, but also their nationals; (…) therefore, independently of the legislation of member states, community law does not only create obligations for individuals, but it is also intended to confer rights that enter into their legal patrimony; (…) these rights arise not only when they are explicitly granted by the treaty, but also as a result of certain obligations that the treaty imposes in a well-defined way both on individuals and on member states and community institutions"[26]. Considering this specificity of the EU legal order, the Romanian constituent legislator regulated the relationship between internal law and the EU law - a new legal order of international law resorting to the monist theory with the priority of Union law. Worth mentioning that, unlike the situation in art. 20 (where we find a rule, but an exception is also established), in art. 148 only the rule without any exception is present. Thus, according to para. (2) of this article „as a result of the accession, the provisions of the constitutive treaties of the European Union, as well as the other binding community regulations, have priority over the contrary provisions of the internal laws, respecting the provisions of the act of accession".

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[23] I. Gâlea, *Manual de drept internațional*, vol. I, Hamangiu Publishing House, Bucharest, 2021, p. 355.

[24] R.M. Beșteliu, *Drept internațional public*, vol. I, *op. cit.,* p. 12.

[25] The Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations on December 10th, 1948 and is the first document dedicated to human rights, adopted by an international organization. From a legal point of view, [the Declaration] is not a treaty", with no binding legal force (L.-C. Spătaru-Negură, *Protecția internațională a drepturilor omului. Note de curs*, Hamangiu Publishing House, Bucharest, 2019, p. 37).

[26] Judgement of the Court of February 5th, 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, case 26/62, EU:C:1963:1.

5. Conclusions

As a rule, the application of international treaties in space is carried out in compliance with the principle of territoriality, by virtue of which the treaties are applied to the entire territory of the states party, subject to their sovereignty.

The application of international treaties in time is carried out according to the principle of non-retroactivity, as it also results from the provisions of art. 28 of the Vienna Convention. States parties to a treaty may derogate from the principle of non-retroactivity, provided that the derogation results from the clauses of the treaty.

Knowing how a treaty is applied, territorially and spatially, contributes to the compliance of the principle of fulfilling the assumed obligations in good faith, otherwise the principle of international liability[27] of the state can be applicable[28].

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[27] „Liability is inherent in the existence of the rule of law, being necessary both internally and externally" (E.E. Ștefan, *Răspunderea juridică, privire specială asupra răspunderii în dreptul administrativ*, ProUniversitaria Publishing House, Bucharest, 2013, p. 12).

[28] K. Gözler, *La Question de la supériorite des normes de droit international sur la Constitution*, Ankara Universitesi Hukuk Facültesi Dergisi (Revue de la Faculté de droit de l'Université d'Ankara), Cilt, (Vol.) 45, 1996, Sayi (No) 1-4, pp. 195-211 (*https://www.anayasa.gen.tr/superiorite.htm*, accessed on April 5th, 2023).

ENLARGEMENT OF THE EUROPEAN UNION IN THE CONTEXT OF UKRAINE, MOLDOVA, AND GEORGIA'S MEMBERSHIP APPLICATIONS

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Abstract

Ever since the foundation of the European Communities during the 1950s, enlargement of these organisations has been an important goal, as well as, in some cases, a challenge to the existing legal and political paradigm. In this article we set out to present the evolution of the accession process and the particularities present in specific cases, specifically those of the countries forming what is called the Eastern Neighbourhood, in order to evaluate Ukraine, Moldova, and Georgia's likelihood of becoming a fully-fledged member of the European Union, and the probable timeline.

Keywords: *Association Trio, accession to the EU, EU membership, Eastern Partnership, Eastern Neighbourhood.*

1. Introduction

The European Union[1], in accordance with the objectives laid out for it in art. 3 TEU[2], sets out to promote its values and encourage third countries' adherence to these values, with an eye to achieving and maintaining world peace and the improvement of standards of living, democracy, human rights, and welfare for all people. The EU does so by using both bilateral acts (in particular, advantageous trade agreements, cooperation agreements and association agreements that stimulate other states to comply with the EU's high standards in order to gain access to the EU's wealth single market) and unilateral ones, such as public statements, decisions, progress reports by the Commission, and others.

In the case of its relations with Eastern Europe, following the dissolution of the USSR and fall of the Iron Curtain, the European Union has employed a differentiated approach for specific regions and groups of states, with some Central and Eastern European states becoming EU Member States in a relatively timely fashion. At the same time, the Western Balkans, Ukraine, Moldova, and Georgia have progressed much slower in their relationship with the EU, despite concluding various Association Agreements, creating free trade areas, and working on harmonising their legislations with EU law. The events of 24 February 2022 seem to have changed the status quo, and to have prompted renewed efforts on the part of both the EU and the Eastern states to further integration and make future membership a reality, not just a possibility.

2. The process of accession to the European Union

Article 49 TEU currently provides two *sine qua non* conditions that a third state must fulfil if it hopes to become a member of the European Union: it must be a European[3] state and it must show its respect for and commitment to promoting the EU's values, as enshrined in art. 2 TEU. The aspiring member must send its application to the EU Council, which will decide following a consultation of the Commission and the approval of the European Parliament; should the two conditions laid out in art. 49 not be fulfilled, the application will be deemed inadmissible. Additionally, the state must fulfil[4] a set of „conditions of eligibility" that have been set by

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[1] As mentioned in art. 1 TEU, the „Union shall replace and succeed the European Community", following the entry into force of the Treaty of Lisbon (2009). For reasons of simplicity and clarity of language, this paper will use the designation „European Union" to refer both to the European Community (the organisation prior to 2009) and the European itself (2009 – present).

[2] „The Union's aim is to promote peace, its values and the well-being of its peoples".

[3] Whilst a relatively clear condition on its surface, determining what constitutes a „European state", or where Europe begins and ends, has occasionally been a subject of debate, especially in terms of its Eastern borders, with Turkey's status even being put into question. For more on what „European" means in this context, see L. Mkrtchyan, *The border-making policy of the European Union: eastern enlargement*, in Journal of Education Culture and Society no. 2, 2012, p. 8.

[4] Art. 49 TEU states that the conditions of eligibility „must be taken into consideration", suggesting that the EU institutions could decide to approve membership even when they are not sufficiently fulfilled; this would mean that only the two conditions explicitly laid out in art. 49 TEU are mandatory.

the European Council. The latest version of them was codified in Copenhagen, in 1993, at a point in time where the EU was looking toward the eastern side of the continent and anticipating a wave of accessions of formerly communist states, that would have to make significant efforts to catch up, economically and politically, to western states already in the EU. Thus, under the heading „Relations with the Countries of Central and Eastern Europe", the Conclusions of the European Council lay out the Copenhagen criteria: „Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for the protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces withing the Union. Membership presupposes the candidate's ability to take on the obligations of a membership including adherence to the aims of the political, economic, and monetary union".[5] Additionally, the European Council used the word „brave" to describe these countries' efforts to transition from the central planning system to a market economy, and pledged the EU's support in this endeavour, considering the success of these efforts crucial to maintaining peace and prosperity in Europe. To that purpose, the European Council expressed its approval that Central and Eastern Europe should become members of the EU, as soon as they are „able to assume the obligations of membership by satisfying the economic and political conditions required", and progress in that direction shall be monitored by the European Council, so that it may decide when the time is right for their accession. The Copenhagen criteria have, over time, become a baseline for accession conditions and have been partly codified via treaty revisions.[6]

If the aspiring member clears these initial conditions and its application is considered admissible, the accession process begins with the negotiation stage. Negotiations do not automatically start the moment the application is admitted, and they conclude with the drafting and signing of the accession treaty by the EU Member States and the applicant state. In order for the treaty to come into force, it must be ratified by all Member States; so far, there have been no cases of accession treaties being blocked by a single EU Member State refusing to ratify it. It can be noticed that the procedure laid out in Article 49 TEU is not a very detailed one, leaving instead a large margin of flexibility for the EU institutions involved and for the Member States, an understandable approach, considering the effects that a new state joining can have on the EU and on its members' economic and political landscape. However, aspiring members could also be discouraged by this lack of clarity and certainty when it comes to having their candidacy evaluated.

Initially, the accession procedure was state-centred, in a way more closely resembling that of traditional cooperation organisations, rather than integration ones, like the European Communities; the European Commission was called to give an opinion on the potential accession of a state, but this opinion was non-binding[7]. Even at present, starting and finalising the accession procedure is dependent on an unanimous vote from the Member States, although this could come under question as more and more states join the EU and, in turn, make the likelihood of other states being able to join less likely, considering geopolitics.[8] However, over time, the EU institutions have become more involved in the process: the first important change to that effect was involving the European Parliament, once it had become a democratically elected institution. Following the Single European Act (1987)[9], the Member States being in agreement about another state's application is no longer sufficient, and the European Parliament must give its approval following an absolute majority vote. The Lisbon Treaty (2009) effected further change by explicitly stating that the European Council sets „eligibility conditions" that must be taken into consideration when evaluating a state's candidacy, and generally establishes the framework of the accession process. And whilst the Commission's opinion is non-binding, it does hold sway over the Member States in most cases, and it had an influence on the drafting of the Copenhagen Criteria, at the request of the European Council, who asked the Commission to work on the content of these criteria and to track the

[5] Conclusions of the Presidency, European Council in Copenhagen, 21-22 June 1993, p. 12, available at *https://www.europarl.europa.eu/summits/copenhagen/co_en.pdf*.

[6] C. Hillion, *Accession and withdrawal in the law of the European Union*, in Anthony Arnull, Damian Chalmers (Editors), The Oxford Handbook of European Union Law, Oxford University Press, Oxford, 2015, p. 128. For more on the Copenhagen criteria, see also A. Fuerea, *Manualul Uniunii Europene*, VIth ed., Universul Juridic Publishing House, Bucharest, 2016.

[7] For example, the UK received a positive opinion on its first application, which was rejected by France. Decades later, Greece's application received a negative opinion from the Commission [COM (76) 30 final, 20.01.1976], but became a Member State nonetheless.

[8] In theory, it's been suggested that a Member State who unjustifiably opposes the accession of another state could be called to answer in front of the CJEU. See C. Hillion, *op. cit.*, p. 134. However, this would likely have serious political consequences, with Member States feeling like the veto they still have on this matter is being reduced.

[9] Art. 8 SEA.

candidates' progress in this matter, as a precursor to opening accession negotiations.[10] Following the accession of 10 states in 2004, which tested the limits of the European Union's possibility of absorption of new members, the European Council decided, in 2006, to put forward the „New Consensus for Enlargement", that introduced, among other dispositions, the concept of conditionality: in order for various negotiation chapters to be opened and closed, and for the accession procedure to progress, the candidate must fulfil several „opening" and „closing benchmarks", which are defined and monitored by the European Commission, with the approval of Member States.

Following the decision to employ a conditionality-based approach, the Council and the European Council, based on an initiative by the Commission[11], endorsed a New Approach system, meant to encourage candidates' efforts regarding the implementation of the EU acquis. Chapters that were given particular attention were Chapter 23, „Judiciary and Fundamental Right", and Chapter 24, „Justice, Freedom, and Security" (notably, areas that are not economic in nature, but rather related to the EU's core values). These chapters are opened early in the negotiation process, and closed late, in order to allow candidates as much time as possible to efficiently and consistently implement the necessary changes to ensure compliance with their disposition, with the EU giving specific advice and guidance on how this goal can be achieved, throughout the process. Additionally, if the candidate doesn't comply with these standards and conditions, the New Approach entails the possibility of applying sanctions to that state („corrective measures")[12],

Consequently, the accession procedure has moved from being a mostly political, inter-state one, as presented in art. 237 EEC, to being an elaborate process that involves several actors, at a national and supranational state, and a more detailed system of conditions and sanctions, even if the final decision remains with the Member States, through the unanimous vote[13] that is expected in the Council for several of the process' steps, such as deciding whether a candidate's application is admissible and should be submitted to the Commission for an opinion, and to the European Parliament for its approval.

3. Relations between the EU and its partners – the concept of conditionality

The European Union influences Member (and future Member) States' behaviours, development, and standards by way of two methods: *ex ante* conditionality and *ex post* conditionality. *Ex ante* conditionality refers to the conditions imposed by the EU on a state who aspires to becoming a member of the EU, and who has to adapt its legislation and internal structures to the rigors of the EU integration system. This can be done through a variety of means, such as cooperation agreements and association agreements, international treaties through which said states take on obligations related to incorporating and fostering the EU's values, as well as copying EU *acquis* in various areas. Only once the EU's conditions have been met, will the agreement be applicable and the road toward membership become clearer for the state. *Ex post* conditionality refers to the fact that a specific agreement provides rules and obligations that a state shall have to follow/meet the standards in order for that agreement to apply; it offers more certainty for the state that following said rules will result in palpable benefits for it. *Ex post* conditionality is noted[14] as being more frequent in the EU's external policy, such as its practice to include conditions related to upholding human rights in its association agreements.

When divided into positive and negative conditionality, the relevant criterion is the nature of the consequences of violating the conditions. The concept of negative conditionality refers to the fact that a partner state is „threatened" with the suspension or elimination of certain benefits it enjoys in return for upholding the standards provided for in the agreement. Positive conditionality, on the other hand, refers to the practice of „rewarding" compliant states with economic, social, political etc. benefits, in exchange for fulfilling the conditions

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[10] C. Hillion, *op. cit.*, p. 129-130. This „pre-accession strategy" was introduced in 1994 as a method of preparing for what would be a large wave of accessions of Central and Eastern European countries.

[11] Communication from the Commission to the European Parliament and the Council, 'Enlargement Strategy and Main Challenges 2011–2012', COM(2011) 666 final, 12.10.2011, available at *https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0666:FIN:EN:PDF*.

[12] C. Hillion, *op. cit.*, p. 131.

[13] Despite a simple majority having been used for past accessions, it's been noted that, in recent times, it has become customary to expect a unanimous decision on this matter. For example, Germany single-handedly stalled, for over six months, the decision on asking the Commission to prepare an Opinion on Albania's application. C. Hillion, *op. cit.*, p. 132. This essentially turns an inter-institutional process into an intergovernmental one.

[14] G. Gabrichidze, *The Instrument of Human Rights Clause as a Part of Conditionality in European Union-Georgia Relations*, in The Review of European Affairs, vol. 1, issue (2), 2017, p. 86.

indicated by the EU. The Union's approach is a mixture of positive and negative conditionality – positive conditionality offers states something to strive toward and aspire to, whilst negative conditionality represents a way to effect immediate change by bringing the consequences to the states' attention as soon as they disrespect the rules.

Most external agreements that the EU concludes concern trade matters, reflecting the Union's predilection for utilising economic instruments.[15] An example of an important agreement between the EU and third countries – in this case, an entire region – is the Cotonou Agreement (ACP-EU Partnership Agreement). This agreement represents the legal framework for the Union's relations with countries from Africa, the Caribbean and the Pacific. However, the EU also concludes many agreements with a larger scope of cooperation. A suspension mechanism, meant to be included in agreements that the Union concluded with third countries, was approved in 1995 by the Council, allowing the EU to rapidly respond to situations where such a country would commit grave crimes, such as violating fundamental rights.[16]

4. The Eastern Partnership

The eastern enlargement process began in the 1990s, following the dissolution of the USSR and the emerging possibility that the states that had been part of it, or within its sphere of influence, could gravitate towards the west and the European Union. Once discussions had been opened, the Union first offered the Central and Eastern European countries membership of a „Stability Pact", whilst Turkey's desire to join was met with an offer to form „a privileged partnership".[17] The initial discussions stopped at Romania, Poland, and Slovakia, as an eastern border of sorts, whilst Ukraine, Moldova, and Belarus were relegated to a different regime. One seemingly contradictory aspect to its approach was the fact that the EU seemed to waver between adopting a single policy framework for all post-communist states, and employing differentiated policies for various of these states.[18]

At the beginning of the 2000s, the EU invested large amounts into East European and Central Asian countries in order to assess the potential consequences a „Wider Europe", involving enlargement toward the east and including the „Newly Independent States" would have. To that end, the EU's goal was to enhance cooperation and to reduce economic disparities between its Member States and its neighbours, as well as foster stability and democracy in the latter. At that point, the EU identified two categories of benefits derived from eastern enlargement: for the organisation itself, and for the future members. The EU would benefit from the increase in eastern security, the stabilisation of an area that, until now, has been prone to conflict and political tensions, access to growing markets and tens of millions of people, enhanced protection of the environment (particularly important, considering that the effects of pollution are felt continent-wide, and are not constrained to the areas where it is produced) thanks to new Member States integrating with the EU and its legislation on the environment, enhanced capabilities to fight against crime and illegal immigration, and to stop the trafficking of illegal substances. At the same time, Eastern European stated who join the EU can benefit from the support offered by the organisation in the process of stabilising their young democracies, the protection of minorities, economic support and reforms leading to growth, better employment prospects, and trade surplus, as well as more opportunities for their citizens, to study, work, and integrate with the people from Western Europe. Additionally, enlargement enhances the worldwide influence and image of both parties – the EU grows and expands its influence to new territories and people, and integrates their economic capabilities, whilst the new Member States enjoy the legitimacy and the protection brought by participation in one of the most important and powerful international actors, known for the high standards it imposes on aspiring members.[19]

In 2006 the EU established a new financial mechanism meant to support the existing European Neighbourhood Policy[20], and replacing the existing frameworks[21]: the European Neighbourhood and Partnership

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[15] Whilst the Union's objectives have always been a mixture of the political and the economic, the Union's main instruments for achieving these objectives are economic in nature.

[16] G. Gabrichidze, *op. cit.*, p. 87. „Furthermore, suspension of cooperation in certain areas, imposition of a trade embargo, postponement of planning or starting new projects, etc., can also be considered as an appropriate measure."

[17] L. Mkrtchyan, *op. cit.*, p. 14.

[18] D. Jano, *EU Enlargement Rounds and Dilemmas: The Successful, the Reluctant, the Awkward, and the Laggards*, in Bruno Ferreira Costa (Editor), Challenges and Barriers to the European Union Expansion to the Balkan Region, IGI Global, January 2022, p. 29.

[19] L. Mkrtchyan, *op. cit.*, p. 11-12.

[20] Regulation no. 1638/2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument.

[21] The financial assistance programmes TACIS (for Eastern European countries) and MEDA (for Mediterranean countries).

Instrument (ENPI). Programmes financed under the ENPI had to comply with all of the EU's international agreements and commitments, thus including all the provisions regarding the respect of human rights and fundamental freedoms, democracy, rule of law, etc., with any violation of these provisions opening the possibility for an *ad hoc* review and for other appropriate steps regarding the assistance granted to the offending state[22]. The ENPI was replaced, in 2014, by the European Neighbourhood Instrument (ENI)[23], which further promoted the EU's values in this area, and also provided a conditionality clause, stating that partner states would be monitored with regard to their respect of these values, with support potentially being withdrawn if serious or persistent regression is identified.[24]

The Eastern Partnership (EaP), a joint project involving the EU, its Member States, and six partner countries, was initiated in 2008 and officially launched on 7 May 2009, in Prague, establishing free trade and cooperation, and starting the discussion on visa liberation, with the EU's eastern neighbours: Armenia, Azerbaijan, Belarus, Georgia, Moldova, and Ukraine. The possibility of future membership was not raised with these countries; nevertheless, the prevailing opinion has been, all along, that of these countries, Moldova and Ukraine stand the highest chance of becoming EU members, especially when comparing their situation with that of Turkey, who has been trying to accede for several decades.[25]

The EaP is based on common values and interests, and aims to deepen the political and economic relations between the parties involved. The most important achievements, within the framework of the EaP, have been the Association Agreements and the Deep and Comprehensive Free Trade Agreement that the EU signed, in 2014, with Georgia, Moldova, and Ukraine, and visa liberalisation with these countries (2014 for Moldova, 2017 for Georgia and Ukraine).[26] The Agreements' goal is to strengthen the EU and its partner's bonds even more, and to align the Eastern states' rules and legislation with those of the EU.

The Russia-Ukraine war has influenced and accelerated the western-oriented development of the European Neighbourhood countries, who now view EU accession as essential for their security, as well as their economic growth.[27] Consequently, Ukraine presented its application for EU membership on 28.02.2022, just four days after the start of the war, and Georgia and Moldova soon followed its lead, applying on 03.03.2022. On June, 17, the Commission delivered its Opinion, and on June, 23, the European Parliament granted candidate status to Moldova and Ukraine, whilst Georgia's candidacy was conditioned by the addressing of a series of priorities. These developments might have the consequence of the EaP framework becoming unnecessary, EU's relations with its Eastern neighbours becoming typical relations between the Union and candidates for membership.[28]

4.1. Georgia

Following the breakdown of the USSR, Georgia reoriented itself toward the west, accentuating its European identity as part of the recovery and development process it underwent, and deciding that one of its main foreign policy objectives should be integration with the west and cooperation with European Union.[29] An important moment in this process was the Rose Revolution, in 2003, which further pushed Georgia away from the Soviet political legacy and towards the west, a move that coincided with the EU's increased openness towards eastern, formerly Soviet states. Over time, initiatives such as the Eastern Partnership and Association Agreement, the Deep and Comprehensive Free Trade Area, the visa liberalisation scheme, and most recently, the application for EU membership have brought Georgia closer than ever to the fulfilment of its western aspirations.

The EU and Georgia's first legal instrument of cooperation was the Partnership and Cooperation Agreement (PCA)[30], signed by the European Union, its Member States, and Georgia on 22.04.1996. The PCA entered into

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[22] Art. 5 and art. 7 of Regulation no. 1638/2006 laying down general provisions establishing an ENPI.

[23] Regulation no. 232/2014 establishing an ENI.

[24] Art. 4.2 of Regulation no. 232/2014 establishing an ENI.

[25] L. Mkrtchyan, *op. cit.,* p. 15.

[26] O. Tkachuk, *Three decades of relations between the European Union and Moldova – from cooperation to the membership perspective*, in Rocznik Integracji Europejskiej, Uniwersytet Adama Mickiewicza, no. 16/2022, p. 224.

[27] P. Klimkin, A. Umland, *How to Progress Ukraine's Western Integration as a Prelude to Accession to the EU and NATO*, in UI Paper, Swedish Institute of International Affairs, no. 4/May 2020, p. 3.

[28] W. Kononczuk, *No Stable EU Without a New Eastern Enlargement*, Stockholm Centre for Eastern European Studies, Guest Commentary no. 15/10.11.2022, p. 1.

[29] The European Union has always been one of the main economic partners of Georgia, following the dissolution of the USSR. For more, see O. Çalışkan, *An Analysis of Georgia-EU Relations through the Expectation of Candidacy Status*, Sosyolojik Bağlam Dergisi, 3(3), December 2022, p. 267.

[30] Available at *https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A21999A0804%2801%29*.

force on 1 July 1999 and was applicable for an initial period of ten years, followed by an automatic yearly renewal, provided that neither party notified the other with their intention to denounce the PCA six months before its expiry.

The preamble of the PCA stated that the parties „convinced of the paramount importance of the rule of law and respect for human rights, particularly those of persons belonging to minorities, the establishment of a multiparty system with free and democratic elections and economic liberalization aimed at setting up a market economy, and recognizing the efforts of Georgia to create political and economic systems based on these principles", and its „General Principles" were defined in art. 2 as including „Respect for democracy, principles of international law and human rights as defined in particular in the United Nations Charter, the Helsinki Final Act and the Charter of Paris for a New Europe, as well as the principles of market economy, including those enunciated in the documents of the CSCE Bonn Conference". Article 3 underlined the future necessity for the independent states that had emerged as a consequence of the dissolution of the USSR to cooperate with each other „in compliance with the principles of the Helsinki Final Act and with international law and in the spirit of good neighbourly relations".

The PCA provided that, in case one of the parties had failed to fulfil its obligations as provided in the agreement, the other party – after informing the Cooperation Council created under art. 80 – could take whatever appropriate measures it deemed necessary and, in cases of emergency (such as violations of the aforementioned principles from art. 2), could even do so without informing the Cooperation Council, up to and including the suspension of the PCA's application. This kind of conditionality clause regarding the respect of human rights had been previously used in the European Community's Europe Agreements with Bulgaria and Romania, from 1993, that had itself replaced the similar clause used in the 1992 Europe Agreements with the Baltic states.[31] The main – and crucial – difference between the two was that, in the case of Baltic clause, the parties were entitled to suspend the application of the Agreement in case of grave infringements of the essential provisions, whilst in the later version of the clause – as used in the EU and Georgia PCA – it became permitted to suspend the application of the Agreement for any infringements, as long as the appropriate forums are consulted (and without any consultation at all in the case of serious infringements).

Georgia was invited to participate in the European Neighbourhood Policy (ENP) on 14.06.2004. The ENP did not replace the PCA, but rather added to it by expanding EU-Georgia economic relations and integration, including by allowing Georgia to participate in the EU's internal market. The ENP also made numerous mentions of the shared values of the EU and its neighbours, and the central role these values must play in their cooperation. Consequently, these countries are subjected to conditionality clauses, the Commission specifying that, for states in the Southern Caucasus, „the EU should consider the possibility of developing Action Plans with these countries in the future on the basis of their individual merits. With this in view, the Commission will report to the Council on progress made by each country with respect to the strengthening of democracy, the rule of law and respect for human rights". The bilateral Action Plan that was subsequently elaborated in order to govern EU-Georgian relation was used to implement the ENP and identified priorities such as reforming the judicial system, in order to strengthen the rule of law, reforming the penitentiary system, strengthening democratic institutions and safeguarding fundamental human rights and freedoms.[32]

Negotiations to include Georgia in the EaP began in July 2010, and the final text of the EU and Georgia Association Agreement was signed on 27.06.2014, after being reached during the third Eastern Partnership Summit, in November 2013, and entered into force on July 1, 2016.[33]

Initially, Georgia planned to apply for EU membership, but, in the context of the Ukraine-Russia war, and Ukraine's application on 28.02.2022, which called for an accelerated accession process, Georgia submitted its own letter of application on 03.03.2022, along with Moldova.

Following an expedited procedure and consideration, the Commission expressed its Opinion on 17.06.2022, stating that Ukraine, Moldova, and Georgia have reason to hope for membership. Unlike Ukraine and Moldova, Georgia did not receive an immediate acception of its candidacy, with the Commission saying that some aspects would first have to be prioritised and addressed by Georgia; the Commission has established 12 pre-conditions. Whilst this separation from Ukraine and Moldova's road to membership caused disappointment at a national

[31] G. Gabrichidze, *op. cit.*, p. 88.

[32] EU and Georgia Action Plan https://www.eeas.europa.eu/sites/default/files/georgia_enp_ap_final_en_0.pdf

[33] Georgia has been called „the most progressive of the trio, Georgia, Moldova, and Ukraine, regarding the implementation of the Association Agreements and reforms that brought its legislation closer to that of the EU". See Orçun Çalışkan, *op.cit.*, p. 267.

level, Georgia's outlook is still a positive one, especially considering that, until relatively recently, membership of the EU had not been seen as a realistic possibility.[34] The 12 pre-conditions suggested by the Commission regard the matter of political polarisation, independence of state institutions (rule of law), judicial reforms, fight against corruption, combating „oligarchisation"[35], fight against organised crime, media freedom and independence, protection of vulnerable minorities, gender equality, compliance with the European Court of Human Rights' rulings, involvement of civil society in the decision-making process, and independent and transparent nomination of public defenders[36].

It has been suggested that the reason behind this differentiated approach is the regression registered by Georgia in some key areas, such as a certain level of „democratic backsliding", a worsening of institutional independence, political polarisation, and suppression of opposition media. Another issue that has been identified is that of vulnerable minority treatment; a conditionality clause introduced with the Visa liberalisation plan, agreed upon in 2013, regarded the introduction of an anti-discrimination law, which has proven to be a controversial topic. Despite it being adopted, the fact that it was met with criticism and opposition can put into question whether its implementation will be effective and long-term.[37] Additionally, the European External Action Service published a report, on 13 August 2022, showing that Georgia's alignment with the EU has declined from 62% in 2020 to 42% in 2022;[38] at the same time, the „share of Georgians who think Georgia is a democracy declined to the lowest level in a decade in 2022".[39] Considering this pre-existent declining trend, it will be challenging for it to catch up in all these areas of interest, so its candidacy's status might remain unresolved for a longer time.

4.2. Moldova

Moldova's relations with the European Union took shape, as in the case of other post-Soviet states, during the 90s, when the EU looked to the east and the opportunity of future enlargements. Moldova and the EU signed the Partnership and Cooperation Agreement (PCA), a bilateral agreement concluded for a term of 10 years, on 28.11.1994, and it entered into force on 01.07.1998. Subsequently, the PCA constituted the legal and institutional framework for the two parties' cooperation, until 2004, when it was replaced as a basis for cooperation by the European Neighbourhood Policy. Following the signing of the PCA, the Moldovan Parliament approved a Foreign Policy Concept, in February 1995, stating that „one of the main and prospective foreign policy goals of the Republic of Moldova is the gradual entry into the European Union. The first step in this direction was the signing of the PCA, and in December 1996, the newly elected President of the state addressed a letter to the President of the European Commission, expressing Moldova's desire to become an associated country by 2000, a foreign policy strategy that was further confirmed in March 1999, when the Prime Minister of Moldova initiated a European-leaning programme whose slogan was „Rule of law, economic revival, European integration".[40] Moldova joined the Stability Pact for South-Eastern Europe, which offered partner states assistance in order to foster cooperation and friendly relations, with a goal to remove trade barriers. The western-oriented foreign policy was furthered by Moldova creating, in December 2002, the National Commission for European Integration.

Moldova's inclusion in the ENP was welcomed by the state, who considered the ENP important for its internal reform and for connecting it to the EU's Member States. On the other side, the EU considered that a state close to the EU's borders, but that had an internal territorial dispute (as a consequence of losing control over the secessionist, Russia-supported Transnistria province)[41] represented a particular point of interest, in terms of European security, with the Union wanting to help Moldova foster internal stability, strong institutions,

[34] Orçun Çalışkan, *op.cit.*, p. 264.

[35] The exact meaning of this concept is debated, and this pre-condition might prove to be the hardest to fulfil.

[36] https://www.eeas.europa.eu/delegations/georgia/twelve-priorities_en?s=221

[37] Orçun Çalışkan, *op. cit.*, p. 266.

[38] Another matter that will likely prove to be a long-term obstacle in Georgia's EU accession is that of Abkhazia and South Ossetia, breakaway regions that represent more than 20% of its territory. The EU's current stance is that it can't accept the accession of states which have territorial disputes or conflicts.

[39] Orçun Çalışkan, *op. cit.*, p. 269.

[40] O. Tkachuk, *op. cit.*, p. 225.

[41] During the Council meeting on 14.06.2004, support for Moldova was reaffirmed, with the Council calling on both parties of the Transnistrian conflict to resolve its dispute while recognising Moldova's territorial integrity.

democratic values, respect for human rights, and the rule of law. The EU also underlined the importance of Moldova-Ukraine cooperation on the matter of common border management.[42]

Following the dissolution of the USSR, Moldova joined the World Customs Organisation in 1994 (October 28, 1994), has been a member of the World Trade Organisation (WTO) since 26 July 2001, and of the Pan-Euro-Med Convention since 1 December 2016. At present, the EU is Moldova's biggest trading partner, accounting for over 50% of Moldova's trade. The main exports from the EU to Moldova are mineral products, and machinery and appliances, whilst the main imports are electrical machinery and appliances, base metals and metal products, and vegetable products. Exports from the EU to Moldova grew from 2020 to 2021 by 22%, while imports increased by 13.4% within that same time period. Moldova was the first country in the region to obtain visa liberalisation for its citizens, on 28.04.2014, with over 2,5 million Moldovans visiting the EU without a visa, and numerous students and researchers have benefited from the country's participation in the Erasmus+ Programme.

Having been a member of the EU's ENP and EaP since their respective foundation, the strengthening cooperation between Moldova and the Union culminated with the conclusion of the EU and Moldova Association Agreement on 27.06.2014, with it entering into force on 1 July 2016; the Agreement introduces a preferential trade regime, and contains numerous provisions on matters such as taxation, and customs and trade facilitation, regarding goods and services. In 2022, the two partners published a new Association Agenda for 2021-2027, meant to „consolidate their partnership by agreeing on a set of priorities for the period 2021–2027 for the joint work towards achieving the objectives of political association and economic integration as set out in the Agreement". The EU and Moldova Association Agreement creates a preferential trade regime between the two parties, called the Deep and Comprehensive Free Trade Area (DCFTA), which requires Moldova to align with EU legislation on matters related to trade and which involves the reduction or even elimination of tariffs for numerous goods, the development of the services market, and the rise in investments.

Along with Georgia, Moldova applied for EU candidacy on 03.03.2022, in the context of the Russia-Ukraine war, and was granted candidate status on 23.06.2022, along with Ukraine. Considering Moldova's relations with the EU were already more advanced in some aspects, such as the earlier visa liberalisation, the fact that it has very strong ties with an EU Member State (Romania), and the fact that it has a relatively small population, its integration might be a smoother process than in the case of Georgia and Ukraine. However, Moldova's main obstacle in joining the EU is likely to be Transnistria, a breakaway territory, similar to Georgia's Abkhazia and South Ossetia, that is no longer under *de facto* control of Moldova. Considering the EU's reluctance to welcome a member who has territorial disputes, it is unlikely that Moldova will join the Union before settling this matter, whether by reaching an agreement regarding Transnistria's autonomy, or by regaining control over it.

4.3. Ukraine

The DCFTA intended to encourage trade in goods and services between the two parties by gradually cutting tariffs and pushing Ukraine to adapt its national legislation regarding specific agricultural and industrial matters to the EU's notably high standards, thus allowing for Ukrainian products to be easily imported in the EU and traded throughout the internal market. This regime was applied provisionally starting on 01.01.2016, and fully came into force on 01.09.2017. As part of the Association Agreement, Ukraine committed to making all necessary efforts to integrate with the Union's internal market, which entails a process of harmonisation, the same process that Member States comply with post-accession. This is part of the reason why association agreements are a helpful step in preparing third countries for a future accession, where possible and desired. However, the conclusion of the EU and Ukraine Association Agreement, in 2014, did not lead to a formal commitment from the EU regarding Ukraine's accession, despite such agreements traditionally representing a first step toward that goal. Until 2022, the attitude among EU institutions had been mixed: the European Parliament had demanded for the EU to formally open the possibility to Ukraine, but the Council and Commission, despite not rejecting it outright, also failed to commit to such an endeavour. Whilst this lack of commitment is partly justified by the fact that the three countries do not adequately fulfil the Copenhagen criteria, geopolitical factors, such as Russia's proximity, as well as a perceived lack of benefit to the EU have played a role in the latter's reticence to

[42] O. Tkachuk, *op. cit.*, p. 226.

award the Eastern partners the same opportunities it did the Western Balkan ones.[43] In 2020, Ukraine's prospects for accession were assessed as „gloomy", considering the political context and the world-altering pandemic.

Following the start of the Russia-Ukraine war, on 24.02.2022, the EU banned the import of good originating in Russian-occupied territories, such as Crimea, Donetsk, and Lugansk, as well as other areas not under Ukrainian control. Additionally, the EU restricted the movement of capital and services from said areas.[44] The war prompted the EU to deepen its relationship with Ukraine, permitting its accession, on 01.10.2022, to the Common Transit Convention[45] and the Convention on Simplification of Formalities in Trade in Goods[46]. the EU and its Member States have offered Ukraine assistance in several areas: border management, support for the health care system of both Ukraine and the states hosting Ukrainian refugees, protection of children, refugee access to education, access to temporary accommodation and housing, access to the labour market. On 24.05.2022 a regulation was adopted, at EU level, allowing for the temporary liberalisation of trade, suspending various tariffs, anti-dumping duties on imports from Ukraine, and encouraging the flow of goods between the two.

All these measures effectively mean that Ukraine has had with the EU, for over a year now, a relationship that is closer to that between EU Member States, than between the EU and partner countries. Whilst there have been some dissatisfactions, on the part of Member States, related to the lower prices of Ukrainian agricultural products, which create a disadvantage for EU-grown products, part of the explanation is that Ukraine is not currently beholden to the exact same rules regarding the health and safety standards that must be followed. It stands to reason that, should the Ukraine follow these rules, as it would once it became a member, the matter of the pricing would be resolved. In short, the EU has had the opportunity to experience a window into what a future Ukraine membership could look like, and taking into account the grave security and humanitarian issues at play, we could surmise that a peaceful membership would not present any particular problems, and would lead to a successful integration. However, it is certain that serious accession negotiations will not begin until the conflict has been finalised and Ukraine enjoys peace and stability once again, and the possibility to rebuild.

5. Conclusions

The process of enlargement of the EU has undergone several changes throughout the years, with new conditions and procedures being implemented, new policies regarding third countries being adopted, and Member State involvement fluctuating in prevalence. One constant, since the foundation of the European Communities and until the present, has been that of the geopolitical motivations behind the decision welcome new members. From France's repeated rejection of the UK's applications for membership (a state who, politically and economically, was fully aligned to the European Communities' standards and rules at the moment of applying), to the rapid accession of Greece, a state whose candidacy had been negatively assessed by the Commission, the decades-long candidacy of Turkey, and to the slow progress toward accession of the Western Balkans, the European Union has always looked first and foremost to the benefits that it and its Member States would derive from enlargement, and only second to the technical aspects of such an enlargement. Where the Union and its Members estimated that there were advantages to be gained, whether related to European security or economic growth, enthusiastic steps were taken to encourage the potential candidates, and to help them align to the Union's high standards and rules. Conversely, states whose internal and foreign policies looked difficult to harmonise with the EU's were invited to cooperate, but were not given the perspective of membership.

This approach seems to have been turned on its head by the current situation in Ukraine. After decades of stalling on the possibility of Ukraine, Moldova, and Georgia's accession, the EU has moved at an unusually fast pace in order to receive and approve their candidacies, in Ukraine and Moldova's case, or to draw up a list of

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[43] P. Klimkin, A. Umland, *op.cit.*, p. 6.

[44] *https://taxation-customs.ec.europa.eu/customs-4/international-affairs/third-countries/ukraine_en*.

[45] „The convention provides the legal framework setting out the obligations on traders and customs authorities for goods in customs transit from one contracting party to another. It covers the EU-27 (as one contracting party) and 8 common transit countries (Iceland, North Macedonia, Norway, Serbia, Switzerland, Turkey, Ukraine and the United Kingdom) as separate contracting parties."

[46] Art. 1: „This Convention lays down measures to simplify formalities in trade in goods between the Community and the EFTA countries, as well as between the EFTA countries themselves, in particular by introducing a single administrative document (hereinafter referred to as the single document) to be used for any procedure at export and import and for a common transit procedure applicable to trade between the Contracting Parties (hereinafter referred to as transit), regardless of the kind and origin of the goods." (*https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:21987A0522(01)&from=EN*).

clear pre-requisites, in Georgia's. This, despite – and because of – the fact that the current geopolitical situation and the Russia-Ukraine put the Eastern partners of the EU in a very delicate, precarious position, and raise important security and stability issues. Whilst the rhythm at which the accession process of these countries will move has yet to be decided, the fact that the EU has made a decision that seems to prioritise the general welfare of all Europe, including its Eastern partners, rather than just that of its own Member States, could mark a new chapter in the European Union's foreign policy.

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DRONES AND THE ETHICAL POLITICS OF PUBLIC MONITORING

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Abstract

This paper aims to analyze, from an ethical and legal point of view, the way in which drones are implemented and used for video monitoring. As such, we will focus on how drones have changed the legal landscape regarding public monitoring by state actors in situations regarding public safety, administrative and judicial tasks, but also during special events.

As such, the paper will evaluate the legal ramifications and instruments from EU and USA while comparing them to practices handled by the People's Republic of China. Furthermore, we will consider the ethical use of drones in conducting state activities. We will scrutinize the methods used by state agents in handling their tasks with drones, by comparing legal systems, using secondary data analysis and by having descriptive and correlational quantitative research.

The article also aims to identify if enough practice (administrative and legal) has been conducted to ensure that data protection has been safeguarded and whether interstate actions could pose a threat to the rule of law. In essence, we will interpret important case law from USA and Europe regarding the usage of cameras and other video monitoring devices, stationary and mobile, and also to figure out if its applicable to drones. If said legislation or legal practice exists and if not, we will spell out if its ethical or not.

Keywords: *drones, ethics, international law, public monitoring, European law.*

1. Introduction

Drones or unmanned aerial systems are a common sight in some states, but due to legal constraints have not been able to fly unrestricted. These restrictions have been in place to safeguard public health and property and will remain in place for a period of time until technology ensures an automatic response most issues.

The need for drones as mobile surveillance devices has been noted in the USA as early as the year 2013[1] when local legislatures adopted specific norms in order to allow law enforcement agencies access to drones for long range monitoring of public events, traffic or to enforce court mandates.

Other authors have noted that drone surveillance will ensure efficient means towards protecting remote and fragile environments. Unmanned Aerial Vehicles (UAV) allowed researchers and analysts to collect data in Antarctica and other special protected zones (Canada, New Zealand and others) without having to venture in hard to reach zones while gathering important data regarding climate changes[2].

Urban monitoring is important for state authorities and drones offer an elegant and cost-efficient solution for gathering information on traffic volume, observing accidents and finding potential law violations, yet the technology has yet to efficiently identify all participants and their goods[3].

Some authors consider that smart traffic monitoring is a key component in lowering car accidents and that a multi-UAV-network could decrease accidents by using drones to monitor the flow of traffic as to check for violations or to analyze a possibile accident based on the network data. The authors identified that Saudi Arabia

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[1] G. McNeal, *Drones and aerial surveillance: Considerantions for legislatures*, Brookings Institute Report, November 2014.

[2] B. Bollard, A. Doshi *et al.*, *Drone technology for monitoring protected areas in remote and fragile environments*, Drones, vol. 6, no. 2, pp. 1-11.

[3] E.V. Butilă, R.G. Boboc, *Urban Traffic Monitoring and Analysis Using Unmanned Aerial Vehicles (UAVs): A Systematic Literature Review*, Remote Sens, 2022, vol. 14, 620, pp. 1-28.

has started using drones for traffic management and preliminary checks showcased that unmanned vehicles lowered by a small percentage the number of law violations[4].

We consider that such by using a UAV-network to monitor potential violations could decrease the number of incidents that happen in the European Union, seeing as how the European Commission released a study, in 2023[5], that highlighted a growing number of accidents in the EU, where Romania has been noted as the deadliest of the Member States.

However, ethics regarding the usage of unmanned aerial vehicles have led some authors[6] to study the usage of drones over groups of people and noticed that gathering information could be a privacy violation since it lacks a proper mean to obtain consent from the person or groups of persons that it flies over. Furthermore, it was considered that the psychological well-being of people could be affected since some groups did not know if the drones were used for their well-being or to illicitly spy on them so they engaged in conspiracy theories.

As such, we will focus on how drones can be used ethically in situations seeing as how starting with the year 2023 these vehicles have started being included in state and economical activities. Up to this point in history, drones had a certain usage in military operations as efficient intelligence gathering tools[7] and ever since the Nagorno-Karabah and Ukrainian-Russian conflicts, these vehicles started being used during armed conflicts as main means and methods of warfare.

2. Analysis of the way of implementation from a legal point of view

The United States of America have been a major state in how the usage of drones have been handled by state authorities seeing as how 27% of their police agencies[8] acquired at least one surveillance drone and 70% of the public authorities that have used drones were law enforcement agencies. Missions conducted by the law enforcement agencies had objectives such as search and rescue, crow monitoring and surveillance, traffic collision reconstruction, crime scene analysis and reconstruction, investigation of active shooters incidents.

The European Union has yet to adopt drones in such great numbers as most acquisition projects regarding drone implementation are scheduled to be conducted by the end of the year 2027[9] and some states, such as France, have had legal issues with how data protection has been handled with the usage of drones. As such, we mention that the Council of State has ruled that the Paris Police Prefecture is not allowed to use drones to monitor public demonstrations, both traditionally and with artificial intelligence blurring[10].

However, other states such as Italy, Greece and Spain have been using drones to monitor borders and the flow of migrants that are in transit to the EU and to try and either help those in need or to coordinate with other states to take them back[11]. Some[12] argued that the usage of drones similar situations could be seen as disproportionate and unethical since authorities deny access to asylum rights while other cases noted that the information sent from an EU state to a tertiary state allowed persons to be captured by other interested parties and sold into slavery.

These types of actions may violate some core principles in how drones can be used seeing as how in the Riga Declaration on remotely piloted aircraft[13] it was considered that: *„Drones also pose potential security risks. The design of drones can and should take into account those risks by using methods such as cyber-defence or geofencing. However, the malicious use of drones cannot be entirely prevented by design or operational restrictions. It is the task of the national police and justice systems to address those risks."*

Despite the Declaration not being legally-binding, the core principle of preventing abuses is the attribute of state authorities, meaning they have to also conduct proper investigations to how these operations have been

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[4] N.A. Khan, N.Z. Jhanjhi *et al.*, *Smart traffic monitoring system using Unmanned Aerial Vehicles (UAVs)*, Computer Communications, vol. 157, May 2020, pp. 434-443.

[5] According to the European Commission study that can be accessed at *https://ec.europa.eu/commission/presscorner/detail/ro/ip_23_953*, accessed at 23.03.2023.

[6] A. Kannan, P. Ranganathan, Sminu T.V., *The Ethics of Utilising Drones in Wildlife Conservation and Monitoring*, Conservation India, 27.07.2020. C. Sandbook, *The social implications of using drones for biodiversity conservation*, Ambio, vol. 44, 2015, pp. 636-647.

[7] A. Hopkins, *The Ethical Debate on Drones*, Augustana Digital Commons, 2017, pp. 1-17.

[8] C.J. Smith, *How police departments are using drones*, Adorama, 17.06.2022.

[9] Statewatch, *„Next generation" armed drone with police potential tipped for EU financial backing*, Statewatch, 04.10.2021.

[10] *Idem*, *France: Court bans drone surveillance of demonstrations*, Statewatch, 13.01.2021.

[11] P. Burt, Jo Frew, *Crossing a line - The use of drones to control borders*, Drone Wars UK, December 2020, pp. 13-15.

[12] *Idem*, p. 19.

[13] Riga Declaration on remotely piloted aircraft (Drones) - *Framing The Future Of Aviation*, 06.03.2015 as published on the website *https://eu2015.lv/images/news/2016_03_06_RPAS_Riga_Declaration.pdf*, accessed at 24.03.2023.

conducted and how the data transmitted from the EU to non-EU states has been sent. We consider this a very concerning aspect seeing as how the European Court of Justice has stated in the *Schrems* case[14] that in the absence of an adequacy decision, such transfer may take place only if the personal data exporter established in the EU has provided appropriate safeguards, which may arise, in particular, from standard data protection clauses adopted by the Commission, and if data subjects have enforceable rights and effective legal remedies.

Regarding the level of protection required in respect of such a transfer, the Court holds that the requirements laid down for such purposes by the GDPR concerning appropriate safeguards, enforceable rights and effective legal remedies must be interpreted as meaning that data subjects whose personal data are transferred to a third country pursuant to standard data protection clauses must be afforded a level of protection essentially equivalent to that guaranteed within the EU by the GDPR, read in the light of the Charter.

In those circumstances, the Court specifies that the assessment of that level of protection must take into consideration both the contractual clauses agreed between the data exporter established in the EU and the recipient of the transfer established in the third country concerned and, as regards any access by the public authorities of that third country to the data transferred, the relevant aspects of the legal system of that third country.

The European Court of Justice outlines that data protection towards third parties has to comply to the GDPR regulation and as such any information must be only transferred to states that ensure protection of this data. However, the lack of proper oversight of how data transfers are being handled and how drones gather said data could be considered a misuse and must be cross-examined as such[15].

It's important to note that the EU must identify the proper means to conduct drone operations seeing as how the European Commission considers unmanned aerial vehicles an important part of the future smart and sustainable ecosystem of European transport of goods and services[16]. The Drone Strategy 2.0 envisions network security for drones as to combat malicious use and to protect unmanned aerial vehicles from hacks.

However, there are more steps needed as to ensure that the strategy can be implemented since it only outlines proper means for authorities to tackle drone misuse, as such we recall that any drone handler has to abide by the CJEU decision in the *Rynes* case[17] which states that video surveillance by individuals that is carried out, even partially, in a public space is subject to the EU's Data Protection Directive, even if the camera capturing images of people is directed outwards from the private setting of the person processing the data.

The EU has been keen on regulating the usage of how drones gather information and as such has integrated unmanned aerial vehicles in its strategy regarding artificial intelligence in Europe as part of a system that display intelligent behaviour by analyzing their environment and taking actions – with some degree of autonomy – to achieve specific goals[18].

The European Commission further emphasizes that human oversight of how data is being collected and handled will be a core principle for any technology that has a data stream that requires a built-in network[19]. As such, the autonomous behaviour of certain AI systems during its life cycle may entail important product changes having an impact on safety, which may require a new risk assessment. In addition, human oversight from the product design and throughout the life-cycle of the AI products and systems may be needed as a safeguard.

Union product safety legislation could provide for specific requirements addressing the risks to safety of faulty data at the design stage as well as mechanisms to ensure that quality of data is maintained throughout the use of the AI products and systems. The opacity of systems based on algorithms could be addressed through transparency requirements.

Furthermore, the European Commission has noted in its safety and liability implications of artificial intelligence report[20] that the operation of some autonomous AI devices and services could have a specific risk

[14] CJEU Judgment in Case C-311/18, *Data Protection Commissioner v. Facebook Ireland and Maximillian Schrems*.

[15] S. Fox, *Policing: Monitoring, investigating and prosecuting 'Drones'*, Brill Academic Publishers, 01.03.2019, pp. 1-33.

[16] European Commission, Communication from the commission to the European parliament, the council, the European economic and social committee and the committee of the regions - A Drone Strategy 2.0 for a Smart and Sustainable Unmanned Aircraft Eco-System in Europe', Brussels, 29.11.2022 COM(2022) 652 final.

[17] CJEU Judgment of the Court in case C-212/13, *František Ryneš v. Úřad pro ochranu osobních údajů*, 11.12.2014.

[18] European Commission, Communication from the Commission, Artificial Intelligence for Europe, Brussels, 25.04.2018, COM(2018) 237 final, p. 1.

[19] European Commission, White paper on artificial intelligence - a European approach to excellence and trust Brussels, 19.02.2020 COM(2020) 65 final, pp. 20-22.

[20] European Commission, The opacity of systems based on algorithms could be addressed through transparency requirements, Brussels, 19.02.2020 COM(2020) 64 final.

profile in terms of liability, because they may cause significant harm to important legal interests like life, health and property, and expose the public at large to risks. This could mainly concern AI devices that move in public spaces (*e.g.*, fully autonomous vehicles, drones and package delivery robots) or AI-based services with similar risks (*e.g.*, traffic management services guiding or controlling vehicles or management of power distribution).

The challenges of autonomy and opacity to national tort laws could be addressed following a risk-based approach. Strict liability schemes could ensure that whenever that risk materializes, the victim is compensated regardless of fault. The impact of choosing who should be strictly liable for such operations on the development and uptake of AI would need to be carefully assessed and a risk-based approach be considered. Despite these warnings, the EU has yet to adopt a regulation on artificial intelligence seeing as how the proposal is still being worked on[21] and its currently entitled Artificial Intelligence Act.

The proposal for regulation does not identify drones or unmanned vehicles in a direct approach, however it covers all devices and vehicles that have autonomous or artificial intelligence capabilities, while also regulating biometric data and how high-risk systems can be sold by specialized vendors.

Drones are regulated in the European Union and European Economic Area with the help of the European Union Aviation Agency which has helped lawmakers adopt a common core of regulatory norms for how unmanned vehicles are allowed to fly[22]. These regulations have strict data security provisions and as such both users, manufactures and importers have to abide by the ethical standards on how cameras and other data gathering tools are being used and force the users to learn and understand basic concepts of data and privacy protection.

Furthermore, automated processing of information has to be handled by the General Data Protection Regulation[23] for all devices that are developed in the EU or imported from third party states. This translates to an obligation to all users to fully understand what types of information their device gathers and what should be done with the p

In other states, such as the United States of America or the People's Republic of China, public monitoring has been conducted in various ways, depending on the legal instruments applicable to said geographical area.

In the United States of America only a small number of states have adopted specific regulations regarding how drones can capture, store and use information gathered with its optics or other means of data gathering tools[24]. Most of the states from USA prohibit the gathering of data from other persons without their consent, while other states also limit public authorities in obtaining data with the use of drones without a mandate.

Data gathered with the usage of various drones showcases different types of information and metrics meaning that some unmanned vehicles gather a data of a higher quality than others and can even analyze the information in real time or can predict certain actions of a person or group[25]. The metrics obtained show that it is possible to efficiently integrate state-of-the-art artificial intelligence models in a drone as new functionalities, embedded in the command and control device used to pilot the drone. In situations such as the COVID-19 pandemic, where strict control of capacity was needed, or other more common situations where large areas need to be kept within capacity limits, we have shown the possibility to easily add existing and improved deep learning detection models in the command and control of the drone for helping law enforcement agents.

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[21] For reference, the proposal can be accessed at *https://digital-strategy.ec.europa.eu/en/library/proposal-regulation-laying-down-harmonised-rules-artificial-intelligence*.

[22] For reference, Regulation (EU) 2018/1139 of the European Parliament and of the Council of 04.07.2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) no. 2111/2005, (EC) no. 1008/2008, (EU) no. 996/2010, (EU) no. 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) no. 552/2004 and (EC) no. 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) no. 3922/91 (text with EEA relevance), published in OJ L 212, 22.08.2018; Commission Implementing Regulation (EU) 2019/947 of 24.05.2019 on the rules and procedures for the operation of unmanned aircraft (text with EEA relevance), published in OJ L 152, 11.06.2019 and Commission Delegated Regulation (EU) 2019/945 of 12.03.2019 on unmanned aircraft systems and on third-country operators of unmanned aircraft systems published in OJ L 152, 11.06.2019.

[23] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27.04.2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (text with EEA relevance), published in OJ L 119, 04.05.2016.

[24] As seen on the website *https://www.findlaw.com/consumer/consumer-transactions/drone-laws-by-state.html*, accessed at 28.03.2023.

[25] P. Royo, A. Asenjo, J. Trujillo *et al.*, *Enhancing Drones for Law Enforcement and Capacity Monitoring at Open Large Events*, Drones, vol. 6, no. 11, pp. 1-22.

In the case of the People's Republic of China, most regulations regarding the usage of drones are similar to those of the European Union or the United States of America[26], meaning we are in a standardized environment on how and where unmanned vehicles can operate, the data gathered while operated (flight data, telemetries and others) are uploaded directly in the civil aviation authority database.

Such situations have sparked a debate on whether or not lawmakers should ban Chinese drone technology because of the information and lack of proper control mechanisms on where and how it is stored. While the EU has yet to tackle the subject in a broad sense, some states, such as Lithuania[27], have started restricting drone imports from certain states that do not uphold a proper data security code of conduct.

These types of legislative measures have been firstly registered in the USA where a Countering CCP Drone Act was proposed in Congress[28] and it focuses on restricting certain types of drones and manufacturers from distributing said goods in shops.

These measures were adopted since a lot of data obtained with goods built in certain states who are known to disregard basic data protection rights seeing as how a lot of data was gathered during a crisis and said data was then sent overseas.

We consider that the EU should either adopt better means in protecting its citizens from unwanted spying as the issues that arose from the Pegasus spyware scandal have not been fully handled by states and the Commission. The European Parliament, in its study of the phenomenon, found that «*On 19 April 2022, the EU Commission stated that it will not investigate Member States that used Pegasus to spy on politicians, journalists and other individuals, as „this is really something for the national authorities", and that the EU commission cannot deal with national security issues: people should seek justice at national courts' level*»[29].

The Pegasus spyware was used illicitly, as the European Data Protection Supervisor outlined[30], that a ban on the development and deployment of intrusive software should be adopted by the EU and as such, we consider a similar approach should be implemented to drones which do not offer a protection of intrusiveness.

3. Study on the ethical use of drones

The ethical usage of drones relies on how efficient artificial intelligence and other automated data processing software and devices interact. As such, we would like to point out a few situations that could be applicable to drones.

One such situation is the capacity of a video mounted on an unmanned aerial vehicle to falsely identify a target and to release a wrongful statement regarding the target's activity. For example, in China, a picture of the chairwoman of Gree Electric Appliances had her face displayed on a huge screen erected along a street in the port city of Ningbo that displays images of people caught jaywalking by surveillance cameras. The artificial software used by the traffic police erred in capturing Dong's image from an advertisement on the side of a moving bus[31]. This led to the police issuing a wrongful accusation and fined the person for unlawful conduct. It was later cleared up.

A similar issue was noted in the United Kingdom where women with darker skin are more than twice as likely to be told their photos fail UK passport rules when they submit them online when compared to lighter-skinned men, according to an investigation. A black student, said she was wrongly told her mouth looked open each time she uploaded five different photos to the government website. This shows how *„systemic racism"* can spread. The facial recognition software was used by the Home Office of the British government to help users get their passports more quickly. Additionally, another person, who describes her complexion as dark-skinned, told

[26] J. Ma Eiger, *Drone regulations in China,* Lexology, 19.01.2021; L. Hao, *Regulations of UAS in China*, ICAO, 2020, presentation accesed at *https://www.icao.int/Meetings/Remotetech/Presentations/Day2_Session%206_%20RPAS%20Stream_Liu%20Hao.pdf* at 28.03.2023.

[27] B. Crumley, *Lithuania's new public IT procurement ban covers drones from China, Russian, and Belarus equipment,* DroneDj, 05.12.2022.

[28] Legislative proposal H.R. 6572, the text can be read at *https://www.congress.gov/bill/117th-congress/house-bill/6572?s=1&r=2*, accessed at 28.03.2023. G. Corn, *The legal aspects of banning Chinese drone technology*, Lawfare, 04.02.2021.

[29] O. Marzocchi, M. Mazzini, *Pegasus and surveillance spyware*, Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies PE 732.268 - May 2022, p. 15.

[30] *Idem*, p. 17.

[31] According to the AI incident database website, editor Sean McGregor, accessed at 28.03.2023 at *https://incidentdatabase.ai/cite/36/#r595*.

investigators that her photos have been judged to be poor quality which included *„there are reflections on your face"* and *„your image and the background are difficult to tell apart."*[32]

Furthermore, Human Rights Watch points toward a possibility where police could use unmanned devices in order to discriminate targets based on certain data that was uploaded to the devices database[33]. This was mostly recorded in China where the police use drones to identify the Muslim minority and use specific operations against them.

An ethical and legal issue arose in the United Kingdom where a group of researchers from Cambridge University analyzed, in the year 2022, how some police departments used facial recognition technologies and concluded that violations on how data protection is handled, racial profiling and illicitly accessing mobile phones have been found[34].

This outcome is a far-cry seeing as how on august 11, 2020, the Court of Appeal of England and Wales overturned the High Court's dismissal of a challenge to South Wales Police's use of Automated Facial Recognition (AFR) technology, finding that its use was unlawful and violated human rights[35].

The Court found that South Wales Police's policies gave too much discretion to individual police officers to determine which individuals were placed on watchlists and where AFR Locate could be deployed. The Court commented that *„the current policies do not sufficiently set out the terms on which discretionary powers can be exercised by the police and for that reason do not have the necessary quality of law."* The Court further described the discretion as *„impermissibly wide"*, for example because the deployment of the technology was not limited to areas in which it could be thought on reasonable grounds that individuals on a watchlist might be present. The Court implied that this should be a significant factor in determining where AFR Locate should be deployed, stating, *„it will often, perhaps always, be the case that the location will be determined by whether the police have reason to believe that people on the watchlist are going to be at that location."*

We would also like to point out the North Dakota v. Brossart case[36] where the District Court of North Dakota allowed the usage of an evidence gathered by a Predator drone to capture and uphold an arrest of an US citizen after a stand-off with a SWAT unit, without the issuance of a warrant for drones.

These situations are just some of the events in which privacy was violated by the usage of drones and some of the only cases in which the perpetrator was able to be brought to justice, seeing as how the Federal Aviation Administration in the USA has thousands of reports[37] of unmanned vehicles that did not get a proper police investigation. Also, it is important to note that in the USA there are over 855.000 drones registered at the Federal Aviation Administration (as of 2023) and almost 92% of the waivers solicited by drone operators is for them to use their vehicles at night[38].

Other incident databases outline that drones have been used to violate privacy of persons while inside their home, disregard public safety limits and observe objectives in restricted airspace and to smuggle contraband[39]. While the number of incidents may be relatively small the implications and the problems are alarming since a lot of these cases are reported as public safety announcements. A lot more cases remain unchecked due to poor legal oversight or lack of resources to properly investigate breaches.

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[32] According to the AI incident database website, editors Sean McGregor and Khoa Lam, accessed at 28.03.2023 at *https://incidentdatabase.ai/cite/87/#r1387*.

[33] M. Wang, *The robots are watching us*, HRW - Pen/Opp, 06.04.2020.

34 F. Lewsey, *UK police fail to meet 'legal and ethical standards' in use of facial recognition*, Cambridge University - Research, 27.10.2022.

[35] Royal Court of Justice, CA, Case no. C1/2019/2670, *R. v. The President of the Queen's Bench Division and others*, 11.08.2020. H.A. Kurth, *UK Court of Appeal Finds Automated Facial Recognition Technology Unlawful in Bridges v. South Wales Police*, Huntonprivacyblog.com, 12.08.2020, accessible at *https://www.huntonprivacyblog.com/2020/08/12/uk-court-of-appeal-finds-automated-facial-recognition-technology-unlawful-in-bridges-v-south-wales-police/*, accessed at 28.03.2023.

[36] District Court - Nelson County, North Dakota, *State of North Dakota v. Thomas Brossart and others*, Case no. 32-2011-CR, accessible at *https://www.nacdl.org/getattachment/136371f4-aa38-476f-bd9a-a0908dbfd19b/Brossart-Order.pdf?lang=en-US*, accessed at 28.03.2023.

[37] As seen on their website: *https://www.faa.gov/uas/resources/public_records/uas_sightings_report*, accessed at 29.03.2023.

[38] Statistics take from the website *https://skykam.co.uk/drone-statistics/*.

[39] As seen on the website *https://www.dedrone.com/resources/incidents-new/all*, accessed at 29.03.2023.

4. Conclusions

Drones can reduce risk to humans and offer new logistical connections. A study in the UK outlines that unmanned vehicles helped public authorities in over 500 incidents globally[40], yet the issue of data and network protection remains an unresolved issue that needs more funding[41].

The solutions to illicit public monitoring should focus on arming public safety agencies with the required tools to thwart threats to individuals and public agencies. However, we do not agree that the usage of military-grade drones, to counter or intimidate potential public events, should be allowed. Such a practice was seen in the year 2020 when a Predator drone flew over the city of Minneapolis to monitor the George Floyd protests instilling fear in regards to participating in public life and privacy[42].

As such, public authorities should arm themselves with both anti-drone weapons and specialized unmanned vehicles designed to identify and neutralize illicit vehicles that are being handled by unauthorized operators. This could help prevent situations in which drones were used to monitor special events (2014 - public speech of Angela Merkel or 2014 - Serbia – Albania football match) or important public objectives (2015 - White House drone crash)[43].

Furthermore, respect is a fundamental virtue in the sense that to respect a person is to value a person. Persons have the fundamental right of having their privacy respected. When drones are used to take photographs of a person or when a person is stalked by another person, their privacy has not been respected[44].

We consider that the only proper way to ensure that public authorities respect privacy and will enforce data gathering and management is by only acting based on an existing warrant. This should act both in means of public monitoring and in the case of anti-drone operations. The right to privacy includes data protection. As indicated, the police collect large amounts of information for the prevention, detection and investigation of crime. There must be safeguards in place to protect the collection, processing and sharing of data. The United Nations Inter-Regional Crime and Justice Research Institute propose that law enforcement agencies comply with the following requirements regarding data protection, namely fairness, accountability, transparency and explainability[45].

To respect citizen's fundamental rights and avoid potential liability, the use robotics in law enforcement should be characterized by fairness; accountability; transparency; and explainability. Some deployments of drones are similar to video capturing systems or incident response by police helicopter. Because they monitor public space, over-arching regulations are appropriate to these deployments, as long as the difficulties surrounding consent and access to data can be addressed. However, unmanned vehicles can be equipped with numerous other attachments (infrared cameras, microphones and others) and must have oversight or at least ensure traceability, because the equipment is both accessible to public agencies and private persons.

A legal solution would be that to consider drone usage as preemptively illicit as it requires technology to undertake visual surveillance, and as such will require proper oversight, both internally and externally as to ensure that the data captured through its optics will be deleted at some point or used only for its intended purpose. This approach has already been tested, as we have shown, since most Court decisions have shown that public authorities and people have not fully grasped the legal obligations that data protection implies.

We consider that a special task force that could use artificial intelligence and drones to counter potential physical assaults and data violations is the most accessible approach that any state can adopt. Such a specialized department was tested in Japan where an anti-drone task force conducted operations against potential hazardous drone incidents (such as the 2015 radioactive drone that was spotted on Japan's Prime Ministers house or the 2022 G7 Summit event where anti-drone technology was used to discourage illicit drone

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[40] Rt Hon Kwasi Kwarteng (coord.) *et al.*, *Advancing airborne autonomy Commercial drones saving money and saving lives in the UK,* H.M. Government report, 18.07.2022, p. 16.

[41] *Idem*, pp. 44-46.

[42] C. Enemark, *Armed Drones and Ethical Policing: Risk, Perception, and the Tele-Present Officer*, Crim Justice Ethics, 2021; 40(2), p. 124-144.

[43] European Army Interoperability Centre, *Top 5 drone incidents*, FINABEL, 20.08.2019.

[44] R. L. Wilson, *Ethical Issues with use of Drone Aircraft*, IEEE, 2014, 978-1-4799-4992-2/14.

[45] A. Hazenberg, I. Beridze (coord.), *Artificial intelligence and robotics for law enforcement,* United Nations Interregional Crime and Justice Research Institute, 2019, pp. 12-13.

monitorisation of the event)[46] . This type of approach ensure that public authorities will properly defend both important state objectives and its citizens from technological threats without having to be a splintered force.

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JUSTICE LAWS AND ROMANIA'S NATIONAL RESILIENCE AND RECOVERY PLAN

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Abstract

As part of the plan to modernise Romania, the new laws are supposed to lay the foundations for a genuine modernisation of the system, bring justice into line with European principles and strengthen its independence, while ensuring respect for citizens' rights and freedoms. Although necessary, this legislative package targeted in the NRRP, should be the result of a broad consultation that the Ministry has undertaken with all the responsible institutions in the field. and when drafting them should have been implemented the recommendations of the Venice Commission, CVM and the judicial courts, in short to take into account all the needs of the system. Despite the controversy surrounding this legislative package, the European Commission seems to have agreed to these drastic reform measures already undertaken by the Romanian state.

Keywords: *rule of law, CVM, reform, justice, justice system, NRRP, RRM.*

1. Introduction

The current difficult context faced by EU countries has led to serious damage to the rule of law in some Member States. As far back as 2020, the EC Rule of Law Report for all 27 countries notes the strongest warnings for Hungary and Poland, with critical remarks also for Bulgaria, Croatia, Slovakia and Malta. Romania is also mentioned in the context. The changes to the legislative package in 2018-2019 have therefore brought massive criticism to the Romanian authorities.

In the following years, numerous amendments were introduced in the public debate, which did not resolve the main criticisms of this legislative package aimed at guaranteeing the rule of law in Romania. Since the establishment of the CVM in 2007, the Romanian authorities, through the numerous governments that have taken office, have taken on the task of reforming the Romanian judicial system and have put many forms of this legislative package up for discussion. In the last Government Programme, 2021-2024, the Romanian Government committed itself to ensure the harmonisation of the legislation on the organisation and functioning of the justice system taking into account the principles of the international instruments ratified by Romania, as well as all the recommendations formulated in the framework of the European mechanisms (CVM, GRECO, Venice Commission, EC Report on the rule of law) and the CCR decisions.

At the time of the European Semester in 2019 and 2020 Romania had to integrate all 9 country specific recommendations - RTD (5 for 2019 and 4 for 2020). Therefore, in the process of developing the National Recovery and Resilience Plan, the aim was to cover all country-specific recommendations.

As a general vision, NRRP represents a synthesis between the development priorities identified by the Romanian Government and the needs indicated in the country recommendations. Through the interventions proposed in the NRRP, the authorities have aimed to provide an adequate response to the economic and social situation in Romania so that the challenges mentioned in the country reports or in other relevant documents formally adopted by the Commission in the framework of the European Semester are resolved or significantly reduced over time. In this respect, in the case of Romania, the focus in the approach to the RTD has been on economic resilience, with emphasis on reforms related to improving the business environment, efficiency of revenue collection, long-term sustainability of public finances, strengthening the efficiency of public administration[1] , strengthening the effectiveness of justice systems and the rule of law. The plan includes 9 major reforms aimed at responding to country-specific recommendations[2] including the long-awaited reform of the Romanian judiciary.

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[1] For more on public administration, see E.E. Ştefan, *Administrative Law Part I, University Course,* 3rd ed., revised, completed and updated, Universul Juridic Publishing House, Bucharest, 2019, pp. 16-27.

[2] NATIONAL RECOVERY AND RESILIENCE PLAN OF ROMANIA, p. 28, *https://mfe.gov.ro/wp-content/uploads/2021/10/facada6fdd5c00de72eecd8ab49da550.pdf*.

2. Content

The biggest attempt to reform the Romanian judiciary took place in 2018 and 2019 with a series of controversial changes that drew criticism from both the Venice Commission and the European Commission noting the state of the rule of law in Romania and how these changes affected the progress made so far by the judiciary and the independence of justice.

With reference to Law no. 303/2004 on the status of judges and prosecutors, republished, with subsequent amendments and additions, both professionals in the field and the EC have witnessed significant changes. Since its adoption, the law has undergone numerous amendments and additions, some of which have led to some dysfunctions in the system, and have created some confusion regarding essential aspects of the judicial system, namely the status and career of magistrates. It should be noted that in 2018 and 2019, this law underwent numerous amendments (legislative interventions being made both by Law no. 242/2018 and by emergency ordinances of the Government), some of which have generated controversy both at the level of associations in the field but also at the level of civil society. Moreover, at the level of European bodies, these additions have been criticized on the grounds that they undermine the independence of the judiciary and that they were not made in compliance with the principles of transparency in the adoption of legislation. Moreover, the major problem that has not been met even in its current form is that they have not been debated at the level of the judiciary in a broad framework or for a sufficiently long period of time.

Also in the same period, namely 2018 and 2019, through Law no. 207/2018, as well as through several emergency ordinances, Law no. 304/2004 was also subject to substantial amendments and additions, some of which are under the critical eye of both magistrates' associations and civil society, as well as European bodies, which seriously affect the efficiency of the work of the Romanian judicial system institutions.

Law no. 317/2004 on the Superior Council of Magistracy, republished, with subsequent amendments and additions is also part of the triad of the justice package. Like the others, it has also received amendments in 2018-2019 that have changed and modified the Romanian judicial system.

The 2018 amendments and subsequent primary regulatory acts made a number of important changes to the organisation and functioning of the Judicial Inspectorate and provided a framework for this new institution.

In the coordination and verification reports of the Romanian judicial system, it is precisely this type of sudden changes that have led to criticism and to the regression of the reform process that the Romanian state embarked on with the accession to the European Union. Moreover, the institutional credibility of the Romanian state has been affected in relation to European mechanisms.

Although since the controversial changes several draft laws have been in consultation with the establishment of the Recovery and Resilience Mechanism at European level, European authorities have been pushing Member States for reforms and measures to close the gap between Member States at all levels from eliminating corruption to digitisation, from reducing pollution to administrative modernisation.

Perhaps the inclusion of the modernisation of the Romanian judicial system in the reform plan undertaken at the level of the Recovery and Resilience Mechanism will only lead to the completion of the long process Romania started in 2007.

2.1. Justice in the NRRP

The emergence of a major event, the outbreak of the pandemic in early 2020, has changed the global economic, social and budgetary outlook. In order to address the economic and social consequences and their asymmetric effects on EU Member States, and to ensure a rapid and sustainable economic recovery process, an urgent coordinated response at both EU and national level was required[3] .

In response to the EU initiative, the Romanian authorities have drafted a strategic document that sets out the reform priorities and investment areas for the implementation of the Recovery and Resilience Mechanism in Romania, namely the National Resilience Recovery Plan (NRRP).

NRRP is Romania's strategic document that underpins the reform priorities and investment areas for the implementation of the Recovery and Resilience Mechanism - RRM at national level.

[3] Memorandum on the Agreement in principle on the contracting of repayable financial assistance from the European Investment Bank to cover part of the national public financing needed to implement reforms and/or investments included in the National Recovery and Resilience Plan.

Following the positive assessment of the plan, on 03.11.2021, the Council of the European Union adopted the Council Implementing Decision approving the assessment of Romania's recovery and resilience plan.

The budget allocation is €29.18 billion4, of which €14 billion are grants and €15 billion are loans. The NSRF is structured in 15 components, corresponding to the 6 pillars set out in Article 3 of EU Regulation 2021/241.

According to the provisions of GEO no. 124/2021 on the establishment of the institutional and financial framework for the management of European funds allocated to Romania through the Recovery and Resilience Mechanism, as well as for the modification and completion of GEO no. 155/2020, with subsequent amendments and additions, the Ministry of European Investment and Projects is the national coordinator for the preparation, negotiation, approval, implementation, monitoring and control of funds granted under the Recovery and Resilience Mechanism, and the reform and/or investment coordinators, set out in the annex to GEO no. 124/2021, have the main tasks in the implementation of reforms and investments.

The NRRP envisages a series of reforms and investments foreseen under several components, and the coordination of their implementation and monitoring is the responsibility of the public institutions designated at national level (reform and/or investment coordinators).

Therefore, reforms and investments are associated with certain milestones and targets, the achievement of which has a double function: on the one hand, it attests the achievement of reforms and investments, and on the other hand, it conditions the granting of European funding to the Romanian state.

A series of investments and a series of reforms are planned for the justice system, aimed at reforming and transforming the Romanian judicial system. Thus justice is nominated under components: Component 14 „Good Governance" and Component 7 „Digital Transformation".[5]

Thus, as regards justice in the NRRP, in addition to the reforms undertaken by the Romanian state at the level of the CVM[6], a series of measures are foreseen, for example:

- adoption of the new National Anti-Corruption Strategy and its implementation;
- adoption of the strategy on the development of the judiciary for the period 2022-2025;
- adoption of the law modifying the powers of ANABI;
- adoption of the „Justice Laws" (status of Romanian magistrates, judicial organization, Superior Council of Magistracy);
- an increase of about 50% in the value of the assets seized and administered by ANABI;
- reforming the national procurement system by streamlining the procurement process – a new electronic standard form will be available[7].

2.2. Reforms under Component 14 „Good Governance"

At the level of Reform 5 „Ensuring the independence, quality and efficiency of the judiciary"[8]. In its capacity as reform coordinator, the Ministry of Justice must ensure the achievement of Milestone 421*, the main point of which is the* approval and entry into force of the Government Decision approving the Strategy for the Development of the Judiciary 2022-2025[9].

The provisions of the plan aim to prepare this review on the basis of internal analyses by the reform coordinator and proposals from civil society and stakeholders.

The proposed strategy will consider two directions to be followed respectively 2 pillars:

- „one will include policies to strengthen the independence of the judiciary and the rule of law. The results of policies to strengthen the rule of law will be objectively assessed through specific performance indicators to be developed as part of the strategy. Measures and indicators will be prepared taking into account the findings

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[4] GEO no. 124/2021 on the establishment of the institutional and financial framework for the management of European funds allocated to Romania through the Recovery and Resilience Mechanism, as well as on the modification and completion of GEO no. 155/2020 on some measures for the elaboration of the National Recovery and Resilience Plan necessary for Romania to access reimbursable and non-reimbursable external funds within the framework of the Recovery and Resilience Mechanism, with subsequent amendments and additions.

[5] NRRP, p. 28, published at *https://mfe.gov.ro/pnrr/*.

[6] Commission Decision 2006/928/EC of 13.12.2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the area of judicial reform and the fight against corruption (OJ 2006 L 354, p. 56).

[7] Council Implementing Decision approving the assessment of the Recovery and Resilience Plan of Romania of 03.11.2021, published at *https://mfe.gov.ro/pnrr/*.

[8] NRRP, p. 29.

[9] *https://www.just.ro/pnrr/*.

of the Rule of Law Report";[10]

- the second will consider the implementation of „institutional capacity building policies in terms of resources, processes and management, as well as policies on quality and efficiency of services in the judicial system, such as:
  - efficient use of human resources (e.g., workload);
  - the policy of optimising the infrastructure of the courts, including the physical infrastructure;
  - digital transformation - through the following measures:
    - the digital interaction of citizens and any interested entity with the judicial system;
    - electronic signature and electronic seal;
    - availability of improved data communication for the electronic file (which is an option for litigants to have electronic access to court records)."[11]

The Reform Coordinator will have to develop a justice sector-wide strategy for the digitisation of the physical archive.

Another milestone for which the Ministry of Justice needs to make the necessary efforts is Milestone 422 - it aims to *stabilize and clarify the powers of the National Agency for the Administration of Seized Assets, i.e., the finalization of the regulatory act providing the legislative framework for its operation.*

The act is intended to transpose Directive (EU) 2019/1153 and will contain *„many changes related to the extension of the institutional mandate, targeting issues such as: administration and recovery of seized assets and collaboration with other relevant bodies in the recovery process"*[12].

Perhaps the most controversial and most important milestone is milestone 423 - the one that implies the completion of a long process of reforming the Romanian state, i.e., «Entry into force of the „justice laws" (laws on the status of magistrates, judicial organization, Superior Council of Magistracy) (implementation deadline: end of the second quarter of 2023)».[13]

Romania and has proposed through this reform package to ensure compliance and follow-up of all the commitments made under the Coordination and Verification Mechanism[14]. Thus, in order to avoid the criticisms made by the EC in the Report on the Rule of Law[15] the legislative act on the status of magistrates

The legislative framework must take into account ensuring and completing the independence of judges and prosecutors. Moreover, the amendments must promote a way of promoting magistrates' careers by following meritocratic and objective principles.

In view of the high court load capacity, the High Council of the Judiciary and the Public Prosecutor's Office need to operate more efficiently.

Moreover, it is necessary to seek to make magistrates more accountable but also to find a way to protect them against abuses.

In order to ensure a balanced process, it is necessary to make judicial inspection more efficient and to ensure greater guarantees of independence and impartiality.

Equally subject to the attention of civil society is also the *424th milestone - Amendment of the Criminal Code and the Code of Criminal Procedure. This milestone should be implemented by aligning the provisions of the* Criminal Code and the Code of Criminal Procedure that entered into force in 2014 with the provisions of the Basic Law, the Constitution, but above all it should not ignore the relevant decisions of the national Constitutional Court on the constitutionality of recent amendments to the Criminal Code and the Code of Criminal Procedure.

Target 425 - „At *least 6,000 justice sector staff (judges, prosecutors and court clerks) trained to improve the quality and efficiency of the justice system"* is included in the plan*. This measure is aimed at the continuous training of magistrates and court clerks and the aim is to increase the quality and efficiency of the judicial system.*

[10] Pillar V. Health, and economic, social and institutional resilience, Component C14. Detailed good governance, NRRP, p. 81.

[11] Pillar V. Health, and economic, social and institutional resilience, Component C14. Good governance, NPRR, p. 82.

[12] Pillar V. Health, and economic, social and institutional resilience, Component C14. Good governance, NPRR, p. 85.

[13] Pillar V. Health, and economic, social and institutional resilience, Component C14. Good governance, NPRR, p. 18.

[14] REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on Romania's progress under the Cooperation and Verification Mechanism, Brussels, 08.06.2021, COM(2021) 370 final, available at *https://ec.europa.eu/info/sites/default/files/com2021370_ro.pdf*.

[15] 2020 Rule of Law Report, Accompanying chapter on the state of the rule of law in Romania, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS, 2020 Rule of Law Report, Situation of the rule of law in the European Union, Brussels, 30.09.2020 SWD(2020) 322 final, available at *https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:52020SC0322&from=EN*.

Continuous training involves a unification of practice and jurisprudence on the new codes, unification of practice and development of skills in the field of public procurement, administrative law, tax procedure. The continuous training of actors in the judiciary will also take into account international judicial cooperation in civil and criminal matters, the ECtHR case law.

Another key reform is Reform 6. „Stepping up the fight against corruption".

Thus, the 426th milestone has in view the „Entry into force of the legislative act approving the new National Anti-Corruption Strategy".[16]

Always under the EC's scrutiny, the new Anti-Corruption Strategy will take into account the principles assumed by Romania since 2007[17]*: reducing the effects of corruption at the citizen level, strengthening mechanisms to prevent and fight corruption, focusing on the improvement of* integrity in priority areas; legislative changes both criminal and administrative to fight corruption, increasing the degree of implementation of anti-corruption measures.

The new strategy will bring new areas to the fore: the environment, the link between corruption and organised crime, integrity in the protection of cultural goods.

The strategy also involves amending the legislation on integrity and requires harmonisation and increasing the quality of the regulatory acts it covers:

- „conflicts of interest[18], incompatibilities;
- the declaration of assets;
- revolving doors (pantouflage);
- the Ethics Adviser;
- the general standard for ex officio publication of information of public interest at central and local government level (to ensure consistency of application)."[19]

Also at the level of Reform 6, the Romanian authorities have set Target 427 which aims to increase the efficiency of the National Agency for the Administration of Seized Assets, i.e., to increase the value of seized assets. This target will also be achieved through the envisaged legislative amendments but also through measures that address the specific activity of the Agency.

The next Target 428 - assumes a continuation of milestone 426, i.e.: *„Completion by 2025 of at least 70% of the measures foreseen in the new anti-corruption strategy."*[20]

A comprehensive monitoring mechanism, similar to the one used successfully in the 2016-2020 cycle, is foreseen in the strategy, including regular reporting, compliance assessment missions to public institutions, annual evaluation reports.

This mechanism involves evaluation missions by independent experts, mid-term and final external audits on the state of implementation.

All of these mechanisms are designed to analyse the objectives of the strategy, its impact on society and institutions, the efficiency and effectiveness of implementation measures and the sustainability of its results.

Other targets set at the NRRP level include:

Target 429 - increase the occupancy rate of 85% of prosecutor positions in the National Anticorruption Directorate by the end of 2023.

The last benchmark measure foreseen in the plan and assumed by the Romanian State is the one foreseen in Milestone 430 *- which aims at preparing the legislative framework, namely the law on whistleblowers. This reform measure* will transpose Directive (EU) 2019/1937 on the protection of persons reporting breaches of Union law and will contain additional provisions, tailored to the national context, integrity policy issues being influenced by the socio-economic context. to address effectively.

[16] Pillar V. Health, and economic, social and institutional resilience, Component C14. Good governance, NPRR, p. 83.

[17] COMMISSION DECISION of 13.12.2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the area of judicial reform and the fight against corruption [notified under document number C(2006) 6569], (2006/928/EC, *https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32006D0928&from=RO*).

[18] On conflict of interest, see E.E. Ștefan, *Conflict of interest in administrative law*, in CKS e-Book 2017, *http://cks.univnt.ro/cks_2017_archive/cks_2017_articles.html*, accessed 10.04.2023, pp. 589-593.

[19] Pillar V. Health, and economic, social and institutional resilience, Component C14. Good governance, NPRR, p. 83.

[20] *Idem*, p. 17.

3. Amendments to the justice package

As the European authorities pointed out in the 2021 CVM Report, the setback in achieving the benchmarks to which Romania had committed itself in 2021 was outweighed by the measures taken in 2021. The European Commission's expectations were that the Romanian authorities would implement the measures and changes to which they had committed in order to fully meet the remaining targets. At the time of 2022 the EC underlined that : „The *Court of Justice ruling of 18 May 2021 provides a clear framework and direction for ongoing reforms with a view to satisfactorily meeting the CVM benchmarks in full compliance with the rule of law and EU law in general*"[21].

At the time, the directions that the new legislation should follow had at their core the rule of law and the removal of any doubt about the rights of citizens and the legal professions.

In what follows we will look at the 3 key laws that have been under the scrutiny of the European Commission since 2007:

- law on judicial organisation[22];
- law on the status of judges and prosecutors[23];
- law on the Superior Council of Magistracy[24].

3.1. Law on judicial organisation

As I pointed out above, this law is a milestone in the biggest reform package Romania has ever committed itself to, namely the NRRP.

In the previous attempt to amend the law, 2018-2019, *„through Law no. 207/2018, as well as through several emergency ordinances, Law no. 304/2004 was subject to major amendments and additions, some of which have been criticized by magistrates' associations and civil society, as well as by European bodies, on the grounds that they seriously undermine the efficiency of the work of the institutions of the judiciary and the independence of justice."*[25] Therefore, the new direction that the new law had to take is to resolve all the inconveniences that led to the setback of the efforts made by the Romanian state in the field of justice reform and ensuring the rule of law.

In amending and finalising this legislation, the following directions were considered:

- the integration and legislative transposition of the recommendations issued by the European institutions;
- implementation of Constitutional Court decisions[26];
- resolving issues of dysfunction in practice.

Main changes

This enshrines the principle that the Ministry of Justice, together with the Superior Council of Magistracy, contributes to the proper organisation and administration of justice as a public service, thus relieving the pressure that was on the Ministry of Justice.

Hearing of the system of random assignment of cases to panels every 2 years. This establishes that the external audit covers technical aspects and aims at identifying and remedying vulnerabilities in the system, even verifying the possibility of bias in random allocation. This audit process is organised and conducted by the Ministry of Justice, with the involvement of civil society and professional associations of magistrates.

The law details the process of setting up the five-judge panels of the High Court of Cassation and Justice and the specific jurisdiction of these panels.

Another important point is to ensure adequate representation of the management of the courts and prosecutors' offices in the management colleges, so that managerial decisions are the responsibility of the heads of judicial institutions, who must ensure the proper functioning of the court or prosecutor's office. The reason

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[21] REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on Romania's progress under the Cooperation and Verification Mechanism, Brussels, 08.06.2021, COM(2021) 370 final, available at *https://ec.europa.eu/info/sites/default/files/com2021370_ro.pdf*.

[22] Law no. 304/2022 on the organisation of the judiciary, published in the Official Gazette of Romania no. 1104/16.11.2022.

[23] Law no. 303/2022 on the status of judges and prosecutors, effective from 16.12.2022.

[24] Law no. 305/2022 on the Superior Council of Magistracy, published in the Official Gazette of Romania no. 1105/16.11.2022.

[25] Explanatory memorandum amending Law no. 304/2003, *https://www.just.ro/proiect-de-lege-privind-statutul-magistratilor/*.

[26] For example: CCR dec. no. 172/24.03.2016, published in the Official Gazette of Romania, Part I, no. 315/25.04.2016, para. 19); CCR dec. no. 384/2020, published in the Official Gazette of Romania no. 657/24.07.2020 etc.

for this amendment is to harmonise with the CCJE's advisory opinion: „The presidents of the courts are responsible for ensuring the proper functioning of the court, including the management of its staff, material resources and infrastructure. It is essential that they have the necessary skills and resources to carry out this duty effectively". „The presidents of the courts should also have the power to set up organisational units or divisions, as well as individual posts or positions, within the courts to meet the various needs related to the work of the courts. When court presidents intend to make significant changes in the organisation of the court, judges should be consulted."[27]

Another provision aimed at ensuring the efficiency of the Supreme Court, namely the resolution of cases within a reasonable time, is the possibility that in the event of a high volume of activity of some chambers of the High Court of Cassation and Justice which resolve cases in matters other than criminal matters, the governing bodies may order the temporary assignment of some judges from chambers other than the criminal chamber in order to unblock the activity.

The enshrinement and re-dimensioning of the principle of hierarchical control in the activity of the Public Prosecutor's Office, as the Constitutional Court has established in the past: „by applying the principle of hierarchical control, it is ensured that all prosecutors in the Public Prosecutor's Office perform their function of representing the interests of society as a whole, in other words, that they exercise their powers of public authority without discrimination[28] and without bias. By virtue of this principle, the Public Prosecutor's Office is conceived as a pyramidal system in which the law enforcement measures adopted by the senior prosecutor are binding on subordinate prosecutors, which gives substance to the principle of the hierarchical exercise of control within this public authority"[29].

The new rules also establish criteria for the appointment procedure, as well as the grounds and procedure for the dismissal of prosecutors appointed to DNA and DIICOT, and objective criteria for verifying the improper exercise of the specific duties of the office[30].

The law also brings clear regulations on the establishment of working procedures at court level, namely the way of establishing the Rules of Procedure of the courts, but also clarifies other areas such as the way of establishing and managing court budgets.

3.2. Law on the status of judges and prosecutors

Amended with many controversial provisions, this law has created many dysfunctions in the judicial system. These mainly concerned the status and career of magistrates, and the provisions in force in 2022 have been criticised by stakeholders in the field, magistrates' associations and civil society, as well as by European bodies. The main cause for controversy concerned the independence of the judiciary and failure to respect the principles of transparency in the adoption of legislation or insufficient time for analysis.

In the drafting of this legislation, it was taken into account that: „The amendment or supplement of a normative act is only allowed if it does not affect the general concept or the unitary character of that act or if it does not concern the whole or the major part of the regulation in question; otherwise the act shall be replaced by a new regulation and shall be repealed in its entirety"[31].

The main elements enshrined in the law took into account the aspects „concerning the career of magistrates in accordance with the decisions of the Constitutional Court on the subject: admission to the judiciary, the probationary period and the examination of competence, the appointment of magistrates, their promotion, whether effective or on the spot, evaluation and professional training, appointment to managerial positions, removal from these positions, delegation, secondment, transfer, the appointment of judges as prosecutors and prosecutors as judges. To this end, all the subsequent regulations contained in the regulations of the Plenary or of the Sections of the Superior Council of Magistracy concerning the above-mentioned aspects,

[27] Opinion no. 19 (2016) - The role of presidents of courts - of the Consultative Council of European Judges (CCJE).

[28] From another perspective, see E.E. Ştefan, *Opinions on the right to nondiscrimination,* in CKS e-Book 2015, pp. 540-544, available online at *http://cks.univnt.ro/cks_2015/CKS_2015_Articles.html*, Public law section, accessed on 10.04.2023.

[29] CCR dec. no. 345/2006 on the exception of unconstitutionality of the provisions of art. 64 para. (3) of Law no. 304/2004 on the organisation of the judiciary, published in the Official Gazette of Romania no. 415/15.05.2006.

[30] According to the Venice Commission Opinion no. 924/2018.

[31] Law no. 24/2000 on the rules of legislative technique for the drafting of normative acts, republished, art. 61.

including the corresponding procedures, have been taken over at the level of law, adapted and systematised in terms of their normative content[32]".

The law clearly spells out the procedure for the professional evaluation of magistrates but also establishes the professionalism of the selection of magistrates.

The most important change is to bring the legislative solutions into line with all the criticisms and recommendations of the European institutions:

- „Regulate by law the selection procedure and objective and transparent criteria for the selection of senior prosecutors; in line with the recommendation to strengthen the role of the Superior Council of Magistracy in the procedure, the interview committee set up by the Minister of Justice includes two prosecutors appointed by the Prosecutors' Section of the Superior Council of Magistracy;
- Explicitly regulating the possibility for a prosecutor removed from a senior management position to appeal the decree of the President of Romania removing him/her from office to the competent administrative court, under the law, without going through the prior procedure. In the proceedings, which are being heard as a matter of urgency, the court will be able to verify the legality[33] and the merits of the Minister of Justice's proposal for removal from office; taking into account the case law of the Constitutional Court on this matter, it has been provided that the President of Romania may refuse, solely on grounds of legality, to remove a person from a senior management position, informing the public of the reasons for the refusal;
- Eliminate the current role of the Ministry of Finance, an institution outside the judicial authority, in the procedure of material liability of magistrates for judicial errors committed in bad faith or gross negligence and give a central role in this procedure to the appropriate sections of the Superior Council of Magistracy as guarantor of the independence of justice (and not to the Judicial Inspectorate, as it is at present, which only has the power to carry out the necessary checks, at the request of the Council)."[34].

Moreover, the legislative act aims at modifying the competence of probationary judges, in order to widen the scope of disputes they can judge.

The new law also sets out new competition procedures for the promotion of magistrates and prosecutors and limits the possibilities for secondment and delegation.

The act also clarifies how magistrates and prosecutors can be sanctioned. Some disciplinary offences are eliminated, such as those related to: *„failure to comply with the decisions of the Constitutional Court or decisions handed down by the High Court of Cassation and Justice in the resolution of appeals in the interest of the law"*[35].

The present law also regulates the career management of the auxiliary staff of the Supreme Court and the disciplinary liability of legal staff assimilated to magistrates, given that the CCR case law has found that such regulations are necessary.

3.3. Law on the Superior Council of Magistracy

According to art. 133 para. (1) of the Constitution, the Superior Council of Magistracy has the fundamental role of guarantor of the independence of justice[36]. Thus, from an organisational point of view, the Superior Council of Magistracy is composed of 19 members who make up the Plenary of the Superior Council of Magistracy. Fourteen members are elected by the general assemblies of magistrates from courts and public prosecutors' offices - 9 judges and 5 prosecutors. Civil society is represented by 2 members, elected by the Romanian Senate. The Minister of Justice, the President of the High Court of Cassation and Justice and the Prosecutor General of the Prosecutor's Office of the High Court of Cassation and Justice are ex officio members. Therefore, all 14 elected judges and prosecutors make up the Judges Section and the Prosecutors Section respectively.

Building on the findings of the European bodies*: „Concerns were expressed in the November 2018 report both about the work of the Judicial Inspectorate and the appointment of an interim management team. Since the*

[32] Explanatory memorandum Law on the status of judges and prosecutors, *https://www.just.ro/proiect-de-lege-privind-statutul-magistratilor/*.

[33] Another approach to the activity of public authorities, in E.E. Ștefan, *Legality and morality in the activity of public authorities,* in Revista de Drept Public no. 4/2017, Universul Juridic Publishing House, Bucharest, pp. 95-105.

[34] Ibid 29.

[35] Ibid 29.

[36] For further details on the independence of justice, see E.E. Ștefan, *Legal responsibility. A special look at liability in administrative law*, Pro Universitaria Publishing House, Bucharest, 2013, pp. 191-196.

last report, the work of the Judicial Inspection has continued to raise concerns for similar reasons. Criticism focused on the correlation between disciplinary proceedings against magistrates and against directors of judicial institutions and the fact that the persons concerned had often taken public positions against changes to justice laws (...) The government's decision to resolve the situation by adopting an emergency ordinance on the appointment of the current interim team - instead of leaving this to the Superior Council of Magistracy - only further fuelled the concerns. The November 2018 report therefore recommended the immediate appointment by the Superior Council of Magistracy of the interim leadership team of the Judicial Inspection and the appointment, within three months, of a new leadership of the Judicial Inspection through a competition (...) More generally, the procedure raises questions as to whether the new provisions of the justice laws on the appointment of the leadership of the Judicial Inspection provide sufficient guarantees and ensure the right balance between judges, prosecutors and the Plenary of the SCM."[37]

The following changes have been made. As a first sentence, the solution of separating the decision on the careers of judges and prosecutors is considered. Thus, the main idea of this law is to define the role of the Superior Council of the Magistracy, in its plenary composition, to defend the independence of the judicial authority as a whole. The law provides for the Plenum of the Superior Council of Magistracy to exercise the powers established by law in the field of recruitment, more specifically in relation to the entrance examination to the National Institute of Magistracy and the entrance examination to the magistracy. Another attribute is the approval of the continuous training plan for judges and prosecutors, on the proposal of the National Institute of Magistracy.

The Plenary of the Superior Council of Magistracy also adopts the Code of Ethics of Judges and Prosecutors, the Regulation on the organisation and functioning of the Superior Council of Magistracy, the Regulation on the procedure for the election of members of the Superior Council of Magistracy, as well as other regulations and decisions provided for by law, and appoints and dismisses, under the conditions provided for by law, the Chief Inspector and Deputy Chief Inspector of the Judicial Inspection.

Another amendment aims to simplify the process of electing judges and prosecutors as members of the Superior Council of Magistracy. But also the way in which the electoral process is carried out, thus measures are foreseen to ensure their representativeness among the electoral body of magistrates, given the rule that general assemblies are legally constituted in the presence of the majority of judges or, where appropriate, of prosecutors in office.

The legislative act also proposes to ensure the management of the Superior Council of Magistracy by holding elections three months before the expiry of the term of office for the posts of President and Vice-President.

The law proposes to extend the scope of the holders of disciplinary action in the area of disciplinary liability of judges and prosecutors, by partially returning to the system that existed prior to the legislative interventions made in 2018. Disciplinary action for misconduct by a judge is therefore exercised by the Judicial Inspectorate, through the judicial inspector, or by the President of the High Court of Cassation and Justice. This introduces a number of procedural provisions on the possibility of disciplinary actions[38] being decided by the sections of the Superior Council of Magistracy.

The act introduces a number of additional legal safeguards for judges and prosecutors by providing that the decision ordering the suspension from office must be drawn up at the time of the decision and immediately communicated in writing to the judge or prosecutor concerned, and that until the date of communication of the decision to the judge or prosecutor concerned it shall have no effect on his or her career and rights.

The same incompatibilities as for judges and prosecutors are introduced for civil society representatives in the Superior Council of Magistracy.

The new regulations also bring new rights and obligations for judicial inspectors, who require the same guarantees of independence and impartiality as magistrates.

At the organisational level, the provisions on the organisation of the judicial inspectorate are revised, in close connection with the powers of the Plenary of the Superior Council of Magistracy, which approved the rules of organisation and functioning of the Judicial Inspectorate. For the avoidance of doubt, both the Chief Inspector

[37] REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on Romania's progress under the Cooperation and Verification Mechanism {COM(2019) 499 final}.

[38] Explanatory memorandum to the draft law on the Judicial Council, *https://www.just.ro/proiect-de-lege-privind-statutul-magistratilor/*.

and the Deputy Chief Inspector are appointed by the Plenary of the Superior Council of Magistracy, following a competition organised by the Superior Council of Magistracy.

The new legislative provisions concern the modalities for appointing, dismissing and ensuring the interim of the chief inspector, the deputy chief inspector and the two directors of the Judicial Inspection, which are the responsibility of the Plenary of the Superior Council of Magistracy.

4. Conclusions

A constant preoccupation of doctrine, looking at the concept of the judiciary we see that it is an essential piece in the puzzle that defines the progress of society and the social and economic mechanism. Thus, the organisation of the judicial system is not only a concern but also a necessity in order to fully understand the implementation of justice.[39]

A comprehensive analysis of the progress of a judicial system and a functional analysis requires comparisons, explanations and concepts.

From the point of view of many scholars the independence of justice is the characteristic that determines its degree of functionality, thus the evolution of a judicial system is strictly linked to independence. When analysing legal systems and the progress they have made, we see that independence is at the root of their development. However, it seems rather difficult to determine the degree of independence of a judicial system.

At the basis of the dispensation of justice lies jurisdiction, which determines the totality of the organs through which the state distributes justice at territorial level.

Starting from the Romanian Constitution, which states in art. 1 para. (4) that „*The State is organised according to the principle of the separation and balance of legislative, executive and judicial powers, within the framework of constitutional democracy*.[40]" We note that judicial power in Romania is constituted through its specially constituted bodies, namely the courts.

The reform of the system and of the whole public policy related to justice and the delivery of justice must lead to the building of the rule of law in Romania. This will have a direct impact on the development of the quality of justice and, moreover, will ensure a fair trial for citizens.

Following all the measures proposed by all the spheres involved, the aim is to shape a modern justice system, in line with the trend towards digitisation, but with a competent, independent and responsible human resource at the forefront.

In an ideal system of law, reformed in line with European principles and values, the public institutions involved will work coherently, will shape a procedural framework that will give substance to effective judicial organisation, will finalise and enshrine the rule of law.

The inclusion of justice reform measures in Romania's National Recovery and Resilience Plan has only accelerated the implementation of a legislative package whose social impact has not been analysed at length to note the effects and implications for the citizen.

In the context of the reform and resilience mechanism, the package of reforms to which the Romanian state has committed itself is primarily aimed at institutional development in the Romanian legal system, professionalisation at all levels, and ensuring the necessary resources for proper functioning.

Therefore, the constant modification of the regulatory framework in relation to social needs will ensure that the state ensures, through its institutions, a functional public service that will help maintain democratic order.

On the other hand, the opinions of the European institutions have created an appearance of stability for the reforms, so it remains to be seen what the practical effects will be on society and especially on the act of justice.

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THE PRINCIPLES OF LAW. METAPHYSICAL RATIONALITY AND LEGAL NORMATIVITY

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Abstract

Any scientific intercession that has as objective, the understanding of the significances of the „principle of law" needs to have an interdisciplinary character, the basis for the approach being the philosophy of the law. In this study we fulfill such an analysis with the purpose to underline the multiple theoretical significances due to this concept, but also the relationship between the juridical principles and norms, respectively the normative value of the principle of the law.

Thus, are being materialized extensive references to the philosophical and juridical doctrine in the matter. This study is a pleading to refer to the principles, in the work for the law's creation and applying. Starting with the difference between „given" and „constructed" we propose the distinction between the „metaphysical principles" outside the law, which by their contents have philosophical significances, and the „constructed principles" elaborated inside the law. We emphasize the obligation of the law maker, but also of the expert to refer to the principles in the work of legislation, interpretation and applying of the law.

Arguments are brought for the updating, in certain limits, the justice – naturalistic concepts in the law.

Keywords: *principles of the law, essence and phenomenon like aspect of the law, „given" and „constructed" in the law, significances of the principles of law, moral value, juridical value.*

1. Introduction

In philosophy and, in general, in science, the principle has a theoretical and explanatory value because it is meant to synthesize and express the bases and unity of human existence, of existence in general and of knowledge in their diversity of manifestation. The discovery and affirmation of principles in any science gives certainty to knowledge, both by expressing the first element, which exists by itself, without needing to be deduced or demonstrated, and by achieving system cohesion, without which scientific knowledge and creation cannot exist.

The principle has multiple meanings in philosophy and science, but for our scientific approach, we retain that of: „fundamental element, idea, basic law on which a scientific theory, a political, legal system, a norm of conduct or the totality of laws is based and of the basic notions of a discipline"[1]. The common place of the meanings of the term principle is the *essence*, an important category for philosophy as well as for law.

The principle represents *the given as such*, which can have a double meaning: a) what exists before any knowledge as an a priori factor and basis for science; b) theoretical element and resulting synthesis of phenomenal diversity for reality of any kind. The distinction but also the reality between „given" and „constructed" are important to understand the nature of principles in science and especially in law. In his work „Séance et technique en droit positif", published at the beginning of the 20th century, François Geny[2] analyzes for the first time the relationship between science and legal technique starting from two concepts: the „given" and the „constructed". In Geny's opinion, a thing is „given" when it exists as an object outside the productive activity of man. In this sense, the author distinguishes four categories: real data; historical data; the rational data; the ideal data. From the perspective of our research topic, two of these categories are of interest, namely: the „rational data" which consists of those principles that arise from the consideration that must be shown to man and human relations, and the „ideal data" through which a dynamic element is established, namely moral aspirations and spiritual of a particular civilization.

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[1] *Dicţionar explicativ al limbii române*, Socialist Republic of Romania Press, Bucharest, 1975, p. 744.

[2] Quoted by I. Craiovan in the monograph *Introducere în filosofia dreptului*, All Beck Publishing House, Bucharest, 1998, p. 63.

A thing is „constructed" when it is made by man, for example a reasoning, a legal norm etc. The „given" is relative in the sense that it is influenced by the „constructed", by human activity. Regarding the „given", man's attitude consists in knowing it with the help of science. As far as the „built" is concerned, man is by hypothesis the builder, he can make art or technique in this sense. The sphere of the constructed also extends to the social and political order.

The question arises whether the right is „given", an object of science, in other words of ascertainment and registration, or is it „constructed", a technical work? From a historical perspective, law is obviously „given", an object of science, as old law, contemporary national or international law appears. However, the development of positive law requires „a construction" and in this sense the legal rules are the work of technique.

In the legal literature, this distinction has been retained, according to which science investigates the social climate that requires a certain legal normativity, and the technique aims at the ways in which the legislator transposes into practice, „builds" the legal rules. The relativity of this distinction was also emphasized, considering that the legal technique also implies a creation, a scientific activity[3].

Therefore, the principles represent the „given" as an ideal or basis for science and the „constructed" in the situation where they are elaborated or transposed into a human construction, including through legal norms.

A good systematization of the meanings of the notion of principle is made in a monograph[4]: „a) the founding principle of a field of existence; b) what would be hidden from direct knowledge and requires logical-epistemological processing; c) logical concept that would allow knowledge of the particular phenomenon".

This systematization, applied to law, means: „a) the discussion regarding the essence of law; b) if and how we would know the essence; c) the operativity of the placement in the phenomenality of the right, correlated or not with the essence"[5].

The spirit's need to ascend to principles is natural and particularly persistent. Any scientific construction or normative system must refer to principles that guarantee or establish them. This regressive movement towards the unconditional, towards what is absolutely first, is for example the movement that Plato follows in Book VII of the Republic[6], when he posits the existence of „Good" as a first and non-hypothetical principle.

In the same sense, another great thinker[7] speaks of the „first principles" or the eternal principles of the unprovable „Being", the basis of all knowledge and of all existence, beyond which lies only ignorance.

The question then is to know if what seems necessary, in the logical virtue of knowledge, is also necessary in the ontological order of existence. In the „Critique of Pure Reason"[8], Kant will show that such a transition from logic to existence (the ontological argument) is not legitimate. If the unconditioned, as a principle, is necessarily posited by our reason, this cannot and must not lead us to the conclusion that this unconditioned exists outside of it and independently of any reality.

Consequently, the principles, since they aim at existence in all its domains, cannot and must not be immutable, but are the result of becoming. They are a „given", but only as a result of the existential dialectic or as a reflection of becoming in the phenomenal world and of essence.

2. Content

Law, because it presupposes the particularly complex relationship between essence and phenomena, as well as a dialectic specific to each of the two categories in terms of theoretical, normative and social reality, cannot be outside the principles.

The problem of the status of the principles of law and their explanation has always concerned theorists. The school of natural law argued that the source, the origin, therefore the basis of legal principles is human nature. The historical school of law, under the influence of Kantianism, opens a new perspective in researching the genesis of legal principles, presenting them as products of the popular spirit (Volkgeist) which moves the basis of law from the universe of pure reason to the confluence of historical origins dissipated in a multitude of transient forms. The variants of the positivist school claim that the principles of law are generalizations induced from social experience. When the generalization covers a sufficiently large series of social facts we are in the

[3] J. Dabin, *Théorie générale du Droit*, Bruxelles, 1953, p. 118-159.

[4] Gh.C. Mihai, R.I. Motica, *Fundamentele dreptului. Teoria şi filozofia dreptului*, All Beck Publishing House, Bucharest, 1997, p. 19.

[5] Gheorghe C. Mihai, Radu I. Motica, *op. cit.*, p. 20.

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presence of some principles. There are also authors such as Rudolf Stammler who deny the validity of any legal principle, considering the content of law diversified in space and time, lacking in universality. In the author's view, law would be a cultural category[9].

Referring to the same problem, Mircea Djuvara affirmed: „The whole science of law does not consist in reality, for a serious and methodical research, except to release from the multitude of provisions of the law their essentials, *i.e.*, precisely these ultimate principles of justice from which all derive the other provisions. In this way, the entire legislation becomes very clear and what is called the legal spirit is captured. Only in this way the scientific elaboration of a law is done"[10].

In our opinion, this is the starting point for understanding the principles of law.

In specialized literature, there is no unanimous opinion regarding the definition and meanings of the principles of law[11]. Several common elements can be identified, which we highlight below:

- Legal principles are general ideas, guiding postulates, fundamental prescriptions or foundations of the legal system. They characterize the entire system of law, constituting at the same time specific features of a type of law.
- The general principles of law configure the structure and development of the legal system, ensure unity, homogeneity, balance, coherence and capacity for its development.
- The authors distinguish between fundamental principles of law, which characterize the entire legal system and which reflect what is essential within the respective type of law, and principles valid for certain branches of law or legal institutions.

Thus, in the doctrine, the following general principles of law were identified and analyzed: 1) ensuring the legal basis for the functioning of the state; 2) the principle of freedom and equality; 3) the principle of responsibility; 4) the principle of equity and justice[12]. The same author believes that the general principles of the law have a theoretical and practical importance which consists in: a) the principles of the law draw the guideline for the legal system and guide the legislator's activity; b) these principles are also important for the administration of justice because, „The legal person must ascertain not only the positivity of the law, he must also explain the reason for his social existence, the social support of the law, its connection with social values"; c) the general principles of law can take the place of regulatory norms when the judge, in silence of the law, resolves the case based on the general principles of law[13].

One of the great problems of legal doctrine is the relationship between the principles of law, legal norms and social values. The opinions expressed are not unified, they differ depending on the legal concept. The school of natural law, the rationalists, the Kantian and Hegelian philosophy of law admit the existence of some principles outside the positive norms and superior to them. The principles of law are based on human reason and configure the value of the entire legal order. Unlike the positivist school of law, Kelsian normativism considers that principles are expressed by the rules of law and consequently there are no principles of law outside the system of legal norms.

Eugeniu Speranţia established a correspondence between law and the principles of law: „If law appears as a total of social, mandatory norms, the unity of this totality is due to the consistency of all norms with a minimum number of fundamental principles, themselves presenting a maximum of logical affinity between they"[14].

In relation to this problem, in the Romanian specialized literature the idea was expressed that the principles of law are fundamental prescriptions of all legal norms[15]. In another opinion, it is considered that the principles of law guide the development and application of legal norms, they have the force of higher norms, found in the texts of normative acts, but they can also be deduced from „permanent social values" when they are not expressly stated by the rules of positive law[16].

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[9] R. Stammler, *Theorie der Recktswissenschaft*, University of Chicago Press, Chicago, 1989, p. 24-25.

[10] M. Djuvara, *Teoria generală a dreptului. Drept raţional, izvoare şi drept pozitv*, All Beck Publishing House, Bucharest, 1999, p. 265.

[11] I. Ceterchi, I. Craiovan, *Introducere în teoria generală a dreptului*, All Publishing House, Bucharest, 1993, p. 30; Gh. Boboş, *Teoria generală a statului şi dreptului*, Didactic and Pedagogical Publishing House, Bucharest, 1983, p. 186; N. Popa, *Teoria generală a dreptului*, Actami Publishing House, Bucharest, 1999, p. 112-114; I. Craiovan, *Tratat elementar de teorie generală a dreptului*, All Beck Publishing House, Bucharest, 2001, p. 209; Gh.C. Mihai, R.I. Motica, *Teoria generală a dreptului*, Alma Mater Publishing House, Timişoara, 1999, p. 75.

[12] Nicolae Popa, *op. cit.*, p. 120-130.

[13] *Ibidem*.

[14] E. Speranţia, *Principii fundamentale de filozofie juridică*, Cluj, 1936, p. 8; N. Popa, *op. cit.*, p. 114.

[15] N. Popa, *op. cit.*, p. 114.

[16] I. Ceterchi, I. Craiovan, *op. cit.*, p. 30.

We consider that the general principles of law are delimited by the positive norms of the law, but there is indisputably a relationship between the two values. For example, equality and freedom or equity and justice are value foundations (values) of social life. They must find their legal expression. In this way, the legal concepts that express these values appear, concepts that become the foundations (principles) of law. Legal norms then derive from these principles. Unlike the norms, the general principles of law have explanatory value because they contain the foundations of the existence and evolution of law[17].

Together with other authors[18], we believe that the legal norms relate to the principles of law in two senses: the norms contain and describe most of their principles; the functioning of the principles is then achieved by applying in practice the conduct stated by the rules. In relation to principles, legal norms have a narrower teleological explanatory value, the purpose of norms being to preserve social values, not to explain the causal reason for their existence. The principles of law are the expression of the values promoted and defended by law. We could say that the most general principles of law coincide with the social values promoted by law.

For a correct understanding of the issue of values in law and their expression through the principles of law, some brief clarifications are required in the context of our research topic. The different currents and legal schools, from antiquity to the present, have sought to explain and substantiate legal regulations and institutions through some general concepts valued as special values for society. Law is based on value judgments. Indeed, by its nature, law implies an appreciation, a valorization of human conduct according to certain values, representing the finality of the legal order, such as: justice, the common good, freedom etc.[19].

The values are not strictly and exclusively legal in nature. On the contrary, they have a wider dimension of a moral, political, social, philosophical nature in general. These values must be understood in their historical-social dynamics. Although some of them can be found in all legal systems, such as justice, still the specificity and historical particularities of society leave their mark on them. The values of a society must be derived primarily from the philosophy (social, moral, political, legal) that presides and guides the social forces in that society.

The legislator, in the process of legislation, orienting himself according to these values, expressed especially by the general principles of law, transposes them into legal norms, and on the other hand, once „legislated" these values are defended and promoted in the form specific to the regulation legal. The legal norm becomes both a benchmark for assessing behavior according to the respective social value, and a means of ensuring the realization of the demands of this value and of predicting the future evolution of society. It should also be added that legal norms materialize legal values relatively, because neither as a whole nor individually they fully indicate a legal value, they do not exhaust its wealth of content.

Regarding the identification of the values promoted by law, the opinions of the authors do not coincide, although they are in close spheres. Thus, Paul Roubier lists *justice*, *legal security* and *social progress* as values[20]. Michel Villey lists four great purposes of law: *justice*, *good conduct*, *serving people* and *serving society*[21]. François Rigaux speaks of two categories, namely: the primordial ones, which he calls formal, *order*, *peace* and *legal security*, and the material ones, *equality* and *justice*[22].

The indisputable value that defines the finality of law, in the view of the most prominent thinkers, since antiquity is justice. The particularly complex concept of *justice* has been approached, explained and defined by numerous thinkers – moralists, philosophers, jurists, sociologists, theologians – who start their definition from the ideas of just, fair, in the sense of giving everyone what is due. The general principle of law, equity and justice is the expression of justice as a social value. Many conceptions of law could be located either in a rationalist line or in a realistic one. Rationalists argue that the principle of justice is innate to man, it belongs to our reason in its eternity. Realists argue that justice is an elaboration of history and general human experience.

Regardless of the theoretical orientation, justice undoubtedly constitutes a complex basis of the legal universe. Giorgio del Vecchio states that justice is compliance with the legal law, the legal law being what includes justice. According to Lalande, justice is the property of everything that is just; Faberquetes considers the law as the unique expression of the principle of justice, and justice as, of course, the unique content of the expression

[17] N. Popa, *op. cit.*, p. 116-117.

[18] N. Popa, *op. cit.*, p. 116-117; Gh.C. Mihai, R.I. Motica, *Teoria generală a dreptului. Curs universitar*, Alma Mater Publishing House, Timişoara, 1999, p. 78.

[19] P. Roubier, *Théorie générale du Droit*, LGDJ, Paris, 1986, p. 267.

[20] *Idem*, p. 268.

[21] Qouted by J.-L. Bergel in *Théorie générale du Droit*, Dalloz, Paris, 1989, p. 29.

[22] Quoted by I. Ceterchi, I. Craiovan in *Introducere în teoria generală a dreptului*, All Publishing House, Bucharest, 1993, p. 27.

of law. It has also been said that justice is the will to give everyone what is his; it is balance or the proportion of relationships between people, it is social love, or it is the harmonious realization of the essence of the human being[23].

Justice as a value and principle of law exists through the legal norms contained in constitutions, laws, etc. This does not mean that objective law, with its expressions, completely and inevitably carries „justice": not everything that is right in force is just. On the other hand, there are legal norms, such as technical ones, which are indifferent to the idea of justice. As there are circumstances when positive law is more inspired by considerations of utility than justice in order to maintain order and stability in society.

In our opinion, justice, as a social value and at the same time as a general principle of law, is dimensioned in the ideas of fair measure, equity, legality and good faith. In particular, the concepts of fair measure and equity express proportionality.

The principle of justice has this guiding content in a cognitive-actional line: to give everyone what is due to them. A legal system is unitary, homogeneous, balanced and coherent if in all its components it „ensures, protects, enshrines", so that each natural and legal person is what he is, has what is due to him without harm each other or the social system.

Equity is a dimension of the principle of justice in its consensus with the moral good. This concept rejuvenates formal legal equality, humanizes it, introducing into the legal systems in force the categories of morality from the perspective of which justification is also a doing for good and for freedom. „Considered in this way, equity spreads to the most distant spheres of the system of legal norms, bearing fruit even in strictly technical or formal domains, apparently indifferent to axiological concerns"[24]. Understood by the idea of proportionality, equity concerns the reduction of inequality, where the establishment of perfect equality (also called formal justice) is impossible due to the particularities of the factual situation. In other words, in relation to the generality of the legal rule, equity suggests that we take into account the factual situations, the personal circumstances, the uniqueness of the case, without going to extremes.

The idea of justice evolves under the influence of social-political transformations in society. Thus, in contemporary democratic states, in order to emphasize the achievements of social policy regarding living and working conditions, economic, social and cultural rights, we speak of *social justice*. The achievement of social justice is listed as a requirement of the rule of law in the document adopted at the Conference for European Security and Cooperation, Copenhagen, 1990.

Another problem of legal doctrine is to establish the relationship between the principles of law and those of morality. Christian Thomasius in his work *Fundamenta juris naturae et gentium ex sensu comuni deducta* (1705)[25], distinguished between the mission of law to protect the external relationships of human individuals through prescriptions that form perfect and punishable obligations and the mission of morality to protect the inner life of individuals only through prescriptions which form imperfect and unsanctionable obligations. This distinction between morality and law has become classic.

Undoubtedly, law cannot be confused with morality, for several reasons analyzed in the specialized literature[26]. However, since ancient times, law and morality have been in a close relationship that cannot be considered accidental. The respective relationship is of an axiological nature. Legal and ethical values have a common origin, namely the conscience of individuals living in the same community. The jusrationalism theory – a modern form of jusnaturalism – tried to argue that there is a fund of principles of universal and eternal justice, because they are inscribed in human reason where they intertwine with the principles of good and truth. Therefore, since law is rational, it is natural, and since it is natural, it is also moral.

Of course, the law eminently regulates the external conduct of the human individual. However, the law is not disinterested in morality, „in that through equity it seeks the good by acting towards the agreement of the outside with the inside, while morality acts towards the agreement of the inside with the outside of the individual, in the same equity"[27].

[23] Gh.C. Mihai, R.I. Motica, *Fundamentele dreptului. Teoria şi filozofia dreptului*, All Publishing House, Bucharest, 1997, p. 128.

[24] *Ibidem*, p. 133.

[25] Quoted by I. Dobrinescu in *Dreptatea şi valorile culturii*, Romanian Academy Press, Bucharest, 1992, p. 95.

[26] G. del Vecchio, *Lecţii de filozofie juridică*, Europa Nova Publishing House, Bucharest, 1995, p. 192-202; I. Dobrinescu, *op. cit.*, p. 95-99; Gh.C. Mihai, R.I. Motica, *op. cit.*, p. 81-86; I. Ceterchi, I. Craiovan, *op. cit.*, p. 39-42.

[27] Gh.C. Mihai, R.I. Motica, *op. cit.*, p. 84.

We consider that indeed morality and law have a common value structure and this can be deduced not only from the fairly frequently encountered statement that „law is a minimum of morality", but also from the finding that there is no moral statement to be denounced as unjust, although sometimes legal statements are discovered in disagreement with moral principles. The tendency of the law to appeal to values of a moral character is observed in order for them to be introduced in legal regulations. In this sense, Ioan Muraru states that: „Moral rules, although they are usually much more appropriated by natural law and custom, they express the ancestral and permanent desires of mankind. Moral rules, although they are usually not fulfilled, in case of necessary through the coercive force of the state must be legally supported in their realization when they defend the life, freedom and happiness of people. That's why the Romanian Constitution does not lack references to the hypostases of morality. These constitutional references ensure efficiency and validity to morality. Thus, for example, art. 26 and art. 30 protect the 'good morals', art. 53 mentions the 'public moralsd'. Likewise, 'good faith', which is obviously first a moral concept, is enshrined in art. 11 and art. 57"[28]. Therefore, the general principles of law and those of morality have a common value base. Law norms can express values that are originally moral and that are also found in the content of the general principles of law, such as equity or its particular form, proportionality.

The principles of law have the same features and logical-philosophical meanings as principles in general. Their peculiarities are determined by the existence of two systems of dialectical relations specific to law:

- Principles – categories – norms;
- Principles – the law, as social reality;

Some more important features of the principles of law can be identified, useful to establish whether proportionality can be considered a principle of law:

- Any principle of law must be of the essence. It cannot identify with a concrete case or with an individual assessment of legal relations. The principle must represent the stability and balance of legal relations, regardless of the variety of normative regulations or particular aspects specific to legal reality. Consequently, the principle of law must be opposed to randomness and express necessity as its essence.

However, the principle cannot be a pure creation of reason. It has a rational, abstract dimension of maximum generality, but it is not a metaphysical creation. Although of the order of essence, the principles of law cannot be eternal and absolute, but reflect social transformations, express the historical, economic, geographical, political particularities of the system that contains them and, in turn, that underpins them[29]. The principles of law evolve because the realities they reflect and explain are subject to improvement. "In law, every legal relationship is susceptible – equally to improvement. The scientific improvement of legal analysis will never be finished. But, in law, we must immediately give solutions, because practical life does not wait"[30].

Being of the order of essence, the principles of law have a generalizing character, both for the variety of legal relationships and for the rules of law. At the same time expressing the essential and general of legal reality, the principles of law are the basis for all other normative regulations.

There are great principles of law that do not depend on their consecration by legal norms, but the legal norm determines their concrete content, in relation to the historical reference time.

- The principles of law are enshrined and recognized by constitutions, laws, custom, jurisprudence, international documents or formulated in legal doctrine.

The principles must be accepted internally and be part of the national law of each state. The general principles of law are enshrined in the constitutions. The characteristics of the legal system of a state influence and even determine the consecration and recognition of the principles of law.

The work of enshrining the principles of law in political and legal documents is in full swing.

Thus, in international documents such as the UN Charter or the Declaration of the UN General Assembly from 1970, principles that characterize the democratic international legal order are enshrined[31]. The regional legal systems knew and recognized their own principles. The regional legal systems knew and recognized their own principles. For example, the community law system enshrines the following more important principles: the principle of equality, the protection of fundamental human rights, the principle of legal certainty, the principle

[28] I. Muraru, E.S. Tănăsescu, *Drept constituţional şi instituţii publice*, 1st vol., All Beck Publishing House, Bucharest, 2003, p. 8.
[29] M. Djuvara, *Drept şi sociologie*, I.S.D., Bucharest, 1936, p. 52-56; N. Popa, *op. cit.*, p. 113-114.
[30] M. Djuvara, *Teoria generală a dreptului. Drept raţional, izvoare şi drept pozitiv*, All Beck Publishing House, Bucharest, 1999, p. 265.
[31] Al. Bolintineanu, A. Năstase, B. Aurescu, *Drept internaţional contemporan*, All Beck Publishing House, Bucharest, 2000, p. 52-71.

of subsidiarity, the principle of res judicata and the principle of proportionality[32]. Most democratic constitutions enshrine principles such as: the principle of sovereignty, the principle of legality and supremacy, the constitution, the principle of democracy, the principle of pluralism, the principle of representation, the principle of equality, etc.

Jurisprudence has a significant role in consecrating and applying the principles of law. There are situations in which the principles of law are recognized through jurisprudence, without being formulated in the text of normative acts. Thus, the Italian Civil Code recommends judges to rule in the absence of texts, in light of the general principles of law.

There are legal systems in which not all principles have a normative consecration. We are specifically referring to the great system known as common law, which consists of the existence of three autonomous and parallel normative subsystems: common law (in the narrow sense); equity; and statute-law. Equity represents a set of principles derived from court practice and which are a corrective to common-law rules.

With all the variety of ways of enshrining and recognizing the principles of law, the necessity of at least their recognition is evident in order to be characterized and applied in the legal system. This consecration or recognition is not enough to be doctrinal but must be achieved through norms or jurisprudence. However, a distinction must be made between the consecration or recognition of the principles of law, and on the other hand, their application.

- The principles of law represent values for the legal system, because they express both the legal ideal and the objective requirements of society, they have a regulatory role for social relations. In the situation where the rule is unclear or does not exist, the settlement of disputes can be done directly based on general or special principles of law. Ideally, they represent a coordinating theme for the work of legislation.
- In the classification of the principles of law, one starts from the consideration that between them there is a hierarchy or a relationship from general to particular[33]. Starting from this finding we can distinguish:

General principles of law that form the content of norms of universal application with a maximum level of generality. These are recognized by the doctrine and expressed by normative acts in domestic law or international treaties of particular importance. As a rule, these principles are written in constitutions, thus having a superior legal force over all other laws and over all branches of law. Referring to the theoretical and practical importance of studying the principles of law, Nicolae Popa remarked: „the general principles of law are the fundamental prescriptions that combine the creation of law and its application... In conclusion, the action of the principles of law results in conferring the certainty of law – the guarantee granted to individuals against the unpredictability of coercive norms – and the congruence of the legislative system, *i.e.*, the concordance of laws, their social feature, their plausibility, their opportunity[34].

General principles also play a role in the administration of justice, because those charged with applying the law must know not only the letter of the law, but also its spirit, and the general principles constitute this spirit. Among them we can include: the principle of legality, the principle of enshrining, respecting and guaranteeing human rights, the principle of equality, the principle of justice and equity, etc.

Specific principles that express values and that usually have limited action to one or more branches of law. They are written in codes or other laws. The principle of the legality of punishments, the obligation of contracts, the presumption of innocence, the principle of respecting international treaties, etc. can be included in this category. The special principles have their value source in the fundamental principles of law.

For example, proportionality is one of the old and classical principles of law, rediscovered in the modern era. The meaning of this principle, in a general sense, is that of equivalent relationship, balance between phenomena, situations, persons, etc., but also the idea of fair measure.

Ion Deleanu specifies that: „Originally, the concept of proportionality is outside the law; he evokes the idea of correspondence and balance, even harmony. Appeared as a mathematical principle, the principle of proportionality also developed as a fundamental idea in philosophy and law, receiving different forms and meanings: „reasonable", „rational", „equilibrium", „admissible", „tolerable", etc.[35]. Therefore, proportionality is part of the content of the principle of equity and justice, considered to be a general principle of law. At the same time, through its normative consecration, explicit or implicit, and through jurisprudential application,

[32] I. Craiovan, *op. cit.*, p. 211.

[33] I. Ceterchi, I. Craiovan, *op. cit.*, p.31; Gh.C. Mihai, R.I. Motica, *Teoria generală a dreptului*, p. 77.

[34] N. Popa, *op. cit.*, p. 117.

[35] I. Deleanu, *Drept constituţional şi instituţii politice*, Europa Nova Publishing House, Bucharest, 1996, p. 264.

proportionality has particular meanings in different branches of law: constitutional law, administrative law, community law, criminal law, etc. The definition, understanding and application of this principle, in the meanings shown above, result from the doctrinal analysis and jurisprudential interpretation[36].

3. Conclusions

An argument for which the philosophy of law must be a present reality not only in the theoretical sphere but also for the practical activity of drafting normative acts or the administration of justice, is represented by the existence of general and branch principles of law, some of which are enshrined in the Constitution.

The principles of law, by their nature, generality and depth, are topics of reflection primarily for the philosophy of law, only after their construction in the sphere of the metaphysics of law, these principles can be transposed into the general theory of law, can be normatively enshrined and applied in jurisprudence. Moreover, there is a dialectical circle because the „meanings" of the principles of law, after the normative consecration and jurisprudential elaboration, are to be elucidated also in the sphere of the philosophy of law. Such a finding nevertheless imposes the distinction between what we could call: constructed principles of law, and on the other hand metaphysical principles of law. The distinction we propose has as its philosophical basis the distinction shown above between „constructed" and „given" in law.

The constructed principles of law are, by their very nature, legal rules of maximum generality, elaborated by legal doctrine or by the legislator, in all situations explicitly established by the rules of law. These principles can constitute the internal structure of a group of legal relations, of a branch or even of the unitary system of law. The following features can be identified: 1) they are elaborated within the law, being, as a rule, the expression of the will of the legislator, enshrined in legal norms; 2) are always expressed explicitly by legal norms; 3) the work of interpretation and application of the law is able to discover the meanings and determinations of the constructed principles of the law which, obviously, cannot exceed their conceptual limits established by the legal norm. In this category we find principles such as: the publicity of the court session, the principle of contradiction, of the supremacy of the law and the Constitution, the principle of non-retroactivity of the law, etc.

Therefore, the constructed principles of law have, by their nature, first of all a legal connotation and only in the subsidiary a metaphysical one. Being the result of an elaboration within the law, the possible metaphysical meanings are to be after their consecration established by the metaphysics of law. At the same time, being rules of law, they are binding and produce legal effects just like any other normative regulation. It is necessary to mention that the legal norms that enshrine such principles are superior in legal force to the usual regulations of the law, because they usually target social relations considered to be essential in the first place for the respect of the fundamental rights and legitimate interests recognized by the subjects by law, but also for the stability and fair, predictable, transparent conduct of judicial procedures.

In the situation of this category of principles, the dialectical circle mentioned above has the following appearance: 1) the constructed principles are elaborated and normatively consecrated by the legislator; 2) their interpretation is carried out in the law enforcement work; 3) the value meanings of these principles are later expressed in the sphere of metaphysics of law; 4) metaphysical „meanings" can constitute the theoretical basis necessary for broadening the connotation and denotation of principles or for the normative elaboration of such new principles.

The number of constructed principles of law can be determined at a certain moment of legal reality, but there is no pre-constituted limit of them. The evolution of law is also manifested through the normative elaboration of such new principles. As an example, we mention the „principle of subsidiarity", a construction in European Union law, adopted in the legislation of many European states, including Romania.

The metaphysical principles of law can be considered as a „given" to legal reality and by their nature are external to law. At their origin, they do not have a legal, normative or jurisprudential elaboration. They are a transcendental and non-transcendent „given" of law, therefore, they are not „beyond" the sphere of law, but they are „something else" in the legal system. In other words, it represents the value essence of law, without which this constructed reality could not have an ontological dimension.

Since they are not constructed, but represent a transcendental, metaphysical „given" of law, it is not necessary to express them explicitly through legal norms. Metaphysical principles can also have an implicit existence, discovered or exploited in the work of interpreting the law. As an implicit given and at the same time

[36] M. Andreescu, *Principiul proporţionalităţii în dreptul constituţional*, C.H. Beck Publishing House, Bucharest, 2007.

as the transcendental essence of the law, these principles must be found, after all, in the content of any legal norm and in any act or manifestation that represents, as the case may be, the interpretation or application of the legal norm. It must be emphasized that the existence of metaphysical principles also underpins the teleological nature of law, because any manifestation in the legal sphere, in order to be legitimate, must be appropriate to such principles.

In the specialized legal literature, such principles, without being called metaphysical, are identified by their generality and that is why they were called „general principles of law". We prefer to emphasize their metaphysical, valuable and transcendental dimension, which is why we consider them metaphysical principles of legal reality. As a transcendental „given" and not constructed by law, the principles in question are permanent, limited, but with determinations and meanings that can be diversified in the dialectical circle that encompasses them.

In our opinion, the metaphysical principles of law are: *the principle of justice*; *the principle of truth*; *the principle of equity and justice*; *the principle of proportionality*; *the principle of freedom*. In a future study, we will elaborate on the considerations that entitle us to identify the principles mentioned above as having a metaphysical and transcendental value in relation to legal realities.

The metaphysical dimension of these principles is indisputable, but the normative dimension remains under discussion. A broader analysis of this problem exceeds the object of this study, which was intended to be a broad excursion on the philosophical dimension of the principles of law. However, some considerations are necessary. Contemporary ontology no longer considers reality by referring to the classical concepts of substance or matter. In his work, „Substamzbegriff und Funktionsbegriff" (1910), Ernest Cassirer opposes the modern concept of function to the ancient concept of substance. Not what the „thing" is or the concrete reality, but their way of being, their inner fabric, their structure interests the moderns. Concrete objects no longer exist in front of knowledge, but only „relations" and „functions". In a way, for scientific knowledge, but not for ontology, things disappear and give way to relationships and functions. Such an approach is cognitively operational for material reality, not for ideal reality, that „world of Ideas" of which Plato spoke of[37].

The normative dimension of legal reality seems to correspond very well to the findings formulated by Ernest Cassirer. What else is the legal reality than an ensemble of social relations and functions that are transposed into the new ontological dimension of „legal relations" through the application of the rules of law. The principles built by applying to a sphere of social relations through the legal norm transform them into legal relations, so these principles correspond to a legal reality, understood as a relational and functional structure.

But there is a deeper order of reality than relationships and functions. Constantin Noica said that we must call „element" this order of reality, in which things are fulfilled and which makes them be. Between the concept of substance and that of function or relationship, a new concept is imposed, which preserves a substantiality and, without dissolving in function, manifests functionality[38].

Taking this idea of the great Romanian philosopher, we can affirm that the metaphysical principles of law evoke not only legal relationships or functions, but „value elements" of legal reality, without which it would not exist.

The metaphysical principles of law have normative value, even if they are not explicitly expressed by legal norms. Moreover, as it follows from the jurisprudential interpretations, they can even have a super-normative meaning and, in this way, can legitimize jusnaturalist conceptions in law. These concepts and the doctrine of supra-legality supported by François Geny, Leon Duguit and Maurice Duverger, consider that justice and, in particular, constitutional justice must relate to supra-constitutional rules and principles. In our opinion, such standards are expressed precisely by the metaphysical principles to which I referred. Natural law concepts were also applied by some constitutional courts. The decision of January 16, 1957, of the Federal Constitutional Court of the Federal Republic of Germany regarding the freedom to leave the federal territory is famous in this regard. The Court declares: „Laws are not constitutional unless they were enacted in compliance with the prescribed forms. Their substance must be in accordance with the supreme values of the democratic and liberal order as a system of values established by the Constitution, but they must also be in accordance with the *unwritten*

[37] C. Noica, *Devenirea întru fiinţă*, Humanitas Publishing House, Bucharest, 1998, p. 332-334.
[38] C. Noica, *op. cit.*, p. 327-367.

elementary principles (s.n.) and the fundamental principles of the Basic Law, especially with the principles of the rule of law and the social state"[39].

A final aspect that we want to emphasize refers to the role of the judge in the application of constructed principles, but especially of the metaphysical principles of law. We believe that the fundamental rule is that of the interpretation and, implicitly, of the application of any legal regulation in the spirit and respecting the value content of the metaphysical and constructed principles of law. Another rule refers to the situation where there is inconsistency between the usual legal regulations and, on the other hand, the constructed and metaphysical principles of law. In such a situation, we appreciate, in the light of the jurisprudence of the German constitutional courts, that the metaphysical principles will have to be applied with priority, even at the expense of a concrete norm. In this way, the judge respects the essential feature of the legal system and not only the legal functions or relations.

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[39] M. Andreescu, *op. cit.*, p. 34-38.

PREDICTABILITY AND ACCESSIBILITY OF THE LAW

Elena ANGHEL*

Abstract

„Where the force of the laws and the authority of their defenders cease, there can be neither liberty nor safety for any," wrote Shakespeare.

The rule of law presupposes the obligation to respect the Constitution and the laws, as provided by the provisions of art. 1 para. (5) of the Constitution. In order for the law to be accepted and respected, it must present a certain legal security, assuming the requirements of accessibility and predictability, logical coherence and stability, features designed to capture the trust of citizens in its provisions.

The need to match laws with time and not time with laws has been emphasized since antiquity. But, as we will show in the present study, the belief in the perfectibility of the law was gradually deprived of rights.

The lack of accessibility and predictability of legal provisions is increasingly invoked before the Constitutional Court, which ruled, in numerous cases, on the violation of these requirements, by reference to the ECtHR jurisprudence, as the existence of interpretation problems and law enforcement is inherent in any legal system, given the fact that, inevitably, legal norms have a certain degree of generality.

As the Constitutional Court ruled in its jurisprudence, the obligation to respect the laws does not imply, by its content, the provision of an inflexible legislative framework. Legislative intervention is necessary both to adapt the normative acts to the existing economic, social and political realities, but also to ensure a unitary legislative framework, which contributes to a better application of the law and to the removal of any ambiguous situations or inequities in the application of the law[1].

Keywords: *law, predictability, accessibility, jurisprudence, interpretation.*

1. Introduction

The law means legal order, according to Mircea Djuvara; the necessity of the law arises from a principle of the justice: the need for security of the society. „Nothing can more easily give rise to injustice than the arbitrary liberty of the one applying the law, to enforce it in an invariable manner, according to one's discretions. It is actually one of the most important needs which ensures the legal order, that everyone knows, as far as possible, what rule will be applicable and not to be left prey to personal inspirations and the instability they can lead to, in one's activity".

There has been constantly stated in the case-law of the court of contentious constitutional that the rule of law is a mechanism the operation of which entails the establishment of a climate of order, in which the recognition and valorization of an individual's rights cannot be conceived in an absolute and discretionary way, but only in relation with the observance of the rights of the others and of the community as a whole[2]. The rule of law entails the obligation to observe the Constitution and the laws, as provided by art. 1 para. (5) of the Fundamental Law.

2. Paper content

Considering the principle of general applicability of laws, the Strasbourg Court[3] held that their wording cannot have an absolute precision. One of the standard regulatory techniques is to resort to general categories rather than exhaustive lists. Therefore, a great number of laws use, by force of nature, more or less ambiguous

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[1] CCR dec. no. 1237/2010, published in Official Gazette of Romania no. 785/24.11.2010.

[2] Decision no. 659/2010 on the constitutional challenge of art. 9 of Law no. 10/2001 regarding the legal regime of certain buildings taken over abusively during 6 March 1945-22 December 1989, published in Official Gazette of Romania no. 408/18.06.2010.

[3] For more information on the predictability and accessibility of the law under the magnifying glass of the ECtHR, please see L.-C. Spătaru-Negură, *Protecția internațională a Drepturilor Omului – Note de curs* (International Protection of Human Rights – Course Notes), Hamangiu Publishing House, Bucharest, 2019, pp. 155, 164, 168, 173, 178.

formulas, the interpretation and application of which depend on practice. No matter how clearly a legal[4] rule is drafted, there is an inevitable element of legal interpretation in any legal system[5].

The need to clarify unclear points and adapt to changing circumstances will always exist. Again, although certainty is highly desirable, it might entail excessive rigidity, but the law must be able to adapt to changing circumstances. The decision-making role given to the courts aims precisely to remove the doubts that persist when interpreting the rules, the progressive development of criminal law by means of the case-law as a source of law being a necessary and well-rooted component in the legal tradition of the member states[6].

But how can we bring together the society need for security and belief in the accessibility and predictability of the law[7], in logical coherence and stability with the risks represented by legislative inflation, the cult of impermanence or with the current tendency to regulate and deregulate everything? These phenomena led to a crisis of conscience and a real reflex of the individual to reject law. The current state suffers from „legislative bulimia": the legislative system „disperses" itself in regulations that do not have enough time to crystallize, therefore they are poorly drafted and poorly coordinated with the rest of the legal system[8].

Modern legislator has significantly moved away from Rousseau, the creator of the modern term of law, the one who has essentially contributed to the development of the rule of law concept: „I therefore give the name "Republic" to every State that is governed by laws, no matter what the form of its administration may be: for only in such a case does the public interest govern, and the res publica rank as a reality". He shared the belief in the cult of the law, a concept that reigned in France starting from the era of the French Revolution: „It is to law alone that men owe justice and liberty. It is this salutary organ of the will of all which establishes in civil rights the natural equality between men".

There were cases when the belief in the predictability of the law was forfeited. Francois Gény campaigned for the release of the judge from the strict letter of the law. The author reacted against the doctrine of that time which considered the law as the only source of the law[9]. By means of his scientific endeavors, Gény wanted to put an end to the „fetishism of the written law" and the belief in its sufficiency, by considering that it is incomplete and that „no matter how much acuity we adjudicate to it, the human mind is not capable of fully comprehending the image of the world in which it moves". The law cannot satisfy all the requirements of social life, it cannot keep up with the dynamics of the society. This is why, when the law does not offer solutions, the judge, helped by the doctrine, must discover them by free scientific research, in terms of habits and in what Gény called *la nature des choses positives*[10].

In order for the law to be accepted and observed, it must demonstrate a certain legal security, assuming the requirement of approachability, logical coherence, stability and predictability, features meant to capture the trust of the citizens in its provisions. The legal security of the individual directly depends on the legal security of the community in which he lives. In this regard, art. 4 of the Constitution is not limited to voice that the *state* is based on the unity of the Romanian people and the solidarity of its citizens, but establishes that Romania is the common and indivisible *homeland* of all its citizens.

We are wondering, however, how the simple citizen, lacking specialized knowledge, can obey the law, when it changes frantically, is obscure, inconsistent or reveals so many deficiencies of legislative technique? In an ideational vision, which reminds us of Socrates, the answer is simple: the good citizen must also obey the bad laws in order not to encourage bad citizen to break the good ones. In Socratic conception, obedience to the law is a duty and his end stands testimony to this.

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[4] For more about legality, see E.E. Ștefan, *Legalitate şi moralitate în activitatea autorităţilor publice*, in Revista de Drept Public no. 4/2017, Universul Juridic Publishing House, Bucharest, pp. 95-105.

[5] E. Anghel, *The reconfiguration of the judge`s role in the romano-germanic law system*, in proceeding CKS-eBook 2013.

[6] CCR dec. no. 297/2018 on the constitutional challenge of art. 155 para. (1) CP, published in Official Gazette of Romania no. 518/25.06.2018.

[7] Please also see M.-C. Cliza, C.-C. Ulariu, *Drept administrativ. Partea generală* (Administrative Law. General Part), C.H. Beck Publishing House, Bucharest, 2023, p. 186.

[8] D.C. Dănişor, I. Dogaru, Gh. Dănişor, *Teoria generală a dreptului*, C.H. Beck Publishing House, Bucharest, 2006, p. 381.

[9] For more about the source of the law, see E.E. Ştefan, *Drept administrativ Partea I, Curs universitar*, IIIrd ed., revised, supplemented and updated, Universul Juridic Publishing House, Bucharest, 2019, pp. 40-49.

[10] For more information, see N. Popa, E. Anghel, C. Ene-Dinu, L. Spătaru Negură, *Teoria generală a dreptului. Caiet de seminar*, 3rd ed., revised and supplemented, C.H. Beck Publishing House, Bucharest, 2017.

Nowadays, the excess of normativism, incoherence of laws, the violation of the principle of normative hierarchy[11], instrumentalization of law, the interference of politics in the legal field and the „juristocracy" unjustifiably complicate the implementation of the law. Paradoxically, beyond the normative avalanche, we are often faced with a legislative vacuum. The citizen can only be perplexed and outraged, as his absorption capacity is limited[12].

In order to demonstrate the aforementioned, we shall analyze a specific case: the legislator's passivity and the non-unitary jurisprudential interpretation of a legal text - art. 155 para. (1) CP – generated in practice a sequence of decisions that are difficult to apply and assimilate, which failed to shed light in an area that required a lot of legislative strictness: the area of criminal liability.

The first step made in the effort to clarify the controversial issues involved by this law text consisted in submitting it to the constitutional review, in order to verify the compliance with the Basic Law and the fundamental principles and values it comprises[13]. Therefore, the Constitutional Court was notified on the constitutional challenge of art. 155 para. (1) CP, motivated by the fact that the phrase *„any act of procedure"* lacks clarity, precision and predictability[14], by violating the provisions of art. 1 para. (5) of the Constitution. The authors of this constitutional challenge raise the issue of the acts by which the course of criminal liability limitation can be interrupted, arguing that not every procedural act should have the aforementioned effect. In this respect, reference is made to the legislative solution regulated by the Criminal Code of 1969, according to which the term of the limitation was interrupted by the performance of any act which, according to the law, had to be communicated to the defender in the course of a criminal trial.

The Criminal Code in force, unlike the Criminal Code of 1969, does no longer provide that the procedural act carried out must be communicated to the defendant in order to produce the effect of interrupting criminal liability limitation, according to art. 155 para. (1) CP, and that, in all investigated case-files that have almost reach the expiry of the criminal liability statute of limitation, formal procedural acts could be carried out in order to prevent the effect triggered by the challenged text.

The Constitutional Court held that, in order to obtain the removal of the criminal liability, the statute of limitation must run without the intervention of any act of nature to bring back the committed facts to the public consciousness. In this regard, art. 155 para. (1) CP provides the interruption of the criminal liability statute of limitation by fulfilling any act of procedure in the case, and according to the provisions of para. (2) of the same art. 155, a new statute of limitation starts running after each and every interruption.

Criminal law, as a whole, is subject both to the requirements of the quality of the law, established by the constitutional provisions of art. 1 para. (5), as well as those of the principle of legality of incrimination and punishment, as regulated by art. 23 para. (12) of the Constitution. These provisions require not only the clear, precise and predictable regulation of the facts that constitute crimes, but also the conditions under which a person can be held criminally liable for committing them. However, the criminal liability limitation is part of the regulations that aim to engage criminal liability.

The statute of limitation is provided by the general part of the Criminal Code. In this regard, art. 154 CP in force provides criminal liability statute of limitation, established by the legislator by reference to the severity of the incriminated facts, and consequently, to the special limits of the criminal penalties provided for the regulated offenses. As the criminal liability limitation is a substantive criminal law institution based on time, the legal provisions regulating criminal liability statute of limitation and the modality of their application are of considerable importance, both for the activity of the judicial bodies of the state, and for individuals who commit crimes.

Taking into account all these considerations, it is necessary to guarantee the predictable nature of the effects of the provisions of art. 155 para. (1) CP on the individual who committed a fact provided for by the criminal law, including by ensuring the possibility of knowing the aspect of the intervention of the interruption

[11] For more informatios about the principle of normative hierarchy, see E.E. Ștefan*, Drept administrativ Partea a II-a, Curs universitar,* IVth ed., revised and updated, Universul Juridic Publishing House, Bucharest, 2022, pp. 59-61.

[12] See also E. Anghel, *General principles of law*, in Lex ET Scientia International Journal - Juridical Series, LESIJ.JS XXIII no. 2/2016.

[13] For details regarding the constitutional review procedure, see, for instance: I. Muraru, N.M. Vlădoiu, A. Muraru, S.G. Barbu, *Contencios constituțional*, Hamangiu Publishing House, Bucharest, 2009; I. Muraru, N.M. Vlădoiu, *Contencios constituțional. Proceduri și teorie*, 2nd ed., Hamangiu Publishing House, Bucharest, 2019; S.G. Barbu, A. Muraru, V. Bărbățeanu, *Elemente de contencios constituțional*, C.H. Beck Publishing House, Bucharest, 2021.

[14] For more information about clarity, precision and predictability of the law, see R.-M. Popescu, *Claritatea, precizia și previzibilitatea - cerințe necesare pentru respectarea Constituției, a supremației sale și a legilor în Român*ia, in Dreptul no. 7/2017, pp. 78-87.

of the criminal liability limitation and the beginning of a new statute of limitation. However, according to the case-law of the Constitutional Court, a legal provision must be precise, unequivocal and establish clear, predictable and accessible norms the application of which does not allow arbitrariness or abuse, and the legal norm must regulate in a unitary and uniform manner and establish minimum requirements applicable to all its recipients[15].

Notwithstanding, the Constitutional Court noted that **the provisions of art. 155 para. (1) CP establish a legislative solution likely to create for the person having the capacity of suspect or defendant an uncertain legal situation regarding the conditions of his/her criminal liability for the committed facts. For these grounds, it notes that the provisions of art. 155 para. (1) CP are unforeseeable and, at the same time, contrary to the principle of legality of incrimination, since the phrase „any procedural act" in their content also includes acts that are not communicated to the suspect or defendant, by not allowing him/her to know the aspect of the interruption of the limitation and the beginning of a new statute of limitation.**

The Constitutional Court noted that the legislative solution provided by the old Criminal Code met the conditions of predictability as it provided for the interruption of the criminal liability limitation only by fulfilling an act that, according to the law, had to be communicated in the case in which the person in question had the capacity of suspect or defendant.

Given these considerations, **by means of dec. no. 297/2018, the Constitutional Court admitted the constitutional challenge and noted that the legislative solution providing the interruption of the criminal liability statute of limitation by fulfilling „any procedural act in the case", in the content of the provisions of art. 155 para. (1) CP was not constitutional.**

However, after the pronouncement of this admission decision, the High Court of Cassation and Justice was referred to with a **referral in the interests of the law[16] after it was found that the interpretation and application of the provisions of art. 155 para. (1) CP is not carried out in an unitary manner**.

The first jurisprudential orientation appreciated that, currently, as an effect of declaring the unconstitutionality of the provisions of art. 155 para. (1) CP, the interruption of the criminal liability limitation is no longer possible. It was shown that, by not defining the causes of the interruption of the criminal liability limitation, the court shall be bound to apply the provisions on the criminal liability limitation provided by art. 154 CP, since it cannot apply law by analogy or to substitute the lack of a regulation, and the rewording of the norm of the old Criminal Code would entail a reactivation of a provision that was expressly repealed by the enforcement of the new Criminal Code. Furthermore, the courts of law do not have the jurisdiction to supplement the provisions of art. 155 para. (1) Cp, this being an exclusive prerogative of the legislator.

The second majority jurisprudential orientation held that, essentially, the effects of CCR dec. no. 297/2018 do not extend to the entire institution of the interruption of the criminal liability statute of limitation, but, according to the considerations of the decision of the constitutional court, the cause of interruption is incidental only in the case of procedural documents which, according to the law, must be communicated to the suspect or the defendant. Therefore, the provisions of art. 155 para. (1) CP remained in the active background of the legislation and continue to produce effects, but the only acts that can have the effect of interrupting criminal liability limitation are those to be communicated to the suspect or defendant.

Although the legal issue interpreted in a non-unitary manner raises controversies, unfortunately it could not be settled by way of the referral in the interests of the law[17], this being **dismissed as inadmissible by dec. no. 25/2019 in the interests of the law** motivated by the fact that the High Court of Cassation and Justice does not have the jurisdiction to rule on the effects of the decision of the Constitutional Court or to issue binding rulings that contradict the decisions of the Constitutional Court [18].

In 2022, the Constitutional Court was referred to again in order to pronounce on the provisions of art. 155 para. (1) CP. The authors of the challenge showed that, after the pronouncement of Decision no. 297/2018,

[15] CCR dec. no. 637/13.10.2015 on the constitutional challenge of art. 26 para. (3) of Law no. 360/2002 on the Statute of the Policeman, published in the Official Gazette of Romania, Part I, no. 906/08.12.2015, para. 34.

[16] For more information, see C. Ene-Dinu, *Constitutionality and referral in the interests of the law*, in LESIJ - Lex ET Scientia International Journal nr. XXIX, vol. 1/2022 (June), pp. 66-74.

[17] For more information, see C. Ene-Dinu, *Rolul practicii judecătorești în elaborarea dreptului*, Universul Juridic Publishing House, Bucharest, 2022.

[18] HCCJ dec. no. 25/2019 on the referral in the interests of the law for the interpretation and application of the provisions of art. 155 para. (1) CP on the interruption of the criminal liability limitation by fulfilling any act of procedure in the case, after the publication in the Official Gazette of Romania of the CCR dec. no. 297/26.04.2018.

whereby the Constitutional Court noted that the legislative solution providing the interruption of the criminal liability statute of limitation by fulfilling „any procedural act in the case" was not constitutional, the courts of law had to note that the provisions of art. 155 para. (1) CP ceased their legal effects, 45 days after the publication of the admission decision. But in practice, the courts ruled that the decision of the Constitutional Court is an interpretive decision, and not a pure and simple one of immediate application. In this context, it was shown that the challenged provisions of the law were not clear, foreseeable and predictable, as they did not allow the defendant to know under what conditions and by means of what acts the criminal liability limitation was interrupted.

By means of **dec. no. 358/2022**[19], the Constitutional Court showed that it had established that a decision was simple/extreme or interpretive/subject to interpretation, also revealed the answer to the question whether the intervention of the legislator was necessary/mandatory in order to agree with the Constitution, in respect of those found by the court of contentious constitutional, of those provisions found to be unconstitutional. Therefore, it was considered that, as a rule, the establishment of the nature of the decision, *i.e.*, simple/extreme determines the necessity/obligation of the legislator to intervene from the legislative point of view, while the assignment of the nature of interpretative decision/ subject to interpretation does not give rise to such an obligation, but rather determines an obligation of the judicial bodies (and the other bodies called to apply the law) to interpret the Court's decision and establish its effects in order to apply it to the specific case.

The Court holds that **dec. no. 297/2018 sanctions the „legislative solution" contained by the challenged text of law, therefore, by applying traditional/classical criteria, it shall no longer fall within the category of interpretative/subject to interpretation decision**. Furthermore, the operative part of the decision does not even include the phrase specific to a decision by which the constitutional interpretation of the norm is established.

The Court also notes that para. 34 of dec. no. 297/2018, highlighted the **reference points of the constitutional conduct that the legislator, and not the judicial bodies, being bound to fall in with, with the obligation, established under art. 147 of the Constitution**, **to intervene from the legislative point of view and to establish clearly and predictably the cases of interruption of the criminal liability limitation.**

However, the Court notes that, **due to the legislator's silence, the identification of cases of interruption of criminal liability limitation remained an operation carried out by the judicial body, reaching a new situation lacking clarity and predictability, a situation which also determined the different application to similar situations of the challenged provisions** (confirmed by the fact that the High Court of Cassation and Justice found the existence of a non-unitary practice). Therefore, **the lack of intervention of the legislator determined the need for the judicial body to replace it by outlining the applicable normative framework in the event of the interruption of the of criminal liability limitation and, implicitly, the application of the criminal law by analogy**. However, the Court constantly held in its case-law that, the provisions of art. 61 para. (1) of the Constitution establish that „the Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the country", and its legislative competence regarding a certain field cannot be limited if the law thus adopted complies with the requirements of the Fundamental Law[20]. Furthermore, the Court ruled that allowing the person who interprets and applies the criminal law, in the absence of an express rule, to establish himself the rule according to which he is going to solve a case, taking as a model another ruling pronounced in another regulated framework, represents an application by analogy of the criminal law.

Therefore, the Constitutional Court finds that the normative set in force does not provide all the legislative elements necessary for the foreseeable application of the norm sanctioned by dec. no. 297/2018. Therefore, although the Constitutional Court referred to the old regulation, by highlighting the reference points of a constitutional conduct that the legislator was bound to fall in with, by applying the provisions of the Court, this fact cannot be interpreted as a permission granted by the court of contentious constitutional to the judicial bodies to establish themselves the cases of interruption of the criminal liability limitation.

Consequently, the Court notes that, under the conditions of establishing the legal nature of dec. no. 297/2018 as simple/extreme decision, in the absence of the legislator's active intervention, mandatory according to art. 147 of the Constitution, during the period between the date of publication of the respective decision and

[19] CCR dec. no. 358/2022 on the constitutional challenge of art. 155 para. (1) CP, published in Official Gazette of Romania no. 565/09.06.2022.

[20] CCR dec. no. 308/28.03.2012 on the notification of unconstitutionality of the provisions of art. 1 letter g) of Lustration Law on temporary limitation of access to some public offices for persons who were part of the power structures and the repressive apparatus of the communist regime during 6 March 1945-22 December 1989, published in Official Gazette of Romania, Part I, no. 309/09.05.2012.

until the enforcement of a normative act that clarifies the norm, by expressly regulating the cases capable of interrupting the criminal liability statute of limitation, **the active background of the legislation does not include any case that allows the interruption of the criminal liability limitation.**

Such a consequence is the result of the legislator's failure to comply with the obligations incumbent on him according to the Fundamental Law and his passivity, even despite the fact that the decisions of the High Court of Cassation and Justice have announced the non-unitary practice resulting from the lack of legislative intervention since 2019. In this background, the Court finds that the situation created by the legislator's passivity, following the publication of the aforementioned admission decision, represents a violation of the provisions of art. 1 para. (3) and (5) of the Fundamental Law, which enshrines the rule of law nature of the Romanian state, as well as the supremacy of the Constitution. This is because the prevalence of the Constitution over the entire normative system represents the crucial principle of the rule of law[21]. The guarantor of the supremacy of the Fundamental Law is the Constitutional Court itself, by means of the decisions it pronounces, therefore neglecting the findings and provisions contained in its decisions causes the weakening of the constitutional structure that must define the rule of law[22].

In order to restore the state of constitutionality, it is necessary for the legislator to clarify and detail the provisions regarding the termination of the criminal liability statute of limitations.

3. Conclusions

A paradox of modern democracy results from this analysis: we lose ourselves in an avalanche of normative acts, in a frightening instability caused by a frantic tendency to reform. This legislative inflation is naturally accompanied by qualitative deficiencies[23] of the regulations, resulting in the devaluation of the legislative system. The weakening of the valorization function of the law has repercussions on its voluntary realization, because the law cannot be imposed by force, but by its persuasive value. In this context, the words of Hegel are particularly relevant: „In ancient times, respect and reverence for the law were universal. But now the fashion of the time has taken another turn, and thought confronts everything which has been approved"[24].

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[21] For more see E.E. Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ*, Pro Universitaria Publishing House, Bucharest, 2013, pp. 63-64.

[22] CCR dec. no. 230/28.04.2022 on the constitutional challenge of art. 14 letter a) and of art. 26 letter d) of Law no. 51/1995 for the organization and practice of the lawyer's profession, published in Official Gazette of Romania, Part I, no. 519/26.05.2022.

[23] For an example on the lack of previsibility of law, please see M.-C. Cliza, D.-C. Borcea, L.-C. Spătaru-Negură, *To Be or Not to Be Plagiarism? Unconstitutionality Criticisms of Article 170 Para. (1) of the Romanian National Education Law*, published in CKS 2022 Proceedings, „Nicolae Titulescu" University Publishing House, Bucharest, 2022, pp. 233-240.

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FORMS OF PROPERTY IN ROMAN LAW

Elena ANGHEL*

Abstract

The exceptional vitality of the Roman legal system is explained both by the creation of the legal alphabet, taken over in later societies, and also by the fact that any society that was founded on private property and the exchange economy found all the concepts, principles and the legal institutions necessary to regulate these social relations.

Thus, the legal institution of property is included among the concepts that make the connection between the past and the present of the rules of law.

The appearance of the Roman state is placed in the 6th century BC, when King Servius Tullius institutes a series of reforms that ensure the transition from gentile society to the one organized in the state: social reform and administrative reform.

In the pre-state era, legal texts attest to the existence of the collective property of land, as well as family property. With the emergence of the state, the Romans exercised collective property of the state as well as private property, called quiritary property, the Quirites being the ancient citizens of Rome.

In the classical era, alongside the quiritary property, which survives the old era of Roman law, new forms of property appear: praetorian property, provincial property and peregrine property.

In post-classical law, we witness a process of unification of property, perfected in the time of Emperor Justinian, a process that results in the merging of all forms of property into a single form, called dominium.

Keywords: *roman law, quiritary property, praetorian property, provincial property, peregrine property.*

1. Introduction

This study aims to provide a historical perspective on the forms of property in Roman law considering the fact that the understanding of contemporary legal institutions cannot be separated from knowing their origin and evolution. As specialized literature provided „it no longer seems sufficient to us to follow up the emergence and evolution of an institution going all the way back to Justinian. We have to go even further, nowadays being able to display the manner in which Roman regulation was received in civil codifications. The student will thus come to perceive the institutions in an evolutionary way (as well as the way in which they were taken over from a generation to another), this study bringing him to the threshold of positive law”[1].

2. Paper content

Several communities with common military and economic interests lived in the center of the Italian Peninsula (Latium), in the 8th century BC. Over time, among these communities, thanks to the conquered wars, Rome, a fortress located on the hills in the south of River Tiber became more important.

At the beginnings, the inhabitants of Rome were organized in gentes. The gens were a primitive social formation based on kinship, bringing together those descending from a common ancestor. The members of a gens jointly owned the land, had common religious holidays and common traditions and defended each other in case of danger. An elected leader was at the head of the gens, *called magister gentis*, assisted in the exercise of the duties by a council of the elders of the gens, called senate.

There were 300 gentes in ancient Rome, divided into 30 curiae and 3 tribes, called founding tribes: the Latins, the Sabines and the Etruscans. Over time, once with the development of the agriculture, some families became rich and began to appropriate significant parts of the common lands; the members of these wealthy families took the name of patricians (patricii).

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[1] V. Hanga, M.D. Boçşan, *Curs de drept privat roman*, Universul Juridic Publishing House, Bucharest, 2006, p. 11.

Along with the formation of gentile aristocracy made up of patricians, the pleb is also formed, made up of those members of some gentes who came down, becoming semi-dependent persons. Later on, foreigners who came to Rome and placed themselves under the protection of a gens (guests and clients), as well as slaves freed by their masters, also joined the pleb.

The patricians tried to consolidate their dominant position, both towards clients and slaves, and towards the plebeians, the latter being more and more dissatisfied with the position of inferiority. The patricians were engaged in agriculture and shepherding, and the plebeians were primitive craftsmen. Despite the fact that both social categories were involved in the economic life of the city, the entire social leadership of Rome belonged to the patricians, the plebeians being forced to respect the decisions made by the patricians, although they did not participate in their adoption. For these reasons, the plebeians will go to war against the patricians to obtain political equality, a conflict that will hasten the disintegration of the gentes and lead to the foundation of the Roman state.

Therefore, in order to end the conflict between the Patricians and the Plebeians, in the middle of the 6th century BC, King Servius Tullius established two reforms which laid the foundations of the Roman state: social reform and administrative reform.

By means of the social reform, King Tullius divided the entire population of Rome, without taking into account the distinction between plebeians and patricians, in 5 social categories, on the criterion of wealth. The classes were delimited in descending order of citizens' wealth, starting with the knights and ending with the proletarians. In their turn, these social categories were divided into centuries, which were military and voting formations, each century expressing a vote. From the political point of view, the 193 centuries thus formatted designated the cooptation of rich plebeians in the decision-making bodies.

Within the administrative reform, Servius Tullius divided the territory of Rome into administrative and territorial divisions (districts), called tribes. Tullius divided Rome into 4 urban tribes and 17 rural tribes. In this way, the capacity of citizen of Rome was no longer linked to the belonging to a gens, but to the district in which the citizen lived.

After the implementation of the two reforms, the two criteria based on which the distinction can be made between pre-state gentile society and the one organized in the state are met, namely: social stratification criterion and territorial criterion.

Despite the fact that, by means of the reforms implemented by Servius Tullius, the plebeians gained access to the comitia centuriata, the conflicts with patricians continued, due to the discriminations to which the plebeians were subject. Therefore, in economic terms, all lands conquered from the enemies became the property of the state with the title of *ager publicus*[2] and then, the right to use was transferred only to the patricians. The plebeians did not have access to such lands. Over time, the patricians' right of use turned into a real private property, going up to the formation of latifundia in the last centuries of the Republic.

This incursion into the past supports the understanding of the first forms of dominion[3], existent in the pre-state age. We call it dominion because, as the doctrine stated, „at least until the Law of the Twelve Tables, we cannot refer to „property" in the legal conceptual meaning, but of a dominion over assets. The existence of a public dominion over the lands in the gentile arrangement created a community of economic interests between the members of the society, and the rules of social conduct were sufficient for their protection"[4].

Therefore, **in the pre-state area**, the Romans knew the following forms of dominion:

- At the time of the founding of Rome, estimated around 753 BC, the Romans knew as form of individual dominion *only* **the ownership over certain movable assets of the family.**

Private property, which was called *dominium ex iure quiritium*, was carried over certain movable assets of the family (slaves, cattle, household items). The proof of the fact that, at that time, there was only ownership over certain movable property, is the fact that *mancipation,* the way of transferring the ownership right over mancipi property was used only with regard to movable property, which could be „grabbed by hand"

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[2] C. Ene-Dinu, *Istoria statului și a dreptului românesc*, revised and supplemented ed., Universul Juridic Publishing House, Bucharest, 2023, p. 23.

[3] For more about public property in administrative law, see E.E. Ștefan, *Drept administrativ Partea a II-a, Curs universitar*, IVth ed., revised and updated, Universul Juridic Publishing House, Bucharest, 2022, pp. 246-276; E.E. Ștefan, *Drept administrativ Partea I, Curs universitar*, IIIrd ed., revised, supplemented and updated, Universul Juridic Publishing House, Bucharest, 2019, pp. 16-27. Also, see on discrimination E.E. Ştefan, *Opinions on the right to nondiscrimination*, in CKS e-Book 2015, pp. 540-544, available online at *http://cks.univnt.ro/cks_2015/CKS_2015_Articles.html*, Public law section, visited on 31.03.2023.

[4] V. Hanga, M.D. Bocşan, *Curs de drept privat roman, op. cit.*, p. 166.

and brought before witnesses and weigher. Furthermore, *in iure cessio* required bringing before the magistrate the asset that was to be transferred. The mechanism of these acts supports the fact that, in the pre-state age, only movable property was likely to fall under the scope of the private ownership[5].

We hereby recall that patrimonial assets, namely the assets likely to fall under the scope of a private patrimony, were divided, according to the value they assigned at that time, in *res mancipi* and *res nec mancipi*. The category of *mancipi assets* included agricultural funds, slaves and animals that served to carry out the main activity of Rome inhabitants, agriculture. On the contrary, *nec mancipi assets* were considered less important by the Romans and included fruits of the earth, animals that did not serve for work, metals used as a mean of exchange, etc.

- Another form of dominion in pre-state age is the **collective property of the gens.** As we have shown above, at that time, the land of Rome was in the collective property[6] of the gens, and its existence is attested by ancient Latin and Greek authors. Varro states that the land of Rome was originally divided between the three founding tribes, and Dionysius of Halicarnassus says that the division was made between the curiae[7].
- Along with the collective property of the gens, Roman society of the pre-state age also knew **family property**. This form of **land** property belonging to the family was called by Romans *heredium* (inheritance) and consisted of a small piece of land (half a hectare), which included the garden and the house[8]. Therefore, ancient authors stated that Romulus had assigned to each family two acres of land, to serve as house and garden. The other lands were in collective ownership.

This is the oldest form of real estate property. This family fund was co-owned by all family members and could not be alienated. Upon the death of the pater familias, the two acres of land were inherited by the *sui heredes*, namely the heirs of the first category, considering that they were just continuing a form of property that they had previously owned together with the pater familias.

At the beginning, family property had indivisible nature, but the Law of the Twelve Tables subsequently created an action called *actio familiae herciscundae*, whereby the heirs could request the exit from the indivision.

In the Ancient Age, after the foundation of the Roman state, the Romans knew two forms of property:

- **Collective property of the state** over the lands conquered from the enemies, as well as over the slaves captured in wars. Sometimes, the state kept part of these lands in its property (*ager publicus*), and what remained served the entire community; over time, the state began to sell these lands to the patricians, for small amounts (to the displeasure of the plebeians).
- **Quiritary property** was, until the end of the Republic, the only form of Roman private property. It was called *dominium ex iure quiritium*, namely *„dominion according to the law of the quirites*" (the quirites were the Roman citizens), therefore, at the beginning, dominion was jointly exercised.

Being regulated by *ius civile*, this form of property was full of solemn formulas, gestures, rituals and symbols, having an inflexible and formalist nature that the Romans knowingly maintained due to the desire to reserve this form of property exclusively for Roman citizens. From another point of view, legal formalism was also explained by the strength of religious beliefs in ancient times and by the low level of development of productive forces. We cannot even speak of a legal phenomenon distinct from the religious one before the expulsion of the kings. Legal acts were rare, celebratory acts, because commodity production and exchange were in their most rudimentary form. The need for certain formalities to give legal value to the conventions did not represent a hindrance in concluding them, because such acts were very rare[9].

Quiritary property had an **exclusive nature**, being exercised only by the Roman citizens, having as scope Roman goods and being transferred by special acts of civil law. Therefore, the peregrini did not have access to *dominium ex iure quiritium,* they benefited from a form of property based on the law of the gentes.

Quiritary property was only carried out over **Roman goods**. After the adoption of the Law of the Twelve Tables , in order to ease commercial relations, nec mancipi goods were also subject to quiritary property.

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[5] For further details, see E. Molcuț, *Drept privat roman. Terminologie juridică romană*, Universul Juridic Publishing House, Bucharest, 2011, p. 120; E. Anghel, *Drept privat roman. Izvoare, procedură civilă, persoane, bunuri*, Universul Juridic Publishing House, Bucharest, 2021, p. 201.

[6] C. Ene-Dinu, *Istoria statului și a dreptului românesc*, revised and supplemented ed., Universul Juridic Publishing House, Bucharest, 2023, p. 45.

[7] E. Molcuț, *Drept roman*, Press Mihaela SRL Publishing House, Bucharest, 2002, p. 114.

[8] V. Al. Georgescu, *Originea și evoluția generală a proprietății în dreptul roman*, Cernăuți, 1936, p. 325.

[9] V. Hanga, M.D. Bocşan, *Curs de drept privat roman*, Universul Juridic Publishing House, Bucharest, 2006, p. 21.

As regards lands, quiritary property could be exercised only over the soil located in Rome and Italy, *not over provincial soil*. Provincial soil was owned by the state (or the Emperor) and was commissioned (not transferred) to certain persons, in order to be cultivated and they paid in return a tax called *stipendium*, if the land belonged to the people or *tributum*, if it belonged to the Emperor. These lands could become subject to the quiritary property if, exceptionally, the Emperor granted by means of a decision the *ius italicum* to the provincial fund.

Quiritary property could be alienated only by procedures specific to civil law: *mancipatio* or *in iure cessio*. At the beginning, mancipation, a solemn act, was the only way of transferring quiritary property over mancipi goods. Over time, the Romans accepted that less valuable goods (*res nec mancipi*) could be transferred by an act under the law of the gens, called *tradition*, which no longer required solemn forms, but the simple material remittance of the good from the seller to the buyer.

In case a mancipi good was transferred by tradition, the quiritary property was not handed over, therefore the seller remained the dominus, according to the civil law. Notwithstanding, the praetor consolidated this right and ruled that if the mancipi good handed over by tradition was owned for 1 year (if it was movable property) or 2 years (if it was immovable property), then the possessor could become the owner by long term adverse possession, if all required conditions in this respect were met. Until the consolidation of this right, the possessor exercised a praetorian property right (**bonitary ownership**) which was legally protected by public action and public exception.

Furthermore, quiritary property had **absolute nature**: the quiritarian enjoys a full right, which grants him *ius utendi, ius fruendi* and *ius abutendi* without limitation, namely the right to use the property, the right to enjoy its fruits and the right to dispose of it, at his discretion.

Furthermore, the quiritary property had a **perpetual nature**, which is expressed as follows: *„proprietas ad tempus constitui non potest”* ***(property cannot be established until a certain time, but forever).*** Quiritary property could not be lost under the passage of the time, could not be transferred under an extinguishing term or under an extinguishing condition, and could not be revoked.

The Age of the Republic was the time of glory of the Roman state and, similarly, of the Roman law. Thanks to its expansionist policy and a very organized army, Rome conquers city after city so that, in the 1st century AD, it becomes the most powerful state in antiquity.

Due to the economic development of the Roman society, important differences in wealth appear among free citizens. Therefore, a privileged class was the landed aristocracy, made up of rich patricians and plebeians, followed by the knights. The middle class was made up of small landowners, small craftsmen and merchants, and a lower category of free citizens was made up of poor peasants and urban plebeians, in a continuous economic decline. „The struggle for land, led by the poor citizens of Rome against big landowners, runs like a red thread throughout Roman history from the Republican age”[10]. Small agricultural property is maintained, although a great part of the peasantry either enlists in the army or settles in Rome, to live off the state.

Towards the end of the Republic, civil wars broke out between nobles and knights, in the struggle for the exercise of power. The victory of the knights led to the establishment of the monarchy. But the transition of Rome from republic to monarchy was not made suddenly, but gradually, through the military dictatorships, which rooted in the people's consciousness the idea of a single leadership, as the only form of maintaining the Roman state.

In the age of the principality, the differences between the poor and the rich, called in texts *humiliores și honestiores* are accentuated. Latifundia were formed, belonging either to the Emperor or to the Senators, while a great part of ager publicus it is now converted into imperial domains and concessioned to small cultivators.

In the classical age, to the extent of the intensification of slavery, at the same time with the collective property of the state, private property (quiritary property) escalates, but other forms of property are also known:

- **Praetorian property** is the property acknowledged and protected by the praetor, in opposition with the quiritary property, sanctioned by civil law. Along with the development of trade, it was necessary to simplify the conclusion of legal acts, since mancipation required very complicated solemn forms. For the transfer of the property over nec mancipi goods, tradition was used, with simplified form conditions, therefore, in practice,

[10] V. Hanga, M. Jacotă, *Drept privat roman*, Didactică și Pedagogică Publishing House, Bucharest, 1964. See also: E. Molcuț, *Drept privat roman. Terminologie juridică romană*, revised and supplemented ed., Universul Juridic Publishing House, Bucharest, 2011; I.C. Cătuneanu, *Curs elementar de drept roman*, Cartea Românească Publishing House, Cluj Bucharest, 1927; C.St. Tomulescu, *Drept privat roman*, University of Bucharest Printing House, 1973; E. Anghel*, Drept privat roman. Izvoare, procedură civilă, persoane, bunuri*, Universul Juridic Publishing House, Bucharest, 2021.

Romans began to transfer mancipi goods, especially slaves, by means of tradition. However, in this case, according to civil law, the owner of the property remained the seller **(tradens)**, who could file a claim against the possessor.

By being involved in the process of adapting the old civil law to the new realities, the praetor admitted that the tradition could be used for the transfer of mancipi goods, but, in this case, the acquirer does not become a quiritarian owner, as the rigorous requirements of the civil law are not met. He will acquire a new form of property, which the Romans called **in bonis** (the good transferred is in the acquirer's patrimony). Praetorian (bonitary) ownership was based on a *legal fiction*, namely that the term required for the long term adverse possession had expired. In order to legally protect this form of property, the praetor created a praetorian action, called **public action**, granted to the one who acquired ownership over a mancipi good by tradition, being considered by the praetor as the owner by long term adverse possession (the conditions for the long term adverse possession were required to be met, except the term).

Upon the expiry of the term of the adverse possession (1 year for movable assets and 2 years for immovable assets), the praetorian owner became quiritarian. Until the fulfillment of this term, two forms of ownership coexisted on the same good: **quiritary property** exercised by the tradens, which remained *dominus ex iure quiritium,* being the owner of an empty right and **praetorian property**, exercised by the acquirer of the good.

- **Provincial property**[11]. As we described above, the lands of the provinces conquered by the Romans became the property of the state under the name of *ager publicus*, then they were distributed for cultivation to individuals who, as a sign of recognition of the state's ownership, paid a land tax called *stipendium* or *tributum*. Although this form of dominion was called *possession* and *beneficial interest*, this right of „use" of the provincials entailed the features of a genuine real right: the land could be transferred between living people by deeds, but also by will and could also be subject to long term adverse possession. In this context, the provincial soil seems to have had *two owners of the ownership right*: the Roman state and the inhabitants of the provinces.
- **Peregrine property.** Originally, foreigners were not welcome in Rome so, unless they were under the protection of Roman citizens, they became slaves. By the time, under the conditions of the development of the exchange economy, the Romans had to show tolerance towards their trading partners. Notwithstanding, the civil law, rigid and exclusive, did not recognize the right of ownership of the peregrini over their property. The praetor's edict is the one that implemented for the peregrini a form of property exercised in accordance with the law of the gentes, but created according to the model of civil actions: in order to file action for the recovery of possession, the fiction that the peregrinus was a Roman citizen was introduced into the formula.

The age of the Dominate begins with the ascension to the throne of Emperor Diocletian, who brings with him the absolute monarchy by divine right. If in the age of the principality, the head of state was considered the first among the citizens, appointed by the senate and acclaimed by the people, in the second phase of the empire, the monarch is *dominus et deus*, above all people, supranatural powers being ascribed to him.

In social terms, we are witnessing a general decay of Roman society. Economic life returns to the practices of primitive, natural economy. The large latifundia (villae), based on the work performed by colonists and slaves, expand, and their owners begin to exercise part of the functions of the state on their domains. Therefore, some of the large landowners had their own army and administration, collected taxes and extended their claims to neighboring territories, being in open conflict with the imperial power.

In this background, in the post-classical age, the property forms analyzed above changed their physiognomy or some even disappeared. Therefore, peregrine property disappeared after the edict of Caracalla of 212, which granted citizenship to all free inhabitants of the empire.

The provincial property also disappeared after the Italian soil was subject to taxes, like the provincial soil, so that all lands were subject to a single ownership right.

The difference between mancipi and nec mancipi goods disappears in the age of Justinian, and tradition becomes the usual way of transferring property. Therefore, the praetorian property merges with the quiritary, forming a unique property, called **dominium**, which could be exercised by any person, beyond the rigors of *ex iure quiritium*.

[11] C. Ene-Dinu, *Istoria statului și a dreptului românesc*, revised and supplemented ed., Universul Juridic Publishing House, Bucharest, 2023, p. 23.

3. Conclusions

It can be said that alongside the important achievements of Roman antiquity - the progress of work tools and methods, the development of crafts, the development of the social division of labor, the progress of the sciences and arts - one no less important can be added: the creation of the Roman legal system, which exercised a decisive influence on the subsequent development of law. This influence is not over, according to the doctrine: the development of the single European law finds its model in Roman law, as a universalist system, able to include and capitalize diversity[12].

„Roman law has its own value, which can be explained by the great inclination our ancestors had for *ars boni et aequi*; it created the legal language and legal categories of universal common law, coordinating for the first time the different legal provisions, raising them to the principles from which they started, grouping them around certain rules. This intrinsic value of Roman law is independent of the solutions given and that is why the persistence of the legal categories drawn up by it is explained, even compared to the diversity and complexity of the issues debated by modern law[13]".

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[12] V. Hanga, M.D. Bocşan, *Curs de drept privat roman*, Universul Juridic Publishing House, Bucharest, 2006, p. 9. E.E. Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ*, Pro Universitaria Publishing House, Bucharest, 2013, pp. 63-64.

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CONSTITUTIONAL REVIEW OF THE REGULATIONS REGARDING THE LAWYERS: AN EFFECTIVE WAY OF MAINTAINING AND STRENGTHENING THE PRESTIGE OF THE PROFESSION OF LAWYER

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Abstract

The right to defense is fundamental in a democratic society, based on the rule of law. Its exercise requires skill, rigor, attention and an excellent knowledge of the legislation involved in each case. A truly professional defense can only be carried out by a genuine legal professional, by a lawyer who is a member of a bar recognized by law. Over the years, the regulation of the profession of lawyer has required legislative improvements to clarify and strengthen the legal status of lawyers as defenders of fundamental human rights. In this approach, the Constitutional Court played an important role, through its decisions on this issue. This paper aims to present the contribution that the constitutionality review had to the improvement of the regulations regarding lawyers.

Keywords: *lawyers, legal profession, review of constitutionality, right to defense, fair trial.*

1. Introduction

The lawyers' role in what concerns the entire set of actions aimed at achieving justice is definitely undeniable. Especially thanks to lawyers the exercise of the fundamental right to defense of any natural or legal person can be fully done and also with the highest effectiveness. They are recognized professionals of the law, whose contribution in protecting the rights and freedoms of the litigants and in ensuring a fair trial is indisputable. This reality has been repeatedly confirmed by the Constitutional Court of Romania itself, which through its case-law affirmed the need to recognize and maintain the prestige of the profession of lawyer.

This paper intends to present some of the decisions by which the Romanian Constitutional Court emphasized the importance of the activity of lawyers who practice their profession under conditions of full legality, within professional structures organized in accordance with the rigors of the special law. According to this law, the access to this honorable profession is allowed exclusively following a selection of candidates, carried out strictly on the criteria of professional competence proven by the drastic testing of legal knowledge.

The scholars' literature has addressed the diversity of issues that the analysis of the legal regulation regarding the profession of lawyer involves, exposing with a high analytical spirit and a broad integrative vision the complexity of aspects that the exercise of this profession entails[1]. Nevertheless, various aspects of the same issues have also been subject to the constitutional review exerted by the Constitutional Court of Romania due to its powers provided by the art. 146 of the Basic Law, before or after entering into force of the legal regulations (the so-called *a priori* and *a posteriori* review of constitutionality)[2].

We consider that those stated in the case-law of the Constitutional Court deserve to be distinctively presented, as a result of the binding general effect of the decisions it pronounces, expressly enshrined by Article

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[1] See, in this regard, for example, M. Criste, *Avocatul și profesia de avocat în România*, Universul Juridic Publishing House, Bucharest, 2014, dealing with topics such as the independence and autonomy of the profession of lawyer, the ethical and professional rules applicable to lawyers and the relationship between lawyers and the judiciary, F. Streteanu, *Avocatul, etica și deontologia profesională*, C.H. Beck Publishing House, Bucharest, 2019, which address topics such as the ethics and professional conduct of lawyers, conflicts of interest and the relationship between lawyers and clients or even *Manualul avocatului - drepturile și obligațiile profesionale ale avocaților*, published in 2016 by the National Union of Romanian Bar Associations, in collaboration with the National Council of Romanian Bar Associations, which provides a detailed presentation of the ethical and professional rules of lawyers and their obligations in relation to clients and the judicial system.

[2] For detailed and exhaustive analyzes of the review of constitutionality performed by the CCR, see I. Muraru, N.M. Vlădoiu, *Contencios constituțional. Proceduri și teorie*, 2nd ed., Hamangiu Publishing House, Bucharest, 2019; I. Muraru, N.M. Vlădoiu, A. Muraru, S.G. Barbu, *Contencios constituțional*, Hamangiu Publishing House, Bucharest, 2009; S.G. Barbu, A. Muraru, V. Bărbățeanu, *Elemente de contencios constituțional*, C.H. Beck Publishing House, Bucharest, 2021.

147 paragraph 4 of the Constitution. That is why this paper focuses on the jurisprudential approach of several aspects concerning the profession of lawyer.

2. Content

2.1. Specific professional requirements

The right to defense is a fundamental right[3], closely related to the justice making in accordance with the standards of a fair trial, which characterizes the rule of law itself. That is why the profession of lawyer requires the meeting of special qualities, the analysis of which cannot be done otherwise than in the organized framework of official professional structures.

Accordingly, the access to the profession of lawyer requires verification of the legal knowledge that a person wishing to practice this profession must possess. Following the examination, there will be admitted only candidates who prove that they have a solid scientific base, in order to be able to efficiently defend people who call on the services of a lawyer. In this sense, art. 17 para. (1) and (2) of Law no. 51/1995 on the organization and exercise of the profession of lawyer provides that admission to the profession of lawyer is carried out only on the basis of an exam organized by the National Union of Bars of Romania at least annually and at national level, according to the forementioned law and the Statute of the lawyer profession. The exam for admission to the profession of lawyer is held within the National Institute for the Training and Improvement of Lawyers and is conducted in a unitary manner, in its territorial centers, based on a methodology developed and approved by the Council of the National Union of Bars of Romania.

In this context, the Court held[4] that, taking into account the provisions of art. 2 para. (3) and of art. 4 of Law no. 303/2004 regarding the status of judges and prosecutors[5], according to which „judges and prosecutors are obliged, through their entire activity, to ensure the supremacy of the law”, even the High Court of Cassation and Justice ruled that it is necessary for the judicial bodies to take not only the necessary measures to ensure the right to defense to the accused and to the defendant in the criminal process, when this is, according to the law, mandatory[6], but also to observe that the legal assistance is granted by a person who has acquired the quality of lawyer under the conditions of Law no. 51/1995, as amended and supplemented by Law no. 255/2004, because, otherwise, the legal assistance granted is equivalent to a lack of defense[7]. In justifying this decision, the supreme court held that, by Law no. 51/1995, the conditions for practicing the profession of lawyer are regulated in accordance with the provisions of the Code of Criminal Procedure regarding the right to defense of which the accused or the defendant have to benefit throughout the entire criminal process, as well as the absolute nature of the nullity by which acts performed in the absence of the defender when the presence and legal assistance to be provided by him are mandatory, according to the law. At the same time, the High Court noticed that, since the provisions of Law no. 51/1995 - which has the character of a special law regarding the exercise of the profession of lawyer - contain certain imperative requirements, it goes without saying that it is not possible to fulfill such a profession outside the framework institutionalized by that law.

The Constitutional Court showed that the profession of lawyer is a public service, which is organized and operates on the basis of a special law. It is exercised by a professional body which is selected and which operates according to the rules established by law. This option of the legislator cannot be considered unconstitutional, considering that the purpose of Law no. 51/1995 is to ensure the provision of qualified legal assistance. Also, CCR stated that the rules on the basis of which the profession of lawyer is organized and practiced do not violate the constitutional provisions invoked in support of the criticisms of unconstitutionality formulated by the petitioners.

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[3] Regarding the importance of the right of defense and its realization, see, for example, M. Enache, Şt. Deaconu, *Drepturile şi libertăţile fundamentale în jurisprudenţa Curţii Constituţionale*, vol. 1, 1st ed., C.H. Beck Publishing House, Bucharest, 2019, sau N. Popa, E. Anghel, C.B.G. Ene-Dinu, L.-C. Spătaru-Negură, *Teoria generală a dreptului. Caiet de seminar*, 2nd ed., C.H. Beck Publishing House, Bucharest, 2014.

[4] CCR dec. no. 30/19.01.2021, published in the Official Gazette of Romania, Part I, no. 292/23.03.2021.

[5] Republished in the Official Gazette of Romania, Part I, no. 826/13.09.2005.

[6] For a perspective in a European context on this right, see, for example, R. Popescu, *Directiva 2013/48/UE privind dreptul de acces la un avocat in cadrul procedurilor penale*, in Curierul Judiciar no. 11/2013, C.H. Beck Publishing House, Bucharest.

[7] HCCJ dec. no. XXVII/16.04.2007, published in the Official Gazette of Romania, Part I, no. 772/14.11.2007, pronounced in the resolution of the appeal in the interest of the law declared by the general prosecutor of the Public Prosecutor's Office attached to the High Court of Cassation and Justice regarding the effects of assisting or representing the parties in the criminal trial by persons who have not acquired the capacity of a lawyer under the terms of Law no. 51/1995.

The fact that access to the profession of lawyer is conditioned by the fulfilment of certain requirements cannot be seen as a limitation of the right to work or of the right to freely choose one's profession.[8]

Thus, making an analogy with other specific professional fields, the Court held that the criminalization and sanctioning of acts of unlawful exercise of certain professions or activities for which a certain training is required and which, consequently, are subject to authorization, express the need to defend social values of particular importance, including life and the physical and mental integrity of the person, as well as its patrimonial interests. Society cannot allow certain professions, such as that of doctor or pharmacist, to be practiced by unqualified persons and not to assume the necessary liability in case of dangerous or damaging consequences. And this is the case of profession of lawyer as well. The fact that similar requirements, with the same legal consequences, were also imposed on the profession of lawyer is an option of the legislator, which falls within the margin of appreciation of the Parliament during its legislative activity[9].

In the same context of emphasizing the importance of the activity of lawyers, CCR ruled on the provisions of art. 83 CPC regarding the conventional representation of natural persons, which establish the rule according to which in the courts, at all jurisdictional levels, natural persons may be represented by a lawyer or other representative, but if the mandate is given to a person other than a lawyer, the trustee cannot draw conclusions on the procedural exceptions and on the merits except through the lawyer.

Thus, for example, by dec. no. 860/17.12.2019[10], CCR noticed that the provisions of art. 83 CPC, as a whole, are aimed to ensure the fullness of the right of free access to justice, regulating conventional representation as a mechanism to facilitate the exercise of this fundamental right. At the same time, the way of regulating the conventional representation also ensures the full exercise of the right to defense, since the limitation of the possibility of the representative to formulate oral conclusions in the court of justice is nothing more than a guarantee for the realization of the right enshrined in art. 24 of the Basic Law. Considering the importance of this type of defense in the process, the legislator considered that it is necessary to impose it in a professional manner, through a lawyer, thus ensuring that the litigant will benefit from a defense that meets the qualitative requirements sufficient for to serve his procedural interests and to respect the standards of a fair trial.

2.2. The lawyers' requires a legal, officially organized framework

The Constitutional Court had to analyze the constitutionality of some provisions of Law no. 51/1995 regarding the organization of the profession, which stipulate that the profession of lawyer is exercised only by lawyers registered in the bar of which they belong, a component bar of the National Union of Bars of Romania, and the establishment and operation of bar associations outside the N.U.B.R. are forbidden. Their incorporation and registration documents are null and void. Nullity can also be established *ex officio*[11]. At the same time, Law no. 51/1995 stipulates that, on the date of its entry into force, natural or legal persons who have been authorized on the basis of other normative acts or have been approved by court decisions to carry out consulting, representation or legal assistance activities, in any fields, cease *de jure* their activity. Continuation of such activities constitutes a criminal offence and is punished according to the criminal law. Also, at the same moment, cease the effects of any regulatory, administrative or jurisdictional act by which consulting, representation and legal assistance activities contrary to the provisions of this law were recognized or approved.[12]

Under this aspect, another decision issued by the High Court of Cassation and Justice is also relevant[13], through which it analyzed the way the organization and exercise of the profession of lawyer in Romania were regulated, decision regarding the appeal in the interest of the law on the interpretation and uniform application of the provisions of art. 348 CP, in the case of the exercise of activities specific to the profession of lawyer by

[8] CCR dec. no. 514/30.06.2020, published in the Official Gazette of Romania, Part I, no. 770/24.08.2020, CCR dec. no. 379/24.09.2013, published in the Official Gazette of Romania, Part I, no. 731/27.11.2013, CCR dec. no. 155/17.03.2015, published in the Official Gazette of Romania, Part I, no. 259/17.04.2015, para. 14, and CCR dec. no. 158/14.03.2017, published in the Official Gazette of Romania, Part I, no. 394/25.05.2017, para. 19 and 20.

[9] CRR dec. no. 339/10.04.2012, published in the Official Gazette of Romania, Part I, no. 374/01.06.2012, CCR dec. no. 514/30.06.2020, previously cited, CCR dec. no. 379/24.09.2013, published in the Official Gazette of Romania, Part I, no. 731/27.11.2013, CCR dec. no. 412/08.10.2013, published in the Official Gazette of Romania, Part I, no. 712/20.11.2013, CCR dec. no. 129/13.03.2014, published in the Official Gazette of Romania, Part I, no. 291/22.04.2014, CCR dec. no. 155/17.03.2015, published in the Official Gazette of Romania, Part I, no. 259/17.04.2015, or CCR dec. no. 509/30.06.2015, published in the Official Gazette of Romania, Part I, no. 580/03.08.2015.

[10] Published in the Official Gazette of Romania, Part I, no. 301/10.04.2020, para. 17 and 18.

[11] Art. 1 para. (2) and (3) of Law no. 51/1995.

[12] Art. 107 para. (1) and (2) of Law no. 51/1995.

[13] HCCJ dec. no. 15/21.09.2015, published in the Official Gazette of Romania, Part I, no. 816/03.11.2015.

persons who are not members professional organization recognized by Law no. 51/1995. On that occasion, the supreme court held that from the succession of normative acts in time, it follows that the forms of organization at the territorial level of the profession of lawyer, regardless of their name („bars", „colleges"), have never been abolished in Romania, not even during the communist regime. The legal mechanism used by the legislator consisted in the transformation of the legal person, in the sense that the same normative act provided for the dissolution of existing legal persons, simultaneously with the establishment of other legal persons in their place, as successors in rights and obligations of the former. The situation is the same with regard to the forms of organization at national level („Union of Romanian Lawyers", „Union of Romanian Bar Associations", „Union of Romanian Bar Associations", „Central Council of Bar Associations", „National Union of Bar Associations from Romania"), with the only mention that for a short period of time (between February 14, 1950 and July 21, 1954) the profession of lawyer was left without an organizational structure at the national level. From this perspective, in Romania there was a continuity of the organization and exercise of the profession of lawyer, and the establishment of successor legal entities was done directly under the law, without any further formality. It was also emphasized that Law no. 51/1995, republished, with subsequent amendments, regulates unique and exclusive forms of professional organization of lawyers in Romania, in the sense that this profession can only be exercised by lawyers enrolled in the bars (there being only one bar in each Romanian county), which is part of the National Union of Romanian Bar Associations, as the only national structure of the professional order of lawyers in Romania.

Thus, by dec. no. 15/21.09.2015, cited above, the supreme court ruled that the persons who exercise activities specific to the profession of lawyer within bars parallel to those existing under the law, regardless of whether they were/would be established after the entry into force of Law no. 255/2004 or existed before, but continued their activity after this date, have the subjective representation of the fact that they act beyond the legal framework in force, because it has sufficient precision and clarity to allow its recipients to understand it and to conform their conduct to its provisions, thus excluding the possibility of invoking the error as a cause of non-imputability provided by art. 30 CP. In other words, the subjective side of the analyzed criminal offence (respectively the crime of unlawful exercise of a profession or activity) is closely related to its objective side, more precisely with the essential requirement of „unlawful" exercise of activities specific to the profession of lawyer, the fulfillment of which leads to the conclusion that a person in such a situation acts with the intention of harming the social values protected by the incriminating legal norm, following which the judicial bodies will concretely analyze the guilt of each person investigated for this criminal offence.

The problem related to the way of exercising the profession of lawyer in Romania was also the object of the analysis of the ECtHR, which, by the Decision of October 12, 2004 regarding the admissibility of app. no. 24.057/03, formulated by Pompiliu Bota against Romania, declared inadmissible the request regarding the violation of freedom of association, enshrined in the provisions of art. 11 ECHR. Thus, the Strasbourg Court held that, among the statutory objectives of the association whose president was the plaintiff, there was the creation of bar associations, which contravened the provisions of Law no. 51/1995 that prohibits the creation of bar associations and the exercise of the lawyer profession outside the Romanian Bar Association. Thus, due to the fact that the latter cannot be analyzed as an association within the meaning of the provisions of art. 11 ECHR, since the orders of liberal professions are institutions of public law, regulated by law and pursuing goals of general interest.

Also, the Court found that the rules under which the National Union of Bars of Romania operates (N.U.B.R.) do not contravene the invoked constitutional principles and those who wish to practice the profession of lawyer are obliged to respect the law and accept the rules imposed by it[14]. The Constitutional Court clarified this issue, emphasizing the importance of strict legal regulation regarding the access into this profession, denying the existence of parallel, illegitimate and parasitic structures. Under this aspect, the Court analyzed the constitutionality of the provisions of art. 59 para. (6) of Law no. 51/1995 on the organization and exercise of the profession of lawyer, according to which the unauthorized use of the names „Bar", „The National Union of Bars of Romania", „N.U.B.R.", „The Union of Lawyers from Romania" or the names specific to the forms of exercising the profession of lawyer, as well as the use of the insignia specific to the profession or the wearing of the lawyer's

[14] CCR dec. no. 806/09.11.2006, published in the Official Gazette of Romania, Part I, no. 29/17.01.2007; see also CCR dec. no. 182/29.03.2018, published in the Official Gazette of Romania, Part I, no. 531/27.06.2018.

robes in conditions other than those provided for by the said law constitute criminal offence and is punishable by imprisonment of 6 months to 3 years or with a fine.

At the same time, the Court found that, although the profession of lawyer is a liberal and independent one, its exercise must take place in an organized framework, in accordance with pre-established rules. Furthermore, the observance of these rules must be ensured even through the application of coercive measures. These are the reasons that imposed the establishment of unitary organizational structures and the prohibition of the parallel establishment of other structures intended to practice the same activity, without any legal support[15].

Also, the Court found that the organization and the exercise of the profession of lawyer by law, like any other activity that is of interest to society, is natural and necessary, in order to establish the competence, the means and the way in which this profession can be exercised, as well as the limits beyond which it would violate the rights of other persons or professional categories. The Court held[16] that it is at the legislator's latitude to regulate the conditions under which different types and forms of association can be established, organized and function, including ordering the mandatory establishment of some associations for the exercise of some professions or the fulfillment of some public interest attributions/powers, considering the provisions of art. 9 first sentence of the Constitution, according to which „Trade unions, employers and professional associations are established and carry out their activity according to their statutes, under the conditions of the law". The Bar Associations and the National Union of Bar Associations in Romania are professional associations with a special specificity, since their activity is one of public interest, which requires a more comprehensive legal regulation, even with regard to the qualities of the members, the conditions of organization and functioning, indignities, incompatibilities, disciplinary liability[17] and others.

2.3. Requirements of an individual nature for the exercise of the profession of lawyer

There are certain indispensable requirements for the profession of lawyer to be exercised with full probity and dignity, reflecting the special normative regime, dedicated to the defense of fundamental human rights by lawyers during the judicial trials and in their related activity. These conditions must be met both at the time of entry into the profession of lawyer and throughout its exercise, otherwise the sanction may reach the exclusion from the profession. As such, Law no. 51/1995 regulates, in art. 14, the cases when a person is unworthy to be a lawyer.

CCR examined the provisions of art. 14 letter a) which established that it was unworthy to be a lawyer the one who was definitively sentenced by a court decision to prison for committing an intentional crime, likely to harm the prestige of the profession. The consequence of the occurrence of such a case can be found in art. 27 of Law no. 51/1995, which states that the capacity of a lawyer ceases when he „was definitively convicted for an act provided by the criminal law and which makes him unworthy to be a lawyer, according to the law".

Moreover, under this aspect, the Court held that the disciplinary sanction of exclusion from the profession of lawyer reflects the principle of the dignity and honor of this legal profession, representing a guarantee of professional morality and probity for members of the bar. From this perspective, the legislation related to the organization of the profession of lawyer is governed by certain principles and rules that ensure a good and lawful development of the lawyer's activity, who are obliged to refrain from committing antisocial acts that would cast over the whole profession a negative light.

The Court held[18] that the regulation regarding the indignity of the lawyer is a normal one, guaranteeing that the people who exercise this honorable profession have an impeccable moral profile, it being inconceivable that people with (serious) criminal convictions would participate at the making of justice. The legislator understood to subject to this maximum sanction - exclusion from the profession - only the commission of intentional criminal offences, excluding those committed by fault, considering the fact that, if there is no intention on the part of the lawyer, it cannot be said that his probity and fairness are affected. According to the

[15] CCR dec. no. 379/24.09.2013, cited above, CCR dec. no. 129/13.03.2014, published in the Official Gazette of Romania, Part I, no. 291/22.04.2014.

[16] CCR dec. no. 70/24.02.2022, published in the Official Gazette of Romania, Part I, no. 683/08.07.2022, CCR dec. no. 509/30.06.2015, published in the Official Gazette of Romania, Part I, no. 580/03.08.2015, CCR dec. no. 321/14.09.2004, published in the Official Gazette of Romania, Part I, no. 1144/03.12.2004.

[17] For an image of the disciplinary liability of another professional category, namely that of civil servants, see, for example, E.E. Ştefan, *Brief considerations regarding the public servants administrative - disciplinary liability*, in CKS e-Book 2021, pp. 659-664, *http://cks.univnt.ro/articles/15.html*.

[18] CCR dec. no. 629/27.10.2016, published in the Official Gazette of Romania, Part I, no. 36/12.01.2017.

law, the cases of indignity are expressly and limitedly provided for by the law and are checked both on the occasion of admission to the profession, on the occasion of re-enrollment in the list of lawyers with the right to exercise the profession, as well as during the entire duration of its exercise.

Taking into consideration this serious consequence on the professional career of the lawyer, the Court found[19] that through its normative content, art. 14 letter a) of Law no. 51/1995 is not drafted with sufficient clarity and precision, so that its addressees could conform their social conduct to its provisions, more precisely to know exactly which are those criminal offences likely to affect the prestige of the lawyers' profession. Due to the imprecise wording, the determination of this kind of criminal offences is a matter left to the discretion of the competent professional structures to determine the case of indignity, as provided by Law no. 51/1995, republished. That being the case, the Court noticed that the law has not established the scope of the crimes that affect/do not affect the prestige of the lawyer profession, the finding of the state of indignity in which the lawyer is and, implicitly, the termination of his professional quality being carried out, from case to case, by the competent professional structure. Moreover, the adopted decision is not based on objective, reasonable and concrete criteria, but on subjective assessments, which may vary from one territorial professional structure to another. Also, this circumstance is likely to give rise to abuses and arbitrariness, considering the wide spectrum of intentional crimes provided by the Criminal Code and special laws.

In this context, the Court noticed[20] that the fact that the criticized legal provisions do not stipulate which are those intentional criminal offences that lead to the unworthiness of the lawyer to exercise the profession in question means that an essential aspect, which could influence the severity of the imposed disciplinary sanctions, is not explicitly provided by law, but left to the subjective assessment of the competent professional structures. Nevertheless, the rules regarding the disciplinary investigation must comply with certain requirements of predictability. Otherwise, as the person concerned is not able to adapt his/her conduct appropriately nor to have the correct representation of the course of the disciplinary procedure, art. 1 para. (5) of the Constitution would be violated.

That being the case, the Court found[21] that the phrase „likely to harm the prestige of the profession" of lawyer from the content of art. 14 letter a) of Law no. 51/1995 is unconstitutional and contravenes the provisions of art. 1 para. (5) of the Basic Law, due to its wording's lack in clarity and precision, considering that it does not clearly specify those intentional crimes that affect the prestige of the profession of lawyer. Therefore, it would leave room for arbitrariness, making possible the differentiated application of the sanction of exclusion from the profession, depending on the subjective assessment of the legal profession's structures that are competent to assess the case of indignity.

Therefore, the Court stated[22] that it is the legislator's task to give the criticized legal norm an unequivocal normative content and to establish a coherent and unambiguous legislative framework regarding the concrete conditions in which the termination of the lawyer's qualification occurs, by exclusion from the profession, as a result of the incidence of the case of indignity provided by art. 14 letter a) of Law no. 51/1995.

Despite this Constitutional Court's assertion, five years later the legislator still had not fixed the flaw of unconstitutionality. After the publication in the Official Gazette of Romania, Part I, of dec. no. 225/2017, the legal provision whose unconstitutionality was found thereby ceased to have legal effects, as a result of the provisions of art. 147 para. (4) of the Constitution, because the legislator did not intervene to put in in accordance with the constitutional provisions, in the sense of those established by Decision no. 225 of April 4, 2017. Consecutively, an unexpected and undesirable situation arose, consisting in the fact that the loss of the qualification of a lawyer intervened for any intentional crime by which the guilt of the defendant was found by a final court decision, and for which the prison sentence was ordered, regardless if the court has judged that it is necessary to suspend its execution.

Therefore, later on, the Court had to emphasize[23] that this was not the meaning of the admission decision pronounced, which sanctioned the lack of precision of the phrase that determined the intervention of indignity depending on the influence that the crime had on the prestige of the profession. Although, in the spirit of the specific principles of the rule of law, the Court stressed the fact that the lawyer is obliged to refrain from

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[19] CCR dec. no. 225/04.04.2017, published in the Official Gazette of Romania, Part I, no. 468/22.06.2017.

[20] *Idem*, para. 21.

[21] *Idem*, para. 25.

[22] *Idem*, para. 26.

[23] Through CCR dec. no. 230/28.04.2022, published in the Official Gazette of Romania, Part I, no. 519/26.05.2022.

committing antisocial acts that would cast a negative light on him[24]. However, the sanction must be applied in a clear and predictable legal framework that ensures the person likely to fall under the scope of the criticized rule the necessary benchmarks in order to adapt his/her behavior in such a way as to comply with its requirements. That prevents the risk that the exclusion from the profession would be arbitrarily decided by the bodies of the profession, who are, in turn, unable to objectively assess to the aptitude of a certain criminal act to be likely to bring harm to the prestige of the profession of lawyer. The absence of any legal indication regarding the elements that would give a crime the characteristic of being „likely to harm the prestige of the profession" led the Court to find the unconstitutionality of this phrase.

The Court noticed, by dec. no. 230/2022, para. 18, that, in the absence of the active intervention of the legislator, which would clarify the norm through the prism of those ruled by the Constitutional Court, an excessive situation was reached, contrary to the aim took into consideration by the Constitutional Court by pronouncing the mentioned decision: all lawyers who have been definitively sentenced by a judicial court's decision to prison for committing any intentional criminal offence would be excluded from the profession, in an undifferentiated manner. The Court found that, thus, the exclusion from the profession for this reason could become a sanction disproportionate to the gravity of the act, especially in the conditions where the provisions of art. 14 letter a) of Law no. 51/1995 do not make any kind of distinction according to whether the court ordered the execution of the prison sentence or assessed that it could achieve its punitive, educational, dissuasive and preventive purpose even by suspending the execution. However, such a consequence, consisting in the exclusion from the profession of lawyer for any intentional crime for which the prison sentence was applied by a final court decision, represented a distortion of the meaning of Decision no. 225 of April 4, 2017 and the aim behind its pronouncement. Although the purpose of this decision was to increase the legal guarantees provided by law to lawyers regarding the loss of this quality, by eliminating the risk of arbitrarily applying this measure, the consequence was – in the absence of the legislator's intervention – the occurrence of a situation excessively severe for lawyers, especially compared to other legal professions.

At the same time, the Constitutional Court found that the situation created by the legislator's passivity, following the publication of the aforementioned admission decision, amounts to disregarding the provisions of art. 1 para. (3) from the Basic Law, which enshrines the rule of law character of the Romanian state. This, because the prevalence of the Constitution over the entire normative system represents the crucial principle of the rule of law[25]. Or, the guarantor of the supremacy of the Fundamental Law is the Constitutional Court itself, through the decisions it pronounces, so neglecting the findings and provisions contained in its decisions causes the weakening of the constitutional structure that must characterize the rule of law[26].

In this context, the Court found[27] that the legislative solution resulting from the passivity of the legislator leads to more drastic results than those produced according to the rule initially in force, which, although it generates the risk of subjective and discretionary assessments on the part of the decision-making body of the profession of lawyer, called to appreciate the intervention of indignity and, consequently, the loss of the quality of lawyer, still allowed such decision-making body of the legal profession to carry out a selection of crimes that would determine the exclusion from the profession, depending on the seriousness of the act and the damage to the image brought to the profession, even if there was a lack of certainty regarding the objectivity and correctness of such assessments. In addition, the arbitrariness of the assessment of the bar council in the aspect of classifying crimes in the phrase „which could affect the prestige of the profession" was determined precisely by the absence of legal regulation of some criteria whose fulfillment should be followed under this aspect.

Eventually, the legislator clarified and detailed the provisions in discussion, specifying, by Law no. 32/2023 regarding the amendment of art. 14 letter a) from Law no. 51/1995 for the organization and exercise of the profession of lawyer, a series of criminal offences that attract indignity, if by the date of verification of the state of indignity the following has not taken place: rehabilitation, post-conviction amnesty or decriminalization of the act and if the punishment consists in a prison sentence of one year or more. At stake are those crimes punishable

[24] See, in this regard, CCR dec. no. 629/27.10.2016, published in the Official Gazette of Romania, Part I, no. 36/12.01.2017, para. 22, CCR dec. no. 225/04.04.2017, cited above, para. 29, or CRR dec. no. 592/08.10.2019, published in the Official Gazette of Romania, Part I, no. 310/14.04.2020, para. 26.

[25] For more details, see E. Anghel, *General principles of law*, in LESIJ.JS XXIII nr. 2/2016, Lex ET Scientia International Journal - Juridical Series, pp. 120-130.

[26] CCR dec. no. 230/28.04.2022, cited above, para. 20.

[27] *Idem*, para. 21.

by a prison sentence with a special minimum of at least one year, like crimes against life, against patrimony, against the administration of justice, crimes of corruption, of forgery, crimes that affect relationships regarding social coexistence, crimes against national security or crimes of genocide, against humanity and war.

Prior to promulgation, the aforementioned law was subject to the *a priori* constitutionality review in accordance with art. 146 letter a) first sentence of the Constitution, the objection being rejected as unfounded. The Court validated the constitutionality of the new normative content, appreciating, by dec. no. 582/23.11.2022 (para. 31) [28], that the provisions contained in art. I of the criticized law, which modifies art. 14 letter a) from Law no. 51/1995, regulates a series of elements/conditions which, together, unequivocally configure those situations that fall under the first normative hypothesis of indignity in the lawyer profession from the four normative hypothesis of indignity regulated in art. 14 of the law, in accordance with those established by the CCR dec. no. 225/04.04.2017 and CCR dec. no. 230/28.04.2022. The precise indications of the newly drafted provisions contain sufficient and clearly expressed criteria to remove the risk of arbitrariness and abuse in the evaluation of a case of professional indignity, as well as to explicitly prefigure the conduct to be followed by the addressee of these legal norms.

By the same decision, para. 44, the Court held that the selection of those offenses likely to affect the integrity and prestige of the legal profession is the result of the legislator's option, manifested within its margin of appreciation regarding the state's criminal policy, in accordance with its constitutional role of the country's sole legislative authority. The Court emphasized that, in the process of determining the crimes that, by the degree of social danger and the social value protected, present the risk of infringing the principles of dignity and honor of the profession of lawyer, the legislator must take into account the intended purpose, that of increasing the guarantees and the degree of trust of the litigants in the lawyer's moral probity, given that the lawyer is obliged to refrain from committing antisocial acts that would cast a negative light on him[29]. The Court noticed that, in relation to his mission to promote and defend the human rights, freedoms and legitimate interests of the litigants, the lawyer, through his entire conduct, must correspond to a high standard of integrity. However, despite this goal, the legislator could not refer, in establishing those crimes, to all the criminal offences provided for in the Criminal Code or in other criminal laws. In this sense, CCR noted the excessively severe consequences that followed the elimination of the phrase „which may affect the prestige of the profession" from the content of art. 14 letter a) of Law no. 51/1995 and the application of this text without any kind of distinction. Thus it was opened up the possibility of exclusion from the profession following the evaluation as unworthy of any lawyer definitively sentenced to prison by a judicial court's decision for the intentional commission of any crime, but that was not the reason and purpose of the solution of unconstitutionality pronounced by dec. no. 225/04.04.2017.

Furthermore, the Court ruled[30] that lawyers assume not only the role of promoting and defending individual rights and interests, but also the social role of trainers and role models in society, so that any final judicial court's decision sentencing to a prison sentence of at least one year, regardless of the individualized way of executing the punishment, is able to constitute an objective and reasonable criterion in assessing the standard of moral and professional integrity.

3. Conclusions

The selection of constitutional case-law presented above reflects the crucial role lawyers play in protecting human rights and freedoms and also their contribution to justice making through a fair trial, as a defining feature of the rule of law. At the same time, it is important to note that CCR emphasized that lawyers must benefit of adequate protection in the exercise of their profession, which is why the legislation regulating this profession must provide legal mechanisms for lawyers to be protected from usurpation and undermining of their status through fraudulent actions from outside the profession.

In addition, CCR underlined the fact that the defense of citizens' rights and freedoms is a priority and that lawyers are essential partners in ensuring justice and protecting these rights and freedoms. These Constitutional Court's decisions have contributed to strengthening the prestige of the profession of lawyer in Romania and to

[28] Published in the Official Gazette of Romania, Part I, no. 13/05.01.2023.

[29] See, in this regard, CCR dec. no. 629/27.10.2016, published in the Official Gazette of Romania, Part I, no. 36/12.01.2017, para. 22, CCR dec. no. 225/04.04.2017, cited above, para. 29, or CCR dec. no. 592/08.10.2019, published in the Official Gazette of Romania, Part I, no. 310/14.04.2020, para. 26.

[30] CCR dec. no. 582/2022, para. 48.

increasing citizens' trust in lawyers and in the justice system in general. In this context, it should be mentioned that CCR addressed the issue of parallel bars throughout several decisions that reaffirmed the importance of the independence and autonomy of the legal profession and emphasized the need to respect democratic principles and the rule of law. In essence, it found that, in accordance with the Romanian Constitution, access to the legal profession must be regulated by a single representative professional body and considered that the existence of parallel bars, which operate illegally and without authorization, constitutes a violation of democratic principles and the rule of law, as well as civil rights and freedoms. Furthermore, the Court highlighted the importance of respecting the rule of law's values in the justice system, including professional rules and standards in protecting the rights and interests of litigants and the respect of ethical and professional norms.

The issue of perfecting the legal framework that regulates the status of the profession of lawyer, so that it is no longer subject to the risk of absurd encroachments, remains relevant. In order to strengthen and clarify this issue to the highest extent, comparative studies of the legislation of other states would be beneficial, especially integrated in the context of the EU, which would once again demonstrate the uniqueness and specificity of this profession, which in each state has its own individuality and its special regulation, considering its importance in the overall fulfilment of the jurisdictional act.

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THE MATTER OF PENSIONS IN THE LIGHT OF THE LEGISLATION, THE DECISIONS OF THE CONSTITUTIONAL COURT AND THE NEW SOCIAL REALITIES

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Abstract

The public pension system has always raised many questions marks, firstly for its beneficiaries. Additionally, the Romanian legislation through which this system has been implemented has been objected against and the constitutional challenge has arrived on the bench of the Romanian Constitutional Court.

This study wants to analyse the pension system starting from the economic background and ending with the legal one.

In relation to the current system, the position of the Constitutional Court has been and is extremely clear, so that any legislative amendment, either at the initiative of the Parliament or at the initiative of the Government, by emergency ordinance, must take into account the constitutional requirements.

Keywords: *action, court, public pension, Romanian Constitutional Court.*

1. Introductory considerations

The realities of our days show that the issue of the pensions, of the retirement age and the economic implications of this matter is a subject of present-day. Only if we take a look at what is happening in France nowadays and see where the street protests have reached, it is enough to understand that from a simple legislative initiative, obviously dictated by economic realities, we have reached the threshold of a civil war.

However, it is equally true that life expectancy has increased exponentially in the West, that we have completely different realities of the labour market, which is translated into the need to reform pension system, right from its grounds. This also appears in the governing program of all European chancelleries, on the background of the general policies required from Brussels.

In Romania, in addition to these matters, a specific issue was also raised, generated by the existence of „special pensions", namely those categories of pensions which certain social professional categories that had a special status in their activity benefit from, such as magistrates, soldiers and policemen.

All these cumulated problems have generated extensive discussions related to the reform of the pension system, contribution, special pensions, taxation.

The legislator sought and is still seeking various solutions to adjust, for example, special pensions or pensions with a high amount.

Notwithstanding, not infrequently, these legislative solutions are dismissed by the Constitutional Court[1], such as the example that we have proposed for analysis in this study.

2. The particularities of the provisions of art. XXIV and art. XXV of GEO no. 130/2021 regarding the reintroduction of the obligation to pay health insurance contribution on pension income

The end of 2021 brought as a legislative adjustment solution the reintroduction of the obligation to pay the health insurance contribution on pension income.

Therefore, according to the provisions of **art. XXIV** of GEO no. 130/2021:

«*Law no. 227/2015 on the Fiscal Code, published in the Official Gazette of Romania, Part I, no. 688/10.09.2015, as further amended and supplemented, shall be amended and supplemented as follows:*

2. Art. 100 para. (1) shall be amended and shall read as follows:

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[1] See S.G. Barbu, A. Muraru, V. Bărbățeanu, *Elements of constitutional litigation*, C.H. Beck Publishing House, Bucharest, 2021, p. 16 *et seq.*

„(1) The monthly taxable income of pensions shall be established by deducting from pension income the monthly non-taxable amount of RON 2,000 and, as the case may be, the health insurance contribution due according to the provisions of title V – National insurance contributions."

11 In art. 153 para. (1), after letter f^1) two new letters shall be introduced, namely f^2) and f^3), which shall read as follows:

„f^2) National House of Public Pensions, by means of the territorial houses of pensions, as well as sector houses of pensions, for persons who obtain income derived from pensions;

f^3) the entities that pay income derived from pensions, other than those provided for by letter f^2);".

12. In art. 154 para. (1), letter h) shall be amended and shall read as follows:

„h) retired natural persons, for income derived from pensions up to the amount of RON 4,000 per month including, as well as for income derived from intellectual property rights;".

13. In art. 155 para. (1), after letter a) a new letter shall be introduced, letter a^1) which shall read as follows:

„a^1) the income derived from pensions, defined according to art. 99, for the part that exceeds the monthly amount of RON 4,000;".

14. In title V „National insurance contributions" chapter III, title of section 3 shall be amended and shall read as follows:

SECTION 3 „The basis for calculating health insurance contribution due in case of persons who derive income from salaries or assimilated to salaries, income from pensions, as well as in case of persons under the protection or in the custody of the state"

16. After art. 157^2, a new article shall be introduced, namely art. 157^3, which shall read as follows:

„Art. 157^3**. – The monthly basis for calculating health insurance contribution for natural persons who derive the income referred to in art. 155 para. (1) letter a^1)**

The monthly basis for calculating health insurance contribution for natural persons who derive income from pensions is represented by the part exceeding the monthly amount of RON 4,000, for each pension right."

17. In title V „National Insurance Contributions" chapter III, title of section 4 shall be amended and shall read as follows:

SECTION 4 „Establishing, paying and reporting health insurance contribution in case of income derived from salaries and similar to salaries, as well as the income from pensions"

18. In art. 168, para. (1), (5), (7) and (7^1) shall be amended and shall read as follows:

„(1) Natural persons and legal entities who have the capacity of employers or assimilated to this capacity, as well the income payers referred to in art. 153 para. (1) letter f^2) and f^3) shall be bound to calculate and withhold health insurance contribution due by natural persons who obtain income derived from salaries or similar to salaries or income derived from pensions.

(…)

(5) The calculation of the health insurance contribution shall be performed by applying the rates provided for by art. 156 on the monthly basis of calculation referred to in art. 157, 157^1 or 157^3, as the case may be.

(…)

(7) If there were granted amounts representing salaries/balances or differentials in salaries/balances, established by the law or under final and irrevocable Court decisions/final and enforceable Court decisions, including those granted according to the decisions of the court of first instance, which are enforceable in law, as well as in case such judgments have ordered the reemployment of persons, the respective amounts shall be broken down by the months they relate to and the rates of health insurance contributions in force at the time shall be used. Health insurance contributions due in accordance with the law shall be calculated, withheld on the date of payment and paid on or before the 25th day of the month following the month in which they were paid.

(7^1) If there were granted amounts representing pensions or pension differentials, established by law or on the basis of final and irrevocable judgments/final and enforceable court judgments relating to periods for which individual health insurance contribution / health insurance contribution as the case may be, is due, the contribution rates in force for those periods shall be used for the respective amounts. Health insurance contributions due in accordance with the law shall be calculated, withheld on the date of payment and paid on or before the 25th day of the month following the month in which they were paid."

19. In art. 169 para. (1), letter a) shall be amended and shall read as follows:

„a) natural persons and legal entities who have the capacity of employers or assimilated to this capacity, as well the income payers referred to in art. 153 para. (1) letter f^2) and f^3);".

20. After art. 169[1], a new article is introduced, namely art. 169[2], which shall read as follows:

„Art. 169[2]. - Reporting obligations for individuals deriving pension income from abroad under art. 155 letter a[1])

Individuals who derive pension income from abroad for which health insurance contributions are due are required to submit the declaration provided for by Article 122, in compliance with the provisions of the applicable European legislation in the field of social security, as well as the agreements on social security systems to which Romania is a party.»[2].

According to the provisions of **art. XXV** of GEO no. 130/2021:

„(1) By way of derogation from the provisions of art. 4 of Law no. 227/2015, as further amended and supplemented, the provisions of art. XXIV shall enter into force on the date of publication of this Emergency Ordinance in the Official Gazette of Romania, Part I, with the following exceptions:

a) the provisions of items 22-25 shall enter into force on 1 January 2022;

b) the provisions of items 1, 8, 9, 15, 21 shall apply as from the income of the month following the publication of this Emergency Ordinance in the Official Gazette of Romania, Part I;

c) the provisions of items 2, 3, 4, 7, 12, 13, 16, 18 regarding para. (1) and (5) of art. 168 and item 19 shall apply to income derived as of 1 January 2022;

d) the provisions of item 20 shall apply as from the income earned in 2022.

(2) The provisions of art. 291 para. (3) letter o) of Law no. 227/2015, as further amended and supplemented, shall apply to heat deliveries made as of 1 January 2022."[3].

We consider that the aforementioned provisions are unconstitutional by reference to the provisions of **art. 1 para. (3) and (5), art. 16 para. (1), art. 56, art. 115, art. 138 and art. 147 para. (4) of the Constitution of Romania.**

Therefore, former magistrates (judges or prosecutors) who are currently retired would be entitled to the rights recognised by Law no. 303/2004 on the status of judges and prosecutors („*Law no. 303/2004*").

According to the provisions of **art. 73** of Law no. 303/2004:

„When establishing the rights of judges and prosecutors, one shall take into account the place and role of the Judiciary under the Rule of Law, of the responsibility and complexity of the offices of judge and prosecutor, of the interdictions and incompatibilities provided by the law for these offices and shall aim at safeguarding their independence and impartiality."[4].

in this respect, according to **art. 82** of Law no. 303/2004:

*„(1) The judges, prosecutors, assistant-magistrates within the High Court of Cassation and Justice and assistant-magistrates within the Constitutional Court, judicial specialised personnel equated to judges and prosecutors, and also the former financial judges, prosecutors and account councillors from the jurisdictional section, who exercised their duties at the Accounts Court, **having at least 25 years' length of service** in the positions mentioned before, **may retire at their request and shall enjoy, upon reaching the age of 60 years, a service pension, amounting up to 80% of the average of gross income with any other benefits for the last month of activity before the date of retirement**.*

*(2) The judges, prosecutors, assistant-magistrates within the High Court of Cassation and Justice and the Constitutional Court, judicial specialised personnel equated to judges and prosecutors, and also the former financial judges, prosecutors and account councillors from the jurisdictional section, who exercised their duties at the Accounts Court **shall be able to retire, at their request, before reaching the age of 60 years and shall enjoy the pension in paragraph (1), if they have at least 25 years' length of service only** in the office of judge, prosecutor, magistrates within the High Court of Cassation and Justice and the Constitutional Court and judicial specialised personnel equated to judges, as well as the office of judge within the Constitutional Court, financial judges, prosecutors and account councillors from the jurisdictional section, who exercised their duties at the Accounts Court. The time while a judge, prosecutor, assistant-magistrate or judicial specialised personnel equated to judges and prosecutors, as well as the judge of the Constitutional Court, the financial prosecutors and account councillors from the jurisdictional section of the Accounts Court practiced as lawyer, judicial specialised personnel within the former state arbitration committees or legal adviser shall be included into this period of 25 years.*

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[2] Text available at *https://legislatie.just.ro/Public/DetaliiDocumentAfis/249349*.

[3] *Ibidem.*

[4] Text available at *https://legislatie.just.ro/Public/DetaliiDocument/64928*.

*(8) The pension provided for by this article has the **jurisdictional regime of a pension for age limit**."*[5].

Last but not least, according to **art. 79 paras. (8) and (9)** of Law no. 303/2004:

*„**(8)** Working or retired judges and prosecutors, as well as their spouses and dependent children, **are entitled to free medical care**, medicines and prostheses, subject to compliance with the legal provisions on the payment of social insurance contributions.*

***(9)** The conditions for free granting of medical care, medicines and prostheses shall be established by means of Government Resolution. These rights are not salary-related and are not taxable."*[6].

According to the provisions of **art. 99 para. (1)** of Law no. 227/2015 on the Fiscal Code („***Fiscal Code***"):

„Pension income represents amounts received as pensions from funds established from national insurance contributions made to a social insurance system, including those from voluntary pension funds and those financed from the state budget, differential in pension income, as well as amounts representing their updating by the inflation index."[7].

Pension income, according to the legislation in force, before the amendments made by GEO no. 130/2021 were **exclusively subject to income tax**, as clearly resulting from the analysis of the provisions of **art. 61 letter e)** in conjunction with **art. 64 para. (1) letter e)** in conjunction with **art. 100 para. (1)**, with **art. 101**, **art. 137, art. 153** and **art. 155**, all of the Fiscal Code.

Furthermore, **art. 154 para. (1) letter h)** of the Fiscal Code (form in force, before the amendments made by GEO no. 130/2021) expressly provided as follows:

*„The following categories of natural persons **shall be exempt** from the payment of the health insurance contribution: h) retired natural persons, for income derived from pensions, as well as for income derived from intellectual property rights;*".

It is important to point out that, according to the provisions of **art. 100** of the Fiscal Code (the form in force at the date of entry into force of this normative act, *i.e.,* 2015):

„(1) Monthly taxable pension income is determined by deducting from pension income, in order, the following:

a) individual health insurance contribution due according to the law;

b) non-taxable monthly amount of RON 1,050.".

Therefore, at that point in time, as resulting from the provisions of **art. 155** of the Fiscal Code (the form in force on the date of the enforcement of this normative act, *i.e.*, 2015) the obligation to pay health insurance contribution for pension income was provided.

Subsequently, both the provisions of **art. 100** and of **art. 153**, of **art. 154**, respective of **art. 155**, all of the Fiscal Code, were amended by **GEO**[8] **no. 79/2017** for the amendment and supplementation of Law no. 227/2015 on the Fiscal Code, in force on **01.01.2018** („*GEO no. 79/2017*").

The obligation to pay health insurance contribution for pension income was removed by the enforcement of GEO no. 79/2017, this exemption being maintained including after the amendments brought by Emergency Ordinance no. 18/2018 on the adoption of certain fiscal-budgetary measures and for amending and supplementing certain normative acts (in force on 23.03.2018), as well as following the amendments brought by Law no. 296/2020 for the amendment and supplementation of Law no. 227/2015 on the Fiscal Code (in force on 24.12.2020).

Notwithstanding, **GEO no. 130/2021 makes the reversal to the form available before the enforcement of GEO no. 79/2017, the obligation to pay health insurance contribution for pension income being re-established.**

According to the provisions of **art. 9 para. (1) and (5)** of Law no. 554/2004:

„(1) A person whose right or legitimate interest has been harmed by a Government Order or parts thereof may take legal action before the Administrative Litigations Court, raising the exception of unconstitutionality, insofar as the main object of the action is not a finding on the unconstitutionality of the Order or a stipulation in the Order.

(...)

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[5] *Ibidem.*

[6] *Ibidem*.

[7] Text available at *https://legislatie.just.ro/Public/DetaliiDocument/171282*.

[8] On the constitutional regime of emergency ordinances, see E.-E. Ștefan, *Administrative law course. Manual of administrative law (course and seminar booklet), Part I*, Universul Juridic Publishing House, Bucharest, p. 149.

(5) The action stipulated in this Article can be a claim for compensation for damage caused by means of Government Orders, cancellation of administrative acts issued on the basis of such Orders and, as the case may be, compelling a given public authority to issue an administrative act or to perform a specific administrative operation."[9].

We will present our arguments in detail below.

In our opinion, **GEO no. 130/2021, in what concerns the provisions of art. XXIV and art. XXV which regulate the reintroduction of the obligation to pay health insurance contribution for pension income is unconstitutional, by violating the provisions of art. 115 para. (4) and (6) in conjunction with art. 138 para. (2), both of the Constitution of Romania.**

According to the provisions of **art. 115 para. (4)** of the Constitution of Romania:

„(4) The Government ***can only adopt emergency ordinances in exceptional cases, the regulation of which cannot be postponed, and have the obligation to give the reasons for the emergency status within their contents.***

(...)

(6) Emergency ordinances ***cannot be adopted*** *in the field of constitutional laws,* ***cannot affect*** *the status of fundamental institutions of the State,* ***the rights, freedoms and duties*** *stipulated in the Constitution, the voting rights, and cannot establish steps for transferring assets to public property forcibly."*[10].

According to **art. 138 para. (2)** of the Constitution:

„(2) The Government shall annually draft the State budget and the State social insurance budget, which shall be submitted separately to Parliament for approval."[11].

Therefore, as we shall see below, the unconstitutionality of the provisions of GEO no. 130/2021, viewed from the perspective of art. 115 and 138 of the Constitution, derives from the fact that:

GEO no. 130/2021 was not issued as a result of an extraordinary situation the regulation of which could not be postponed;

According to the provisions of **art. 115 para. (4)** of the Constitution:

„(4) The Government ***can only adopt emergency ordinances in exceptional cases, the regulation of which cannot be postponed, and have the obligation to give the reasons for the emergency status within their contents.****"*[12].

Therefore, according to its case-law[13], the Government may adopt emergency ordinances under the following cumulative conditions:

- the existence of an extraordinary situation;
- its regulation cannot be postponed and
- the emergency is motivated in the content of the ordinance.

The extraordinary situations express a high degree of deviation from the ordinary or common and have an objective nature, in the sense that their existence does not depend on the will of the Government, which, in such circumstances, is compelled to react promptly to defend a public interest by means of an emergency ordinance[14].

Furthermore, according to **CCR dec. no. 258/14.03.2006**[15]: *„the non-existence or failure to explain the emergency of regulating extraordinary situations [...] clearly represents a constitutional barrier to the adoption of an emergency ordinance by the Government [...]. To decide otherwise is to empty of content the provisions of art. 115 of the Constitution on legislative delegation and to leave the Government free to adopt, as a matter of emergency, normative acts with the force of law, at any time and - taking into account the fact that an emergency ordinance may also regulate matters covered by organic laws - in any field"*[16].

Furthermore, the Court, by means of **dec. no. 421/09.05.2007**[17], provided as follows: *„the emergency of the regulation is not the same with the existence of an extraordinary situation, and operational regulation can*

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[9] Text available at *https://legislatie.just.ro/Public/DetaliiDocument/57426*.

[10] Text available at *https://www.ccr.ro/constitutia-romaniei/*.

[11] *Ibidem.*

[12] *Ibidem.*

[13] For example, dec. no. 255/11.05.2005, published in Official Gazette of Romania, Part I, no. 511/16.06.2005 and dec. no. 761/17.12.2014, published in Official Gazette of Romania, Part I, no. 46/20.01.2015.

[14] See *mutatis mutandis* dec. no. 83/19.05.1998, published in Official Gazette of Romania, Part I, no. 211/08.06.1998.

[15] Published in Official Gazette of Romania, Part I, no. 341/17.04.2006.

[16] See also dec. no. 366/25.06.2014, published in Official Gazette of Romania, Part I, no. 644/02.09.2014.

[17] Published in Official Gazette of Romania, Part I, no. 367/30.05.2007.

also be achieved by means of the common legislative procedure". Therefore, the issuing of an emergency ordinance ***requires the existence of an objective, quantifiable de facto situation, independent of the will of the Government, which endangers a public interest****. In dec. no. 255/11.05.2005, cited above, the Court held that „the invocation of the element of expediency, by definition of a subjective nature, which is given a determining contributory efficiency of the emergency, which, implicitly, converts it into an extraordinary situation, requires the conclusion that it does not necessarily and unequivocally have an objective nature, but it can also give expression to subjective factors [...]".*

From the analysis of the aforementioned case-law, only the existence of some elements of an objective nature, which could not be foreseen, can determine the emergence of a situation whose regulation is urgently required.

These elements shall be established by the Government, which shall be obliged to state the reasons for its intervention in the preamble to the adopted legislative act.

Therefore, the appropriateness of the enactment is limited to the decision on whether to adopt the normative act, to act actively or passively, provided that the elements of objective, quantifiable nature provided for by **art. 115 para. (4)** of the Constitution are demonstrated.

In other words, the decision of the enactment[18] belongs exclusively to the delegated legislator, who shall be bound to comply with the constitutional requirements if he decides on the regulation of a certain legal situation[19].

Therefore, by returning to the texts we consider unconstitutional, we believe it is important to make an analysis of the reasons behind the elimination of the obligation to pay the health insurance contribution on pension income, established by GEO no. 79/2017, so that we can have a clear picture of the (il)legality of the reintroduction of this obligation by GEO no. 130/2021.

We believe that the provisions of art. XXIV and XXV of GEO no. 130/2021 are constitutional, from the point of view of the fulfilment of the conditions for adoption, only if clear reasons are given, **on the one hand**, for the disappearance of the reasons which made it no longer compulsory to pay the social health insurance contribution on pension income, introduced by GEO no. 79/2017 (and maintained by successive legislative acts), and, **on the other hand**, for the extraordinary and urgent situation which could no longer be postponed, which made it necessary to reintroduce this contribution on pension income.

The analysis of the reasons for the Government's adoption of GEO no. 79/2017 (and implicitly of the conditions under which legislative delegation may operate according to art. 115 of the Romanian Constitution) was performed by the Constitutional Court in the recitals of **dec. no. 46/01.07.2020**[20] on the dismissal of the constitutional challenge of the provisions of art. I items 40-91 of GEO no. 79/2017, according to which:

*„**The Court is to examine to what extent, by adopting GEO no. 79/2017, the Government has complied with the constitutional requirements concerning the demonstration of the existence of an extraordinary situation, the regulation of which cannot be postponed, and the reasoning of the emergency in the content of the legislative act.***

58. In this case, the Court finds that ***the recitals of the emergency ordinance under consideration focuses on the existence of situations which pose a threat to the social rights of citizens****. Therefore, the preamble of GEO no. 79/2017 points out, inter alia, that the promotion of this legislative act is mainly driven by the need to reform Romania's public social insurance systems with a view to increasing the collection of revenue for the state social insurance budget and making employers responsible for the timely payment of compulsory insurance contributions owed by both employers and employees. In this respect, the number of compulsory social contributions shall be reduced, and the employer shall continue to determine, withhold, report and pay the obligations due. Furthermore, the need to draft the State Social Insurance Budget Law and the State Budget Law for 2018 was taken into account in this context.*

59. We took into account the fact that the failure to adopt GEO no. 79/2017 could have negative consequences, in the sense that the correlative amendments to the labour and health legislation could not be promoted by the specialised institutions as from the same date, i.e., 1 January 2018, amendments which brought benefits to employees in the budgetary system. Furthermore, the failure of the economic operators to fulfil their

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[18] Please see N. Popa, E. Anghel, C.G.B. Ene-Dinu, L.-C. Spătaru-Negură, *General Theory of Law. Seminar booklet*, Hamangiu Publishing House, Bucharest, 2017, p. 168.

[19] See also dec. no. 68/27.02.2017, published in Official Gazette of Romania, Part I, no. 181/14.03.2017.

[20] Published in Official Gazette of Romania no. 572/01.07.2020.

obligation to pay social insurance contributions to the state would have led to the non-fulfilment of the budget execution plan and, implicitly, to the violation of citizens' social rights, which are fundamental rights laid down in the Constitution itself. However, the challenged measure was aimed at transferring social contributions from the employer to the employee, with the aim of recovering for the benefit of the employee all the social insurance contributions due in respect of the income earned, but also of increasing the collection of income for the social insurance budget and making employers responsible for paying them on time.

61. In the light of the above, the Court finds that the Government has fulfilled its obligations under art. 115 para. (4) of the Constitution, by reasoning the emergency in the preamble of the normative act and demonstrating the existence of an extraordinary situation the regulation of which cannot be postponed, on the occasion of the draw up of the normative act.".

Starting from the above and returning to the challenged normative act, we note that the preamble of GEO no. 130/2021 does not motivate the need to reintroduce the obligation for retired individuals to pay health insurance contribution in the light of the measures that led to the exclusion of pension income from this obligation by GEO no. 79/2017, the only explanation being that: *„the failure to adopt the measure on the removal of the exemption from the payment of health insurance contributions for individuals who are retired for pension income exceeding RON 4,000 would lead to maintaining the current situation regarding the insufficient funds available to the budget of the Unique National Health Insurance Fund in the background of the current health crisis caused by the epidemiological situation in Romania generated by the spread of the SARS-CoV-2 coronavirus.".*

Notwithstanding, on the one hand, this reason, is not able to remove the grounds which represented the basis for the adoption of GEO no. 79/2017, and on the other hand, is **not a real one** since the same GEO no. 130/2021 provides measures that affect the Unique National Health Insurance Fund, respectively the following are ordered: *„the increase of the non-taxable ceiling not included in the basis for calculating compulsory social insurance contributions from 150 lei to 300 lei per person and per event in case of gifts in cash and/or in kind"*[21].

Moreover, the substantiation note of GEO no. 130/2021 does not indicate any extraordinary situation requiring urgent enactment to reintroduce the obligation to pay health insurance contributions on pension income.

The aspects claimed in the substantiation note are general, in brief and with reference to the need to draw up the budget for 2022, without there being the slightest concern to indicate and argue the exceptional situation justifying the enforcing of health insurance contributions, especially as we are also talking about separate budgets: state budget, on the one hand, and health insurance contributions which are paid into the Unique National Health Insurance Fund, according to art. 220 of Law no. 95/2006 on health reform, on the other hand.

Last but not least, the Legislative Council also expressed the same view in its opinion no. 592/17.12.2021 on draft GEO no. 130/2021, specifically noting that: *„In accordance with the provisions of art. 115 para. (4) of the Constitution of Romania, republished, as well as with the case-law of the Constitutional Court in the field, we recommend that the preamble to the emergency ordinance should be supplemented in order to mention the elements that define the existence of an extraordinary situation the regulation of which cannot be postponed, by describing the quantifiable and objective situation that deviates significantly from the usual and that requires to resort to this regulatory procedure for all the areas regulated by the draft law"*[22]*.*

Therefore, please find that the introduction of the obligation to pay social security contributions on pension income by means of **GEO no. 130/2021 was not the result of an extraordinary situation the regulation of which could not be postponed, the normative act being clearly unconstitutional** as it violates the provisions of **art. 115 para. (4) of the Constitution of Romania.**

(i) GEO no. 130/2021 violates rights, freedoms and obligations provided by the Constitution.

Given the provisions of **art. 115 para. (6)** of the Constitution, according to which:

„Emergency ordinances ***cannot be adopted*** *in the field of constitutional laws,* ***or affect*** *the status of fundamental institutions of the state,* ***the rights, freedoms and duties*** *stipulated in the Constitution, the voting rights and cannot establish steps for transferring assets to public property forcibly."*[23].

In conjunction with those of **art. 138 para. (2)** of the Constitution, according to which:

[21] Text available at *https://legislatie.just.ro/Public/DetaliiDocumentAfis/249349*.

[22] See by visiting *http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=19793* or *https://www.senat.ro/legis/lista.aspx#ListaDocumente*.

[23] Text available at *https://www.ccr.ro/constitutia-romaniei/*.

„(2) The Government shall annually draft the State budget and the State social security budget, which shall be submitted separately to Parliament for approval."[24]*,*

it is very clear, **on the one hand**, that when legislative amendments concern rights, freedoms or duties laid down in the Constitution, they cannot be operated by means of emergency ordinances, and, **on the other hand**, that when amendments have an impact on the draft state budget or social insurance budget, they must be approved by Parliament.

Both the right to a pension and the obligation to pay contributions are laid down in the Constitution, in **art. 47, 56 and 139** which is why we believe that any amendment affecting these rights must be contemplated by a law adopted by Parliament.

The regulation of the public service pension benefit for judges and prosecutors had grounds justified by the legislator and reinforced by a constant case-law of the Constitutional Court[25] through the constitutional status of magistrates which requires the granting of the service pension as a component of the independence of justice.

The status of judges and prosecutors is constitutionally regulated in art. 125 – for judges and in art. 132 – for prosecutors, provisions which are included in Title III „*Public authority*", chapter VI „*Judicial authority*", section 1 „*Courts of law*" (art. 124-130), section 2 „Public Ministry" (art. 131 and 132) and section 3 „*Superior Council of Magistracy*" (art. 133 and 134).

At the infra-constitutional level, the status of magistrates is regulated by Law no. 303/2004, according to which judges are independent, they only obey the law and must be impartial, prosecutors appointed by the President of Romania enjoy stability and are independent, under the law, and assistant magistrates enjoy stability.

In what concerns **public service pension,** in its case-law, the Constitutional Court has held, as a matter of principle, that it is granted to certain socio-professional categories subject to a special status, namely persons who, by virtue of their profession, trade, occupation or qualification, build up a professional career in that field of activity **and are bound to be subject to the requirements of a professional career undertaken both professionally and personally**[26].

The case-law of the Constitutional Court in the field stated that **it was established in order to stimulate stability in service and the formation of a career in magistracy**.

The introduction of a public service pension for magistrates is not a privilege, but is objectively justified as a **partial compensation for the disadvantages resulting from the rigours of the special status to which magistrates are subject**.

Therefore, this special status established by Parliament by law is much stricter, more restrictive, imposing obligations and prohibitions on magistrates that other categories of insured persons do not have.

Indeed, they are forbidden to engage in activities which could provide them with additional income, which would enable them to create a material situation in order to maintain a standard of living after retirement as close as possible to that which they had during their working life[27].

In what concerns the provisions of **art. 82 para. (2) and (3)** of Law no. 303/2004, the Court ruled by dec. no. 433/29.10.2013, published in Official Gazette of Romania, Part I, no. 768/10.12.2013, and dec. no. 501/30.06.2015, published in Official Gazette of Romania, Part I, no. 618/14.08.2015, **holding that the legislator regulated in art. 82 of Law no. 303/2004, the conditions under which the judges and prosecutors can benefit from the public service pension**.

When granting this benefit, the legislator took into account the importance for society of the activity carried out by this socio-professional category, an activity marked by a high degree of complexity and responsibility, as well as specific incompatibilities and prohibitions.

By means of **CCR dec. no. 1189/06.11.2008**[28], the Court held that the legal meaning of the verb „to affect" within the content of **art. 115 para. (6)** of the Constitution is „*to abolish*", „*to prejudice*", „*to harm*", „*to injure*",

[24] *Ibidem.*
[25] See CCR dec. no. 873/25.06.2010.
[26] See dec. no. 22/20.01.2016, published in Official Gazette of Romania, Part I, no. 160/02.03.2016.
[27] See in this respect, dec. no. 20/02.02.2000, published in Official Gazette of Romania, Part I, no. 72/18.02.2000.
[28] Published in Official Gazette of Romania, Part I, no. 787/25.11.2008.

„to bring out negative consequences" **by pointing out that emergency ordinances can be adopted only if the regulations they entail have positive consequences in the fields in which they take action**[29].

Therefore, the overall view of the text under consideration is that the emergency ordinance should not entail negative consequences, should not harm or prejudice the fundamental institutions of the State, the rights, freedoms and duties provided for by the Constitution and the voting rights.

In this case, **the provisions challenged as unconstitutional affect the right to pension in that they abolish it by unlawfully introducing (by means of an emergency ordinance), additional contributions, respectively health insurance contribution of 10% on pension income exceeding RON 4000.**

The Constitutional Court also ruled in this regard by means of **dec. no. 82/15.01.2009** noting the unconstitutionality of GEO no. 230/2008 for the amendment of certain normative acts in the field of public system pensions, state pensions and public service pensions, on the grounds that: *„Taking into account the provisions of art. 115 para. (6) of the Constitution, according to which government ordinances cannot affect the rights and freedoms provided by the Constitution, the Constitutional Court is to find that the provisions of GEO no. 230/2008 are unconstitutional because they affect the fundamental rights referred to above."*[30].

More specifically, **art. 82 para. (1)** of Law no. 303/2004 clearly states that the public service pension is of 80% of the calculation basis represented by the gross monthly employment allowance or the gross monthly basic salary, as the case may be, and the bonuses received in the last month of service before the date of retirement, therefore **no modification of this amount can be performed by emergency ordinance** (but only by means of a law adopted by the Parliament)**.**

By means of **dec. no. 900/15.12.2020**, the Constitutional Court held that: *„although the amounts paid as social insurance contributions do not represent a time deposit and therefore, they cannot entail a right of claim against the state or social insurance fund, they entitle the person who derived income and paid the contributions to the state social insurance budget to benefit from a pension reflecting the level of income earned during his or her working life. The amount of the pension established in accordance with the contribution principle is an earned right, so that its reduction cannot be accepted even temporarily."*[31].

Last but not least, the provisions of **art. 79 para. (8) and (9)** of Law no. 303/2004 are also relevant in this respect:

„(8) Working or retired judges and prosecutors, as well as their spouses and dependent children, ***are entitled to free medical care****, medicines and prostheses, subject to compliance with the legal provisions on the payment of social insurance contributions.*

(9) The conditions for free granting of medical care, medicines and prostheses shall be established by means of Government Resolution. These rights are not salary-related and are not taxable."[32]*,*

which underlines the unlawfulness of the challenged provisions, since it is contrary to the principle of legal certainty that, on the one hand, the right to health care is provided free of charge and, on the other hand, the respective right is conditioned by the payment of the health insurance contribution.

Furthermore, by analysing the provisions of **art. 138 para. (2)** of the Constitution, the only conclusion that can be drawn is that when changes have an impact on the draft state budget or social insurance budget, they must be approved by the Parliament but, amending the Fiscal Code in terms of provisions having an impact on National Budgets obviously has a decisive influence on the draft budgets in question, in which case Parliament's approval is always required.

In the absence of such approval, legislative intervention implemented by means of the mechanism of the Emergency Ordinance is unconstitutional.

In this respect, we also note the provisions of **art. 16 para. (1) letter a)** of Law no. 500/2002, according to which:

„(1) *The state budget, the state social insurance budget, the budgets of special funds, the budgets of autonomous public institutions, the budgets of foreign loans contracted or guaranteed by the state, the budgets*

[29] See *mutatis mutandis* dec. no. 297/23.03.2010, published in Official Gazette of Romania, Part I, no. 328/18.05.2010, dec. no. 1105/21.09.2010, published in Official Gazette of Romania, Part I, no. 684/08.10.2010, or dec. no. 1610/15.12.2010, published in Official Gazette of Romania, Part I, no. 863/23.12.2010.

[30] Text available *https://legislatie.just.ro/Public/DetaliiDocumentAfis/101426*.

[31] Text available at *https://www.ccr.ro/wp-content/uploads/2020/11/Decizie_900_2020.pdf*.

[32] Text available at *https://legislatie.just.ro/Public/DetaliiDocument/53074*.

of non-refundable foreign funds, the state treasury budget and the budgets of public institutions are approved as follows:

a)** state budget, state social insurance budget, budgets of special funds, budgets of foreign loans contracted or guaranteed by the state and budgets of non-refundable foreign funds,* ***by law*;"*[33].

Therefore, by taking into account the constitutional provisions, in accordance with **art. 56** of the Constitution in conjunction with **art. 115 para. (6)** of the Constitution and with **art. 138 para. (2)** of the Constitution, both the Emergency Ordinance affecting the rights and duties stipulated in the Constitution and the Emergency Ordinance amending laws with impact on national budgets (without being approved by the Parliament) are unconstitutional.

3. GEO no. 130/2021, in what concerns the provisions of art. XXIV and art. XXV which regulate the reintroduction of the obligation to pay health insurance contribution for pension income is unconstitutional, by violating the provisions of art. 1 para. (3) and (5) in conjunction with art. 56 para. (2), all of the Constitution of Romania

According to **art. 1 para. (3) and (5)** of the Constitution of Romania:

„(3) Romania is a democratic and social state, ***governed by the rule of law****, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed.";*

(5) ***„In Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory****"*[34].

Therefore, starting from the provisions of **art. 1 paras. (3) and (5)** of the Constitution of Romania, the Constitutional Court has recognised in its case-law ***the principle of legal certainty.***

The emergence of the principle of legal certainty is a specific consequence of modern law which, both because of its complexity and the rapid succession of rules over time, becomes difficult to be perceived by its addressees.

Although the ultimate aim of any regulation must be to protect fundamental rights and freedoms, the paradoxical situation arises where overly complex regulation tends in fact to infringe them.

The Constitutional Court provided the following: *„The principle of legal certainty is implicitly established by art. 1 para. (5) of the Constitution and which essentially expresses the fact that citizens must be protected against risks that come from the law itself, against an insecurity that the law has created or risks to create, requiring that the law be accessible and predictable"*[35].

Furthermore, the Court provided that the principle of legal certainty: *„It is a concept which is defined as a complex of guarantees of a constitutional nature or with constitutional valences inherent in the rule of law, in view of which the legislator has a constitutional obligation to ensure both the natural stability of the law and the best enjoyment of fundamental rights and freedoms."*[36].

As the doctrine has pointed out[37], the case-law of the Constitutional Court of Romania on the principle of legal certainty can be structured according to three essential components of this principle: **approachability and predictability of the law**, **ensuring uniform interpretation of legal provisions** and non-retroactivity of the law.

The principle of mandatory compliance with laws[38] is established both in the Constitution of Romania, and in most of the constitutions of the European states, but in order to be complied with by its addressees, **the law must fulfill certain requirements of precision, clarity and predictability**.

In this respect, the Court holds that[39], **where a legal text may give rise to different interpretations, it is bound to intervene whenever those interpretations give rise to violations of constitutional provisions**.

[33] Text available at *https://legislatie.just.ro/Public/DetaliiDocument/37954*.

[34] Text available at *https://www.ccr.ro/constitutia-romaniei/*.

[35] CCR dec. no. 238/2020, §45; dec. no. 51/2012.

[36] CCR dec. no. 238/2020, §45.

[37] I. Predescu, M. Safta, *The principle of legal certainty, the foundation of the rule of law. Case law*, in Bulletin of the Constitutional Court no. 1/2009.

[38] On matters regarding the general principles of law, please see E. Anghel, *General principles of law*, in Lex ET Scientia International Journal, XXIII no. 2/2016, pp. 120-130, available at *http://lexetscientia.univnt.ro/download/580_LESIJ_XXIII_2_2016_art.011.pdf*.

[39] See CCR dec. no. 1092/18.12.2012, published in Official Gazette of Romania, Part I, no. 67/31.02.2013.

Furthermore, „*the Court provided that a legal provision must be precise, unequivocal,* ***establish clear, predictable and accessible rules, the application of which does not enable arbitrariness or abuse.*** *The legal rule must regulate in a unitary, uniform manner, setting minimum requirements applicable to all its addressees*”.[40]

Furthermore, the Constitutional Court has ruled in a great number of decisions[41] that **the lack of regulation of essential elements which make the rule clear and predictable amounts to an infringement of art. 1 para. (5) of the Constitution of Romania.**

The requirement of predictability therefore implies that the legal rule must be stated with sufficient precision, in order to enable citizen **to control his/her conduct, to be able to foresee**, to a reasonable extent in the circumstances of the case, **the consequences which might result from a given act**, even if he/she has to seek expert advice on the matter.

By analysing the legal provisions challenged for unconstitutionality, in the light of the provisions of art. 1 para. (3) and (5) of the Constitution, we note the following:

- they make no distinction between contributory pensions and public service pensions and
- they violate the principle of fiscal predictability established by the provisions of art. 4 of the Fiscal Code.

First of all, as mentioned before, magistrates’ pensions are included in the category of public service pensions and benefit from a special regulation, which can be found in the provisions of Law no. 303/2004.

Unlike the aforementioned pensions, contributory pensions are regulated by Law no. 127/2019 on public pension system.

The Constitutional Court held that „*public service pensions enjoy a different legal regime from pensions granted under the public pension system. Therefore, unlike the latter, public service pensions are composed of two elements (...) namely: contributory pension and a supplement from the State which, when added to the contributory pension, reflects the amount of the public service pension laid down in the special law. The contributory part of the public service pension is paid from the state social insurance budget, while the part exceeding this amount is paid from the state budget*.”[42].

We consider that, in order for the provisions of GEO no. 130/2021 to be deemed to meet the requirements of appropriateness and predictability, they should have expressly provided for the categories of pensions to which they apply.

This obligation is imperative if we consider the fact that the introduction of compulsory payment of health insurance contribution on pension income derived by magistrates by means of the provisions declared unconstitutional is contrary to Law no. 303/2004, which expressly provides that this category of retired individuals shall benefit from free health care.

More precisely, according to the provisions of **art. 79 paras. (8) and (9)** of Law no. 303/2004:

„(8) Working or retired judges and prosecutors, as well as their spouses and dependent children, ***are entitled to free medical care****, medicines and prostheses, subject to compliance with the legal provisions on the payment of social insurance contributions.*

(9) The conditions for free granting of medical care, medicines and prostheses shall be established by means of Government Resolution. These rights are not salary-related and are not taxable.”.

Therefore, it still remains unclear what is meant by this gratuity following the introduction of compulsory payment of social insurance contributions on pension income derived by former magistrates.

Therefore, we consider that all these inconsistencies between the amendments introduced by GEO no. 130/2021 and the legal texts in force strongly affect the clarity and predictability of the law, by affecting the provisions of **art. 1 para. (3) and (5)** of the Constitution.

Secondly, the amendment of the Fiscal Code by way of derogation from the provisions of **art. 4** of this normative act affects the principle of legal certainty from the perspective of legal stability, creating, at the same time, difficulties of application and legal uncertainty, as we shall note.

According to the provisions of **art. 4 para. (1)-(3)** of the Fiscal Code:

„(1) This code ***shall be amended and supplemented by law****, which shall enter into force within at least 6 months as of the publication in the Official Gazette of Romania, Part I.*

[40] CCR dec. no. 454/2020, §32.

[41] See for example, CCR dec. no. 230/2022.

[42] See CCR dec. no. 871 and no. 873/25.06.2010, published in Official Gazette of Romania no. 433/28.06.2010.

(2) If new taxes, fees or mandatory contributions are introduced by law, the existing ones are increased, the existing facilities are eliminated or reduced, they shall enter into force on 1 January of each year and shall remain unchanged at least during the respective year.

(3) ***In the event that the amendments and/or supplementations are adopted by ordinances****, shorter terms of entry into force may be provided,* ***but not less than 15 days from the date of publication, except for the situations provided for by para. (2)****.*".

Therefore, analysing the legal provisions, we note that in order not to affect the stability and predictability of the legal circuit that originates from fiscal law relationships (as a necessity of the constitutional obligation of fair settlement of fiscal burdens - **art. 56** of the Constitution), the legislator provided for the possibility of amending the Fiscal Code by means of Emergency Ordinances, except for cases when following the introduction (for example) of new contributions, unfavourable situations are created for taxpayers, in that situation the regulation can only be performed by law, in compliance with the provisions of **art. 4 para. (1) and (2)** of the Fiscal Code.

This interpretation is the right one and represents the transposition at the level of the infra-constitutional laws of the provisions of **art. 139 para. (1)** of the Constitution, according to which: *„(1) Taxes, duties and any other revenue of the State budget and State social security budget shall be established only by law."*[43].

Therefore, it is obvious that the legislator's will, in case of the amendments concerning taxes, duties and contributions, established by the exception in **art. 4 para. (3)**, was to exclude from the scope of the Emergency Ordinances the possibility of making changes that are unfavourable to the taxpayer, *i.e.,* the introduction of or increases in taxes, duties or contributions or the elimination or reduction of tax benefits.

This also results from the analysis of **art. 3 letter e)** of the Fiscal Code, which governs the principle of predictability of taxation, according to which: *„predictability of taxation ensures the stability of taxes, duties and compulsory contributions for a period of at least one year, during which there can be no changes in terms of increase or introduction of new taxes, duties and compulsory contributions.".*

In this respect, the doctrine points out that: *„There are two exceptions from this rule (*stated in the two first paragraphs of art. 4*), justified by the urgency of the amendment, which, acting by means of ordinances, may enter into force within at least 15 days: however, the law provides that by the conjunction of para. (3) with para. (2),* ***no amendments unfavourable to taxpayer can be performed by means of ordinances, respectively the introduction of or increases in taxes, duties or contributions or the elimination or reduction of tax benefits****.*"[44].

Furthermore, even if we accept the possibility of introducing contributions by means of emergency ordinances, GEO no. 130/2021 did not even meet the 15-day deadline (**art. 4 para. 3** of the Fiscal Code), as we have noted, the normative act entered into force on 18.12.2021 and the obligation to pay the contributions became due from 01.01.2022, thus violating the provisions of **art. 1 para. (5)** of the Constitution, according to which the observance of the laws shall be mandatory.

As we have already mentioned, the rules in **art. 4** of the Fiscal Code are meant to ensure effective publicity *in tax matters,* from at least two perspectives:

- **on the one hand**, the publicity of the measures proposed by the Government or the parliamentarians was considered, by establishing the obligation to promote the law amending the Fiscal Code or the Fiscal Procedure Code 6 months before their entry into force and its debate within the legislative procedure;
- **on the other hand**, the publicity of the amendments and supplementations adopted by the Parliament was taken into account, by establishing a „reflection period" represented by the period between the adoption of the amending law and 1 January of the following year.

It should be noted that in another Member State of the European Union[45], Poland, the Constitutional Court[46] assessed as necessary the existence of a period of *vacatio legis* in fiscal matters, of one month from the publication of the law in the Official Journal, starting from the principle enshrined in art. 2 of the Constitution of

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[43] Text available at *https://www.ccr.ro/constitutia-romaniei/*.

[44] R. Bufan, *Tax code commented at 01-nov-2020,* Wolters Kluwer, comment on art. 4 of the Fiscal Code, available at *https://sintact.ro/#/commentary/587237121/1/bufan-radu-codul-fiscal-comentat-din-01-nov-2020-wolters-kluwer?cm=URELATIONS*.

[45] R.-M. Popescu*, Interpretation and enforcement of article 148 of the Constitution of Romania republished, according to the decisions of the Constitutional Court*, in Challenges of the Knowledge Society, Bucharest, 17th-18th May 2019, 13th ed., available at *http://cks.univnt.ro/articles/14.html*, p. 711 *et seq.*

[46] See C.F. Costaş in R. Bufan, M.Şt. Minea (coord.), *Tax code commented*, Wolters Kluwer Publishing House, Bucharest, 2008, p. 114-115, point 175.

Poland, namely the rule of law principle in a democratic state. This principle was specifically established by the Polish constitutional court by means of several rules:

- establishing a balance between the exclusive right of the state to establish fees and taxes for the realization of budget revenues and the rights and interests of taxpayers, by regulating some procedural guarantees in favour of the "weak part" of this relation;
- the loyalty of the state in relation to the recipients of the legal norms enacted, by formulating predictable and accessible regulations, published in the Official Journal with a reasonable time interval before their application;
- legal security, *i.e.*, maintaining the decreed provisions for a certain period of time, so that there are no legal effects that could not be foreseen at the time the taxpayer made important decisions in fiscal matters.

Given all these, the following were noted, including in the doctrine: „Based on these elements, we believe that the Parliament should reject any emergency ordinance that does not meet the constitutional requirements. This is all the more necessary in the fiscal field, where the principle of legal security requires ensuring stability, certainty, predictability”[47].

In conclusion, in our opinion, there is no doubt that the provisions of **art. XXIV and art. XXV of GEO no. 130/2021 are unconstitutional,** by being issued in violation of the provisions of **art. 1 para. (3) and (5) in conjunction with art. 56 para. (2),** all of the Constitution of Romania.

4. GEO no. 130/2021, in what concerns the provisions of art. XXIV and art. XXV which regulate the reintroduction of the obligation to pay health insurance contribution for pension income is unconstitutional, by violating the provisions of art. 56 and art. 16 para. (1) of the Constitution of Romania

According to the provisions of **art. 16 para. (1)** of the Constitution: „(1) Citizens are equal before the law and public authorities, without any privilege or discrimination.”[48].

According to the provisions of **art. 56** of the Constitution: „(1) Citizens are under the obligation to contribute to public expenditure, by taxes and duties.

(2) The legal taxation system must ensure a fair distribution of the tax burden.

(3) Any other dues shall be prohibited, except those determined by law, under exceptional circumstances.”[49].

The violation of the principle of equality by the provisions of GEO no. 130/2021 are substantiated by the fact that the obligation to pay health insurance contribution is established only for pensions that exceed RON 4000, exclusively on the difference that exceeds this ceiling.

This legislative intervention creates different legal regimes for identical social situations.

The constitutional right to pension takes shape after the fulfilment of the retirement conditions and reflects the result of the person's contribution (material and/or professional/vocational), which is recognized throughout his or her active working life to the state funds created for this purpose.

The different amount of the pension does not represent a benefit granted by the state and on which the state can intervene at any time and in any way, but it is an earned right of the person, recognized as a result and to the extent of the contributions paid throughout life in relation to the income obtained or the qualities held (through a legal assessment of the interference of the professional activity exercised in the interest of all, in the private life of the taxpayer), on which it is not possible to intervene.

Beyond this aspect, even if we admit the possibility of an intervention restricting these rights, this intervention must be a unitary one affecting, equally, all pensions, regardless of the value of these rights, otherwise the principle of equality is obviously affected.

Therefore, given that the challenged provisions affect only pension income exceeding RON 4000, we consider that the principle of equality laid down in art. 16 of the Constitution is infringed.

GEO no. 130/2021, by means of the provisions subject to unconstitutionality control, makes a clear differentiation in the application of health insurance contributions, the new „tax” being established only on high

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[47] R. Bufan, *Tax code commented at 01-nov-2020*, Wolters Kluwer, comment on art. 4 of the Fiscal Code, available at *https://sintact.ro/#/commentary/587237121/1/bufan-radu-codul-fiscal-comentat-din-01-nov-2020-wolters-kluwer?cm=URELATIONS*.

[48] Text available at *https://www.ccr.ro/constitutia-romaniei/*.

[49] *Ibidem.*

value pensions, respectively for the amounts exceeding RON 4000 in what concerns income derived from pensions, by applying a percentage of 10%.

This also infringes the provisions of **art. 56** of the Constitution from the perspective of the principle of tax fairness.

As regards the fair assessment of the tax burden, the Constitutional Court[50] held that taxation must be not only lawful but also proportional, reasonable and fair and must not differentiate taxes according to groups or categories of citizens.

Therefore, in connection with all the aforementioned, it is obvious that this uneven application of health insurance contribution in relation to the value of salary entitlements is an infringement of the provisions of **art. 16** and **art. 56** of the Constitution.

5. GEO no. 130/2021, in what concerns the provisions of art. XXIV and art. XXV which regulate the reintroduction of the obligation to pay health insurance contribution for pension income is unconstitutional, by violating the provisions of art. 147 para. (4) of the Constitution of Romania

According to the provisions of **art. 147 para. (4)** of the Constitution: „(4) Decisions of the Constitutional Court shall be published in the Official Gazette of Romania. As from their publication, decisions shall be generally binding and effective only for the future."[51].

By means of Decision no. **900 of 15.12.2020**, the Constitutional Court pointed out the following: „although the amounts paid as social insurance contributions do not represent a time deposit and therefore, they cannot entail a right of claim against the state or social insurance fund, they entitle the person who derived income and paid the contributions to the state social insurance budget to benefit from a pension reflecting the level of income earned during his or her working life. **The amount of the pension established in accordance with the contribution principle is an earned right, so that its reduction cannot be accepted even temporarily**."[52].

More specifically, **art. 82 para. (1)** of Law no. 303/2004 clearly provides that public service pension is 80% of the calculation basis represented by the gross monthly employment allowance or the gross monthly basic salary, as the case may be, and the benefits received in the last month of service before the date of retirement, therefore, any modification of this amount, in the sense of an indirect reduction as a result of the introduction of compulsory payment of the health insurance contribution, violates the provisions of **art. 147 para. (4)** of the Constitution.

6. Final considerations

In conclusion, for all the arguments of fact and law set out above, we consider that these legal norms are contrary to the constitutional norms above mentioned.

In relation to the current system, the position of the Constitutional Court has been and is extremely clear, so that any legislative amendment, either at the initiative of the Parliament or at the initiative of the Government, by Emergency Ordinance, must take into account the constitutional requirements.

Last but not least, given the European Commission's criteria for granting funds to Romania under the National Recovery and Resilience Plan, discussing the issue of special pensions is highly topical.

We are waiting to see what legislative changes the Parliament will propose and how they will pass through the filter of the Constitutional Court.

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[50] See, for example, dec. no. 6/25.02.1993, published in Official Gazette of Romania, Part I, no. 61/25.03.1993 and dec. no. 940/06.07.2010, published in Official Gazette of Romania, Part I, no. 524/28.07.2010.

[51] Text available at https://www.ccr.ro/constitutia-romaniei/.

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A CENTURY OF CONSTITUTIONALISM

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Abstract

In the exceptional framework at the end of the First World War, followed by the union with the Old Kingdom of the Romanian provinces of Bessarabia, Bucovina and Transylvania, the question of a new constitution was raised, to reflect the new political, economic-social, ethnic and institutional conditions. The problem of national minorities had also become more complex, confessions had appeared that previously were not very important from a numerical point of view in the Old Kingdom (Greek-Catholic, Protestant, Catholic), and through the peace treaties Romania was obliged to guarantee their rights. After the war, until January 1922, there were no less than six governments, three of which were led by generals (Arthur Văitoianu, Alexandru Averescu, Constatin Coandă), who did not elaborate such a vast and complicated work. The situation changed with the coming to the head of the government, on January 19, 1922, of the well-known politician Ion I.C. Brătianu, who had the ambition to complete what he had started en 1914 without bringing it to fruition. Becoming prime minister, Ion I.C. Brătianu proposes to the king the organization of elections for the National Constituent Assemblies, a name that wanted to highlight both their representative character for the nation and their role in the construction of the state.

Keywords: *Constitution, civil rights, nation, state, democratic parliamentary regime, unitary national state, political parties.*

1. Introduction

In the matter of constitutional law, in the Kingdom of Romania, the Constitution remained in force from 1866 until 1923, when a new Constitution was adopted. It was promulgated on March 28 and published on March 29, 1923[1].

In the process of drafting the new constitution, it started from the texts of the 1866 Constitution, of which approximately 60% were taken over. That is why, in legal doctrine, it was stated that the Constitution of 1923 is only a modification of the one of 1866.[2] Enshrining the creation of the Romanian unitary national state, the Constitution stipulated that "Romania is a national state, unitary and indivisible" and that "the territory Romania is inalienable".

The constitution enshrined the democratic parliamentary regime[3], recognized the rights and freedoms of citizens, and established the principle of separation of powers[4] in the state.[5] According to the Constitution, the legislative activity was to be exercised by the king and the national representation (consisting of the Senate and the Chamber of Deputies), the executive by the king and the Government, and the judicial by the courts.

New provisions were introduced that stemmed from the treaties signed by Romania within the League of Nations.

This new fundamental law was imposed by the reality of the creation of the unitary national state, admitted, in principle, by all political parties. However, the parliament formed after the 1922 elections, as a constituent assembly, was harshly attacked by the opposition parties (National Party, Peasant Party, People's Party) who believed that they were unable to effectively participate in the drafting of the new fundamental law.

In art. 19 it was stipulated that the mining deposits, as well as the wealth of any kind in the subsoil, are the property of the state.

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[1] Official Gazette no. 282/29.03.1923.

[2] C. Ionescu, *Dezvoltarea constituţională a României. Acte şi documente 1741-1991,* C.H. Beck Publishing House, Bucharest, 2016, p. 529.

[3] I. Muraru (coord), A. Muraru, V. Bărbățeanu, D. Big, *Drept constituțional și instituții politice. Caiet de seminar*, C.H. Beck Publishing House, Bucharest, 2020, p. 66.

[4] For more about the separation of power, see E.E. Ștefan, *Drept administrativ Partea I, Curs universitar,* IIIrd ed., revised, supplemented and updated, Universul Juridic Publishing House, Bucharest, 2019, pp. 27-32.

[5] E. Focşeneanu, *Istoria Constituţională a României 1859-1991,* Humanitas Publishing House, Bucharest 1998, pp. 57-58.

The Constitution also defended the interests of the financial banking system, guaranteed the equality of citizens before the law, regardless of class, individual freedom, the inviolability of the domicile, freedom of education, the press, and the writings. Many of these freedoms took on a formal character.

The Constitution also enshrined the principle of the supremacy of the law and the rule of law, establishing the way of organizing the control of the constitutionality of laws.[6]

The fundamental law of 1923 established the democratic parliamentary regime, recognized the rights and freedoms of citizens, representing a positive factor in the development of Romania.[7]

The third title includes the constitutional provisions that enshrined the separation of powers in the state, the legislative activity to be exercised by the king and the National Representation, the executive activity by the king and the Government, and the judicial activity by the courts.

The national representation consisted of the same two assemblies, respectively the Senate and the Assembly of Deputies.

The legislative initiative belonged either to the king or to one of the two assemblies.

The Assembly of Deputies was made up of deputies elected by Romanian citizens, organized by constituencies.

The Senate was composed of de jure senators and elected senators. Senators could be elected by Romanian citizens from the age of 40, with the right to vote, from the electoral constituencies fixed by law, by the members of the county and communal councils, of the chambers of commerce, industry, labor, agriculture, by the professors at every university in the country. De jure senators were part of clergy representatives (metropolitans, bishops), former heads of government, former ministers, former presidents of legislative bodies, former senators, and deputies.

The king had powers to sanction the laws, the right to convene the parliament, to dissolve one of the two chambers, to appoint a new government.[8]

In the exercise of his powers, the king drew up regulations for the application of laws, appointed or confirmed public positions, could create new state positions, exercise command of the army, confirm military ranks, confer Romanian decorations, and had the right to mint coins.[9]

The Constitution provided for the creation of a Legislative Council, which formulated the bills to be debated in the National Representation.

According to the provisions of Chapter III, the executive power was exercised by the Government, in the name of the king. Ministers were appointed and dismissed by the king. The person of the king was inviolable, and the ministers were responsible for their activities.

The Council of Ministers was chaired by a president, appointed by the king and with the formation of the government.

Another innovation of the 1923 Constitution was the introduction of the control of the constitutionality of laws, which was to be exercised by the High Court of Cassation and Justice.

An innovative concept represented a principle of control of the legality of administrative acts.[10] Thus, the courts could censure documents issued by the state administration and oblige the state to pay compensations.[11]

A provision with important consequences was the one in art. 128, according to which „in case of state danger, a state of general or partial siege could be introduced".

The electoral system crystallized between 1917 and 1926, universal suffrage was introduced, and the first parliamentary elections were organized in November 1919.

A new electoral law was adopted in March 1926, which enshrined the right to vote and be elected, the conduct of elections, the structure of the Assembly of Deputies and the Senate.

The new electoral law ensured the interests of the big political parties, consecrating a comfortable majority in the Parliament, and removed the smaller political groups from the stage of political life.

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[6] N. Popa, E. Anghel, C. Ene-Dinu, L. Spătaru Negură, *Teoria generală a dreptului. Caiet de seminar,* 3rd ed., revised and supplemented, C.H. Beck Publishing House, Bucharest, 2017 p. 115.

[7] For more information, see E. Anghel, *The implication of the institution of Ombudsman in the constitutionality control*, in proceedings CKS-eBook, 2021.

[8] I. Muraru, S. Tănăsescu, *Drept constituțional și instituții politice,* vol. I, C.H. Beck Publishing House, Bucharest, 2015, p. 64.

[9] C. Ene-Dinu, *Istoria statului și dreptului românesc*, 2nd ed., Universul Juridic Publishing House, Bucharest, 2023, p. 296.

[10] For more about the control of the legality of administrative acts, see E.E. Ștefan, *Drept administrativ Partea a II-a, Curs universitar*, 4th ed., revised and updated, Universul Juridic Publishing House, Bucharest, 2022, pp. 110-177.

[11] E. Cernea, E. Molcuț, *Istoria statului și dreptului românesc*, Universul Juridic Publishing House, Bucharest, 2013, p. 316.

This law replaced the principle of proportional representation with that of the first majority. This system was applied in the elections for the Assembly of Deputies and was based on the following rules: the totalization of votes for each party at the scale of the entire country; the party that obtained 40% of the total votes in the country benefited from a major premium (the first 50% of mandates); the remaining 50% of mandates are distributed proportionally to the number of votes obtained by all parties that received at least 20% of the total votes; the group that did not obtain 20% of the votes did not receive any mandate, unless it obtained an absolute majority in a county; if none of the parties obtained 40% of the votes, the mandates were distributed proportionally to the number of votes obtained.

In the Senate elections, all mandates in each constituency went to the party that had obtained the most votes (relative majority principle).

In the period 1927-1930, the constitutional provisions related to the institution of the regency functioned, which was determined by the renunciation of the crown by Charles II, the eldest son of King Ferdinand. In January 1926, the legislative bodies ratified the act of renunciation, proclaiming Mihai, son of Carol II, heir.

The regency was constituted of three persons, who were to exercise their prerogatives if Mihai would have become king before reaching the age of majority. The king began to exercise his powers from June 1929, following the death of King Ferdinand, until 1930, when Carol returned to the country and proclaimed himself king.

2. Innovative legal institutions introduced by the 1923 Constitution

2.1. In the field of administrative law

Administrative law[12] has seen the most important changes. They were carried out for the unification of legal regulations and imposed the unification of the state apparatus at the central and local level.

In Transylvania, Basarabia and Bucovina, certain powers were exercised by the own governing bodies of the provinces that united with the country. In, the public services were managed by the Governing Council, and in Basarabia and Bucovina, the attributions were exercised by service directorates and secretariats. These powers were established by the Decree Law of December 26, 1918, in Transylvania and by the one of January 1, 1919, for Bucovina and Basarabia. Foreign affairs, the army, the railways, the post, the telegraph, the financial circulation, the customs, the public loans, the security of the state came under the competence of the central government.

On April 4, 1920, the Governing Council of Transylvania and the directorates and service secretariats of Basarabia and Bucovina were dissolved, thus putting an end to the regional forms of leadership. During the reference period, new administrative organization laws were adopted both at the central and local levels.

The Law for the Organization of Ministries was adopted on August 2, 1929, which created the general framework for the organization of ministries in a unitary system. According to this law, the king appointed the person who was to form the Government, appointed and dismissed the ministers. The law also provided for the establishment of local ministerial directorates, in number of seven, for each ministry, as local administration and inspection centers.

On June 14, 1925, the Law for administrative unification was adopted, which established a unitary system of territorial organization of the national state and provided for the establishment of eligible local bodies.

According to the law, the territory of Romania was divided, from an administrative point of view, into counties and communes.

Communes were of two types: rural and urban.

- Rural communes could be formed from one or more villages, depending on the number of inhabitants they had.
- Urban communes were population centers recognized as such by law; in their turn, they were divided into county residence communes and non-county residence communes. Internally, urban communes were divided into sectors. Some urban communes, county seats, of greater importance, could be declared municipalities by law.

[12] Regarding the emergence of administrative law in Romania, please see M.-C. Cliza and C.-C. Ulariu, *Drept administrativ. Partea generală (Administrative Law. The General Part)*, C.H. Beck Publishing House, Bucharest, 2023, p. 1.

At the head of the communal administration is the mayor, who executes the decisions of the local Council and the permanent communal Delegation. The mayor was elected by the Communal Council. The counties were divided into squares. The county administration was under the leadership of the prefect, appointed by royal decree, at the proposal of the Ministry of the Interior. The leadership of the palace was exercised by a praetor, appointed by ministerial decision.

At the level of communes and counties, permanent councils and delegations functioned, competent to decide according to the law.

Through the Law for the organization of local administration of August 3, 1929, a series of changes were made to the system of administrative organization. This law stipulated that all communes, urban or rural, could be divided into sectors and that both counties and communes, as well as communal sectors, enjoyed legal personality.

The villages that were part of a rural commune were sectors of it and had their own leadership.

During the reference period, a series of laws were adopted regarding the creation of the Legislative Council; Superior Administrative Council; Pension Houses; Agricultural Chambers; Chambers of Labor; as well as the reorganization of the Chambers of Commerce and Industry. Also, the Statute of civil servants was adopted.

2.2. In terms of civil law

In the field of civil law, the code adopted in 1864 remained in force, but some special laws were also applied, the adoption of which was imposed by economic and social transformations.

The unification of civil legislation was achieved gradually and differentiated from one province to another. Thus, if, at the end of the third decade, the same civil law norms were applied in old Romania and Bessarabia, in Transylvania some specific norms continued to be applied until the Second World War.

In certain areas of civil law, new regulations have intervened, and new principles have been introduced. Thus, in the matter of property, if, according to the classical conception, expressed in art. 480 Civil Code, the property right has an absolute character[13], the 1923 Constitution and the special civil legislation established the concept of property as a social function.[14] In this way, the legal basis was created for expropriation for reasons of national utility. Through the Constitution of 1923, the concept of „public utility" was reformulated, giving it a much wider meaning compared to the one established by the Constitution of 1866. On this basis, a series of measures were adopted to limit the right of absolute ownership. These measures were necessary, since, according to the classical Romanian conception, taken over by the bourgeois civil codes, the owner of a plot of land had full rights both over the basement and over the air space located on that plot.[15]

However, the 1923 constitution provided that the wealth of the underground becomes the property of the state, which is equivalent to a nationalization of the underground. Also, restrictions were brought regarding the right to airspace, in the interest of air navigation companies. At the same time, the nationalization of some armament enterprises and some metallurgical plants was carried out.

In fact, after nationalization, the wealth of the underground and the enterprises were transferred to the use of private individuals, under the pretext that they can be better valued by private individuals than by the state.

About land ownership, a series of laws were adopted to carry out agrarian reform. These laws were distinct for old Romania and for the old provinces. The agrarian reform, legislated in 1921, involved two distinct operations.

The first operation was that of the transfer of the expropriated lands to the state, with the payment of substantial compensations. The redemption price was equal to the regional lease price multiplied by 40 in the old Romania and by 20 for the rest of the country. This first operation could be carried out in a short period of time, especially since the compensations were to be paid by the state.

The second operation consisted in the sale of land by the state to the peasants. This legal formula by which the appropriation was made was intended to give the impression that the lands did not pass from the property of the landlords to that of the peasants but were sold by the state. The appropriation laws provided that the lands distributed to the peasants could not be sold or mortgaged before the debts to the state were paid off.

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[13] C. Bîrsan, *Drept civil. Drepturile reale principale*, Hamangiu Publishing House, Bucharest, 2008, p. 29.

[14] E.T. Danciu, *Privire istorică asupra evoluţiei proprietăţii în context politic*, Journal of Legal Sciences no. 4/2008, pp. 128-132.

[15] B. Berceanu, *Istoria constituţională a României, în context internaţional*, Rosetti Publishing House, Bucharest, 2003, p. 458.

The legal regime of ownership over the basement was established by the Mining Law of July 3, 1924. This law reaffirmed the constitutional principle regarding state ownership of underground wealth, with some exceptions. Thus, the law recognized the acquired rights over the underground wealth, known and exploited at that time, which constituted an important limit of the regulation. This is how the provisions of the law were to be fully applied only for the concession of lands in the state reserve and for the lands of private persons, who could not exploit the basement on their own land.

The legal regime of state property underwent a series of changes through the Mining Law of March 29, 1929, and the Law on the Commercialization and Control of State Economic Enterprises of June 6, 1929. The provisions of these laws were formulated in such a way as to favor private capital, including foreign capital. Thus, for example, the proportion of private capital's participation was not fixed, so that, based on a symbolic participation, it acquired access to the exploitation of state assets.

During the reference period, the provisions of the civil law regarding the legal status of the person were supplemented with new regulations.

We mention in this regard:

- Civil Status Act 1928;
- Employment Contracts Act 1929;
- The law of 1932 on lifting the incapacity of married women.

These laws alleviated the inequality between men and women in the field of civil law. Thus, it was provided that the woman no longer must ask for her husband's consent to conclude an employment agreement and that the woman has the right to collect her salary and dispose of it, as well as the right to alienate her assets without her husband's authorization.

In the matter of legal entities, there have been changes imposed by the transformations in social and economic life. Thus, the Law of May 26, 1921 authorizes the organization of trade unions, on the condition that they concern themselves only with the problems of a strictly professional, economic, social and cultural nature of their members. Trade unions were prohibited from carrying out any political activity, as well as dependence on any political party.

Through the Law for Legal Entities of February 6, 1924, the old system, according to which legal personality was granted by law, was replaced by the system of granting legal personality based on a special procedure, which took place before the courts.

The new regulations that intervened in the matter of obligations gave the state the opportunity to direct the relations between creditors and debtors, especially during the economic crisis. In this regard, we mention the Law of August 20, 1929, for the free movement of agricultural goods (Mihalache Law), by which the lots resulting from appropriations could be put up for sale by creditors. To solve the agricultural debts of the peasants, which generated deep dissatisfaction, the state intervened with a series of measures aimed at reducing the debts of the peasants, extending the deadlines for the debts that remained to be paid, organizing the agricultural credit, and suspending the foreclosure on the peasants.

Such provisions include the Law for the Settlement of Agricultural Debts from April 19, 1933, the Law for the Regulation of Agricultural and Urban Debts from April 14, 1932, as well as the Law for the Conversion of Agricultural Debts from April 7, 1934. During the reference period, there were also changes in the appearance of the sale purchase contract. According to the Civil Code, the sale-purchase contract is a transfer of ownership, a fact which, under the crisis conditions, generates serious inconveniences for capitalists.

This is because, at the time of bankruptcy, the goods in the merchants' stores were sold at auction, and the resulting sum was divided proportionally among the bankrupt's creditors. In the practice of commercial relations, the goods were procured periodically through the sales purchase contract, and the payment was to be made at the stipulated deadlines: the big traders became the owners of the goods now of their receipt, even if the price was not paid. And if the goods remained unsold, under the conditions generated by the economic crisis, the retailers went bankrupt, and the creditors put their goods up for sale to compensate.

The result was that the industrialists and wholesalers could no longer capitalize on the claim rights born from the contracts concluded with the small merchants, so they also went bankrupt. To avoid such consequences, it was resorted to the sale of the goods without the transfer of the ownership right, if the price was not paid at the time of the return of the goods.

In the field of labor relations, new regulations were adopted during that period, including legislative unification. A series of laws were adopted that included provisions regarding the resolution of collective labor

conflicts, the Sunday rest, the length of the working day, the protection of minors and women, labor contracts, and labor jurisdiction.

2.3. Criminal law

In the field of criminal law, the code adopted in 1864 under the rule of Alexandru Ioan Cuza remained in force. In Romanian law, the legality of criminalization was enshrined in all previous criminal codes, including the Constitution of 1923.[16]

After the creation of the Romanian unitary national state, a new penal code was drawn up, which was adopted, after long delays, on March 18, 1936, and entered into force on January 1, 1937.

The new Criminal Code was systematized in three parts:

- Part I - General provisions;
- Part II - Provisions regarding crimes and misdemeanors;
- Part III - Provisions regarding contraventions.

During the period we are referring to, a series of special criminal laws were also adopted, which referred to the defense of peace and the country's credit (1930), to the repression of unfair competition (1932), to the repression of crimes against public peace (the Mârzescu Law - 1924), to the defense of the monarchical regime in Romania (1927), to the introduction of the state of siege (1933) and to the defense of order (1934).

2.4. Changes to civil and criminal procedures

Due to the differences that existed in the civil procedure in the provinces united to the old Romania, the state intervened with a series of special laws for the use of the Civil Procedure Code in certain areas. In the field of civil procedure, the Code adopted in 1864 continued to apply. The legislative unification in this matter was achieved both by extending some civil procedure provisions from the old Romania to the new provinces, and by adopting new laws. We mention, in this sense, the Law of May 19, 1925, which aimed at the unification of some provisions of civil and commercial procedure, the facilitation and acceleration of judgments, as well as the competence of judges. The law referred to the trial procedure in civil and commercial cases before the tribunals and the courts of appeal. It is an important step in the unification of the procedure, differences remaining as far as the courts are concerned. The advantage of the law is that it also simplified some procedural forms and shortened some deadlines. Thus, the opposition is abolished, that way of appeal by which the missing party at the first term demanded the restart of the process. Also, the appeal period was shortened from 30 days to 15 days.

Important is the new organization given to the summons. It is stipulated that it should include all the plaintiff's claims, with the means of proof that he understood to be used, being made in as many copies as there are parts, plus one copy for the court. Upon receipt of the action, the court communicated to the defendant and the other parties a copy of the action each, and the defendant was obliged to submit to the court, in a short period of time, before the day fixed for the trial, a written response, which would include all his defenses against the claims the plaintiff, as well as the evidence in combating the claims of the plaintiff. In this way, at the first term, the court could proceed to the settlement of the trial, avoiding those countless postponements, for the communication of the action or the approval of the evidence and their administration, etc.

However, the essential features of the civil process were preserved, maintaining the investigation of the merits of the process both in the first instance and in the appeal. Also, the use of appeals was very expensive due to the stamp duty that had to be paid by the person declaring the appeal.

And in the field of criminal procedural law, the old code remained in force. In 1935, on March 19, a new code of criminal procedure was adopted, which entered into force on January 1, 1937. The new Code took over many provisions from the previous one, but also provided for some new regulations. To create a unitary framework for the application of the law, on January 25, 1924, the Law for the unification of the judicial organization was issued.

According to the provisions of this law, the courts were established in a system consisting of:

- judges: rural, urban and mixed.

[16] M.A. Hotca, P. Buneci, M. Gorunescu, N. Neagu, R. Slăvoiu, R. Geamănu, D.G. Pop, *Instituții de drept penal*, Universul Juridic Publishing House, Bucharest, 2014, p. 11.

- courts - in each county there was a court, composed of one or more sections.
- appeal courts, 14 in number, composed of one or more sections.
- courts with juries, which tried only criminal cases.
- Court of Cassation.

To unify the composition of the body of lawyers, a special law was passed in 1923, amended in 1925.

3. Conclusions

Beyond the complex political process and the resulting normative text, the adoption of the Constitution of 1923 meant both an exercise and an extraordinary intellectual effort, in which the reunited creative legal forces of the reunited country participated, in an unprecedented and unique context in the history of law from Our country. The gathering, dialogue and valorization of the great European constitutional experiences brought to Bucharest by the representatives of the Romanian multicultural legal horizon of the time - Neo-Latin, Austrian, Austro-Hungarian and Russian - entailed a work of synthesis and extraordinary legal-cultural options, intended to ensure continuity, to satisfy diversity and above all to ensure national state specificity in a Europe founded on the values of Law and Justice.

The 1923 Constitution worked until February 1938, when King Charles II initiated a new Constitution, which strengthened royal power and limited democratic freedoms. After the abdication of Charles II, although theoretically his version of the Constitution remained in force, it returned to customs, and after August 23, 1944 the Constitution was partially amended and revised in 1946. Practically, the Constitution of 1923 was once and for all abandoned with the forced abdication of King Mihai I, on December 30, 1947, being replaced without the expression of popular will by one made according to the Soviet model.

It was the moment when the constitutional monarchy, which laid the foundation of modern Romania, was repealed, and the republic was established - an institution brought to Romania by the recently condemned communist regime, an institution without traditions and without popular support. It was the beginning of the darkest period in Romania's history. It represented, finally, an adaptation of the constitutional data configured in 1866 in terms of a new synthesis to the reintegrated national framework and to the reorganized European one based on the law and values of cooperation and creative mutual dialogue[17].

The juridical-constitutional work of a century ago was one of synthesis, in which the professors of constitutional law from the four law faculties of the country participated, the other renowned specialists in the field, who were joined, from the specific perspectives, by sociologists, historians or economists. All of this has constituted a precious heritage whose cultural-historical essences endure to this day and must be capitalized as such.

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[17] For information on this regional context and on the need for international cooperation, please see L.-C. Spătaru-Negură, *Dreptul Uniunii Europene – o nouă tipologie juridică* (*European Union Law – A New Legal Typology)*, Hamangiu Publishing House, Bucharest, 2016, p. 71 *et seq.*, as well as L.-C. Spătaru-Negură, *Protecția internațională a Drepturilor Omului – Note de curs (International Protection of Human Rights – Course Notes)*, Hamangiu Publishing House, Bucharest, 2019, p. 14, 21 and 59.

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CURRENT JUSTICE LAWS IN ROMANIA

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Abstract

At the end of 2022, the new Romanian justice laws were adopted, namely Law no. 303/2004 on the status of judges and prosecutors, Law no. 304/2022 on the status of judges and prosecutors and Law no. 305/2022 on the Superior Council of Magistracy.

The magistracy is the judicial activity carried out by judges for the purpose of dispensing justice and by prosecutors for the purpose of defending the general interests of society, the rule of law and the rights and freedoms of citizens.

The judicial organization is the set of principles and rules governing the functioning of the courts in judicial activity, with the aim of guaranteeing respect for the Romanian Constitution and the realization of the fundamental rights and freedoms of the individual through the dispensation of justice as a public service.

Judges and prosecutors may be awarded the Diploma of Judicial Merit by the President of Romania, on the proposal of the Plenum of the Superior Council of Magistracy, for outstanding merits in their activity.

The Ministry of Justice and the Superior Council of the Magistracy shall cooperate loyally in the exercise of their respective powers relating to the proper organization and administration of justice as a public service.

Keywords: *magistrates, judges, prosecutors, judicial authority, judiciary, Public Ministry, Superior Council of Magistracy, justice laws, statute of judges and prosecutors, judicial organization.*

1. Introduction

According to the provisions of art. 1 of the Romanian Constitution, the Romanian State is a democratic and social state governed by the rule of law, organized according to the principle of the separation and balance of powers – legislative, executive and judicial – within the framework of constitutional democracy.

The judiciary is made up of the High Court of Cassation and Justice and all other courts established by law.

In particular, the High Court of Cassation and Justice ensures the uniform interpretation and application of the law by the other courts, according to its jurisdiction.

The Constitutional Court of Romania, despite its name, is not a court of law and is not part of the judicial order but of the constitutional order.[1]

The concept of judicial power is not confused with that of judicial authority.

The judicial authority consists of the courts, the Public Prosecutor's Office and the Superior Council of Magistracy.

Regarding the status of judges, the Romanian Constitution states that they are appointed by the President of Romania, irremovable and incompatible with any other public or private office, with the exception of teaching posts in higher education.

The Public Prosecutor's Office exercises its powers through prosecutors constituted in public prosecutor's offices operating alongside the courts, in accordance with the law, representing the general interests of society and defending the rule of law and the rights and freedoms of citizens.

The work carried out by prosecutors is governed by three principles: the principle of legality, the principle of impartiality and the principle of hierarchical control.

Prosecutors enjoy stability and are incompatible with any other public or private office, except for teaching posts in higher education.

The Superior Council of Magistracy is the guarantor of the independence of justice, consisting of 19 members, and proposes to the President of Romania the appointment of judges and prosecutors, with the

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[1] N. Popa (coord.), E. Anghel, C. Ene-Dinu, L.-C. Spătaru-Negură, *General Theory of Law. Seminar booklet*, 3rd ed., C. H. Beck Publishing House, Bucharest, 2017, p. 61.

exception of probationary judges and prosecutors under the law, and acts as a court, through its sections, in the area of disciplinary liability of judges and prosecutors.

The Superior Council of Magistracy, in addition to being the guarantor of the independence of justice, contributes to the proper organization and administration of justice through its powers and competences.

The concept of justice laws in Romania refers to the status of judges and prosecutors, the judicial organization and the Superior Council of Magistracy.

At the end of 2022, the new justice laws in Romania were adopted, namely Law no. 303/2022 on the status of judges and prosecutors, Law no. 304/2022 on the judicial organization and Law no. 305/2022 on the Superior Council of Magistracy.

2. Content

Law no. 303/2004 on the status of judges and prosecutors, in force from September 2004 until December 2022, was repealed by Law no. 303/2022 on the status of judges and prosecutors.

Law no. 303/2004 on the status of judges and prosecutors has been amended and supplemented over time by several normative acts, including: GEO no. 148/2005, Law no. 29/2006, GEO no. 50/2006, Law no. 356/2006, GEO no. 100/2007, Law no. 97/2008, GEO no. 46/2008, GEO no. 195/2008, GEO no. 230/2008, CCR dec. no. 82/2009, Law no. 77/2009, CCR dec. no. 785/2009, GEO no. 59/2009, GEO no. 80/2010, Law no. 300/2011, Law no. 24/2012, GEO no. 23/2012, GEO no. 81/2012, GEO no. 48/2013, Law no. 255/2013, CCR dec. no. 176/2014, Law no. 118/2014, Law no. 138/2014, GEO no. 1/2016, Law no. 242/2018, GEO no. 7/2019, CCR dec. no. 121/2020, Law no. 313/2021.

Among the amendments and additions made to the regulation of the statute of judges and prosecutors, we mention: the procedure for holding the competition for promotion to the position of judge at the High Court of Cassation and Justice, the facts for which liability for judicial errors may be incurred, the procedure for transferring judges and prosecutors, the minimum seniority requirements for appointment to senior positions, disputes given to the jurisdiction of probationary judges, etc.

Law no. 304/2004 on judicial organization, in force from September 2004 until December 2023, was repealed by Law no. 304/2022 on judicial organization, with the exception of Article 661 which is repealed 90 days after the date of entry into force of the new law.

Law no. 304/2004 on the judicial organization has been amended and supplemented by several normative acts, among which we recall: GEO no. 134/2005, GEO no. 50/2006, GEO no. 100/2007, GEO no. 56/2009, Law no. 202/2010, Law no. 148/2011, Law no. 71/2011, Law no. 300/2011, GEO no. 81/2012, Law no. 296/2013, Law no. 255/2013, GEO no. 3/2014, H. G. no. 328/2016, GEO no. 18/2016, GEO no. 90/2018, CCR dec. no. 547/2020, GEO no. 215/2020, Law no. 198/2021, Law no. 49/2022, CCR dec. no. 55/2022.

With regard to the amendments and additions made, we indicate, by way of example and not exhaustively, the following: the transition from the National Anticorruption Prosecutor's Office to the National Anticorruption Directorate, the control of the senior prosecutor over the acts and measures ordered by prosecutors, the professional level of execution and salary of DIICOT prosecutors, the acceleration of trials, the number of judges' posts in the reserve fund, the abolition of some courts and their prosecutors' offices, issues related to the administrative organization of the High Court of Cassation and Justice and the powers of its Management College, specialized courts and their competences, the jurisdiction of the High Court of Cassation and Justice, measures for the execution of technical surveillance warrants ordered in criminal proceedings, principles of judicial organization, access to justice, court activity during a state of emergency, the establishment and dissolution of the Section for the Investigation of Offences in Criminal Matters, the composition of appeal court panels, etc.

Law no. 317/2004 on the Superior Council of Magistracy, in force from September 2004 until December 2022, was repealed by Law no. 305/2022 on the Superior Council of Magistracy.

Law no. 317/2004 on the Superior Council of Magistracy has been amended and supplemented by a number of legislative acts, including the following: GEO no. 4/2013, CCR dec. no. 196/2013, GEO no. 23/2012, Law no. 255/2013, GEO no. 77/2018, GEO no. 12/2019.

The amendments and additions concerned, inter alia, the election and dismissal of members of the Superior Council of Magistracy, the term of office of members of the Superior Council of Magistracy, the work of the plenary and of the sections of the Superior Council of Magistracy, powers regarding the authorization of search,

detention, preventive arrest or house arrest of judges, assistant magistrates and prosecutors, the completion of Article 67 of Law no. 317/2004 on the Superior Council of Magistracy, disciplinary offences, etc.

Thus, Law no. 303/2022 on the status of judges and prosecutors consists of Title I - General provisions, Title II - Career of judges and prosecutors, Title III - Rights, duties, incompatibilities and prohibitions, Title IV - Assistant judges of the High Court of Cassation and Justice, Title V - Liability of judges and prosecutors and Title VI - Transitional and final provisions.

Law no. 303/2004 contained five titles and 113 articles, whereas the new regulation contains six titles and 294 articles, to which are added Annexes 1 and 2 on the criteria and indicators for evaluating the professional performance of judges and prosecutors, respectively the indicators for evaluating the professional performance of judges and prosecutors in managerial positions, as well as the criteria and indicators for evaluating the professional activity of legal staff assimilated to judges and prosecutors.

In Title I - General Provisions we find the legal provisions concerning the status of judges and prosecutors as magistrates, the irremovability of judges and the stability of prosecutors, the obligation of judges and prosecutors to ensure the supremacy of the law and to respect the rights and freedoms of individuals in all their work, and equality before the law and to ensure non-discriminatory legal treatment of all participants in judicial proceedings, regardless of their status, to ensure that individual rights and freedoms are guaranteed at all stages of the proceedings and to carry out their work in good faith and impartially, in accordance with and in compliance with the Code of Ethics for Judges and Prosecutors.

Title II - Career of judges and prosecutors contains provisions on admission to the National Institute of Magistracy and initial training of judges and prosecutors (the duration of the courses at the National Institute of Magistracy is now 3 years, compared to the previous regulation where the duration was set at 2 years), the status of trainee judges and prosecutors (who enjoy stability, their coordination by a specifically designated judge or prosecutor, their powers, the prohibition to order custodial or restrictive measures, the countersignature of the solutions ordered by the trainee prosecutor by the coordinating prosecutor, taking the capacity examination, the duration of the traineeship is one year compared to the previous regulation where the traineeship lasted 2 years, the appointment of judges and prosecutors who have passed the qualification examination by the President of Romania, on the proposal of the appropriate section of the Superior Council of the Magistracy, to the posts of judge or prosecutor in the courts or public prosecutor's offices where they have been appointed as trainees, continuous professional training (this is a guarantee of independence and impartiality in the exercise of the function, representing both a right and a duty for judges and prosecutors) as well as of the legal specialist staff assimilated to them, professional evaluation of judges, prosecutors, magistrates – assistants and legal staff assimilated to judges and prosecutors and the evaluation procedure, promotion of judges, prosecutors and legal staff assimilated to them, appointment to senior positions in courts and prosecutors' offices (including the DNA and DIICOT), namely the removal from senior positions, delegation, secondment and transfer of judges and prosecutors (the duration of the delegation is a maximum of six months and may be extended, under the same conditions and with the same procedure, for a further six months), and the secondment of judges and prosecutors to positions of public dignity or to the position of judicial inspector, secondment may be ordered for a period of three years, which may be extended once for a further three years; vacant managerial posts may not be filled by transfer), suspension from office and termination of the office of judge or prosecutor (cases of suspension and dismissal).

We note that the continuous professional training of judges and prosecutors must take into account the dynamics of the legislative process and consists mainly in the knowledge and deepening of domestic legislation, European and international documents to which Romania is a party, the case law of the courts and the Constitutional Court, the ECtHR case law and the CJEU case law, comparative law, deontological rules, the multidisciplinary approach to new institutions, as well as the knowledge and deepening of foreign languages and computer operation.

The individual professional evaluation of judges and prosecutors involves the analysis and scoring of criteria and indicators for the evaluation of the professional performance of judges and prosecutors, which mainly concern the quality of work, efficiency, integrity and the obligation of continuous professional training, and in the case of judges and prosecutors appointed to managerial positions, the way in which they perform their managerial duties. Judges of the High Court of Cassation and Justice are not subject to evaluation. The professional evaluation is carried out in relation to the seniority in the position of judge or prosecutor, or may be carried out whenever the judge or prosecutor requests it.

Judges and prosecutors may be delegated or seconded under the terms of Law no. 303/2022 only with their written consent Judges and prosecutors may be delegated, including to managerial positions, or seconded only to courts or prosecutors' offices to which they are entitled to serve according to their professional rank. DNA and DIICOT Prosecutors may not be delegated or seconded to other prosecutors' offices or institutions while working in the two directorates.

The judge and prosecutor is suspended from office in the following cases: (a) when they have been indicted for the commission of a criminal offence, from the time of the finality of the decision by which the preliminary chamber judge has ordered the commencement of the trial; (b) when the magistrate has been placed under preventive arrest or under house arrest; (c) when the measure of judicial supervision or judicial supervision on bail has been ordered and the judicial body has imposed on the magistrate the obligation not to exercise the profession in the exercise of which he or she committed the offence; (d) when he or she suffers from a mental illness which prevents him or her from exercising his or her office properly; (e) when he/she has been disciplinarily sanctioned with the penalty of suspension from office; (f) when, within the disciplinary procedure, the corresponding section of the Superior Council of Magistracy has ordered the suspension from office, under the conditions of the law; (g) in the period between the date of the communication of the decision of the corresponding section of the disciplinary sanction of exclusion from the judiciary and the date of release from office, if the section for judges or, as the case may be, the section for prosecutors considers that this measure is necessary in relation to the nature and gravity of the act and its consequences.

We note that the new regulation no longer provides for the case of suspension from judicial office for referral for trial following the commission of a criminal offence, if it is considered, in the light of the circumstances of the case, that the prestige of the profession is prejudiced.

Judges and prosecutors are dismissed in the following cases: a) resignation, b) retirement, c) transfer to another position, d) professional incapacity, e) as a disciplinary sanction, f) final conviction, g) postponement or waiver of punishment, ordered by a final court decision, as well as waiver of prosecution confirmed by the preliminary chamber judge, except in cases where these solutions were ordered for offences committed with negligence for which the corresponding section of the Superior Council of Magistracy assesses that they do not affect the prestige of justice, h) on the expiry of the one-year term of suspension from office due to the refusal or for reasons attributable to the magistrate to submit to the specialist expertise, if the magistrate did not attend the specialist expertise without justification or if the expertise cannot be carried out for reasons attributable to the magistrate and i) failure to meet the conditions provided for in art. 5 para. (3) (a) and (e) of Law no. 303/2022, *i.e.*, lack of Romanian citizenship, residence in Romania and full capacity to practice, as well as lack of medical and psychological fitness to perform the function of magistrate.

In Title III - Rights, duties, incompatibilities and prohibitions, there are provisions relating to the responsibility and complexity of the function of judge and prosecutor, taking into account the place and role of justice in the rule of law, with the aim of monitoring and guaranteeing the independence and impartiality of magistrates (salary rights, special protection measures, paid rest leave, study leave, right to official housing or settlement of rent for housing, free specialist medical care for the magistrate and his/her family, the right to a pension, the right to publish literary and scientific works, the right to examine draft legislation, the obligation to submit a declaration of assets and interests, incompatibility with any other public or private office, except for teaching posts in higher education, and with the political environment and written or oral consultations in contentious matters).

Judges, prosecutors and their equivalent legal staff may hold office in institutions of the European Union or in international organizations if the international act governing the conditions of their employment expressly makes access to that office conditional on their being a judge.

Judges, prosecutors, assistant magistrates and legal staff assimilated to judges and prosecutors are free to organize or join local, national or international professional organizations for the purpose of defending their professional rights and interests and may be members of scientific or academic societies and of any non-profit-making legal person under private law and may sit on their governing bodies.

Judges, public prosecutors, assistant judges and legal staff assimilated to judges and public prosecutors are prohibited from: a) carrying out commercial activities, directly or through intermediaries, b) carrying out arbitration activities in civil or other disputes, c) being a partner or member of the management, administration or control bodies of companies, credit or financial institutions, insurance/reinsurance companies, national companies or autonomous regions, and d) being a member of an economic interest group.

Judges, prosecutors, assistant judges and legal staff assimilated to them may not belong to political parties or political groups or engage in or participate in activities of a political nature.

In Title IV - Assistant Magistrates of the High Court of Cassation and Justice, we find the legal provisions concerning assistant magistrates, the grades of assistant magistrates, the competition for appointment to the position of assistant magistrate grade III, first assistant magistrate, chief assistant magistrate at the High Court of Cassation and Justice of Romania.

Title V - Liability of judges and prosecutors contains provisions on the types of legal liability of magistrates (civil, disciplinary, misdemeanor, criminal), the procedures for reporting unlawful acts committed by magistrates, search, arrest and detention, the application of judicial supervision and judicial supervision on bail only with the approval of the section for judges or prosecutors of the Superior Council of the Magistracy, with the exception of flagrant offences, the recourse action for financial damages caused by judicial errors, the acts considered as disciplinary offences and disciplinary sanctions, the solutions that may be ordered by the disciplinary committee.

The State is liable for damages caused by judicial errors, but this liability does not remove the liability of magistrates who have exercised their functions in bad faith or with gross negligence, even if they are no longer in office. Judges are not liable for decisions rendered in the absence of bad faith or gross negligence.

According to art. 268 para. (4) of Law no. 303/2022, a miscarriage of justice exists when: (a) procedural acts have been ordered in the course of the proceedings in clear violation of the legal provisions of substantive and procedural law, which have seriously infringed the rights, freedoms and legitimate interests of the person, causing an injury that could not be remedied by an ordinary or extraordinary remedy, and (b) a final judgment has been given which is manifestly contrary to the law or to the facts as shown by the evidence adduced in the case and by which the rights, freedoms and legitimate interests of the person concerned have been seriously prejudiced and which could not be remedied by ordinary or extraordinary legal remedies.

At the same time, the Criminal Procedure Code may regulate specific hypotheses and procedures that may engage the liability of the State and its regression, *i.e.*, the provisions of art. 538-542 CPP regulate the procedure for compensation of material damage or moral damage in case of miscarriage of justice or in case of unlawful deprivation of liberty or in other cases.

With regard to disciplinary liability, judges, prosecutors, assistant judges and their related specialist staff are liable for the culpable commission of disciplinary offences.

According to art. 270 of Law 303/2022, disciplinary offences are: (a) violation of legal provisions on incompatibilities and prohibitions; (b) undignified attitudes in the course of duty towards colleagues, other staff of the court or prosecutor's office in which they work, judicial inspectors, lawyers, experts, witnesses, litigants or representatives of other institutions; (c) engaging in activities of a political nature or expressing political beliefs in public or while on duty; (d) unjustified refusal to receive into the record applications, submissions, pleadings or documents filed by parties to the proceedings; (e) unjustified refusal to perform a duty; (f) failure by the prosecutor to comply with the instructions of the senior prosecutor given in writing and in accordance with the law; (g) repeated and attributable failure to comply with the legal provisions concerning the expeditious disposal of cases or repeated and attributable delay in the performance of work; (h) failure to comply with the duty to abstain when the judge or prosecutor knows that one of the grounds provided for by law for abstaining exists, as well as repeated and unjustified requests for abstention; (i) failure to observe the secrecy of deliberations or the confidentiality of work of this nature, as well as other information of the same nature which has come to his knowledge in the performance of his duties, with the exception of information of public interest, in accordance with the law; (j) repeated unjustified absences from duty or which directly affect the work of the court or the public prosecutor's office; (k) interference in the work of another judge or prosecutor; (l) unjustified failure to comply with provisions or decisions of an administrative nature ordered in accordance with the law by the head of the court or public prosecutor's office or other obligations of an administrative nature laid down by law or regulations; (m) using one's office to obtain favorable treatment from the authorities or intervening in the settlement of requests, claiming or accepting the settlement of personal interests or those of family members or other persons, other than within the legal framework regulated for all citizens; (n) failure to comply with the provisions on the random distribution of cases; (o) obstructing the work of judicial inspectors by any means; (p) participating directly or through intermediaries in pyramid games, gambling or investment schemes for which the transparency of funds is not ensured; (q) failure to draft or sign court decisions or judicial acts of the public prosecutor, for attributable reasons, within the time limits laid down by law; (r) the use of inappropriate expressions in the judgments or judicial acts of the prosecutor, the total lack of reasoning or reasoning manifestly

contrary to legal reasoning, such as to affect the prestige of justice or the dignity of the office of judge or prosecutor; and (s) the exercise of the function in bad faith or gross negligence.

The exercise of office in bad faith refers to the situation where the magistrate knowingly violates the rules of substantive or procedural law, seeking or accepting harm to a person, and the exercise of office with gross negligence refers to the situation where the magistrate culpably, seriously, unquestionably and unquestionably disregards the rules of substantive or procedural law.

In proportion to the seriousness of the misconduct, the disciplinary sanctions that may be applied are: (a) warning, (b) reduction of the gross monthly salary by up to 25% for a period of up to one year, (c) disciplinary transfer for an effective period of one to three years to another court or to another public prosecutor's office, even of the next lower grade, (d) demotion in professional grade, (e) suspension from office for a period of up to 6 months and (f) exclusion from the judiciary.

Compared to the previous regulation represented by Law no. 303/2004, the acts that may constitute disciplinary offences no longer include manifestations that are prejudicial to professional honor or probity or to the prestige of justice, committed in the exercise or outside the exercise of official duties, *i.e.,* failure to comply with the decisions of the Constitutional Court or the decisions rendered by the High Court of Cassation and Justice in the resolution of appeals in the interest of the law.

Title VI - Transitional and final provisions provides for the assessment as fulfilled of the conditions laid down in the new law by the magistrates and legal staff assimilated to them in office at the time of the entry into force of the new law, the number of mandates for the leading positions in courts and prosecutor's offices exercised until the entry into force of the new law, the duration of 2 years of the professional training courses for the auditors of justice admitted to the National Institute of Magistracy in the years 2022-2024, the repeal of Law no. 303/2004 on the status of judges and prosecutors[2], art. 27 para. (21) of GEO no. 27/2006 on the salaries and other rights of judges, prosecutors and other categories of personnel in the justice system[3], and any other legal provisions to the contrary.

Annexes no. 1 and 2 are an integral part of the Law no. 303/2022 on the status of judges and prosecutors, which provide: (i) criteria and indicators for the evaluation of professional performance for judges and prosecutors by reference to the efficiency of work, quality of work, integrity and the obligation of continuous professional training and completion of specialization courses, (ii) performance evaluation indicators for judges and prosecutors in managerial positions, and (iii) criteria and indicators for evaluating the professional activity of legal staff assimilated to judges and prosecutors by reference to the efficiency of professional activity, the quality of activity, integrity, the obligation of continuous professional training and the completion of specialization courses, the manner in which managerial duties are carried out (for managerial positions).

Law no. 304/2022 on the judicial organization comprises nine titles, *i.e.*, 168 articles, plus Annexes 1 and 2, which form an integral part of the law.

Title I - General Provisions provides (a) the principles of judicial organization, (b) ensures access to justice, (c) contains general provisions on judicial procedure.

Judicial organization is the set of principles and rules governing the functioning of the courts in judicial activity, in order to guarantee the respect of the Romanian Constitution and the realization of the fundamental rights and freedoms of the individual by providing justice as a public service.

Justice shall be done equally to all without distinction as to race, nationality, ethnic origin, language, religion, sex, sexual orientation, opinion, political affiliation, property, origin, health or social condition or any other discriminatory criteria.

The trial shall be conducted in accordance with the principles of random allocation of cases and continuity, except where the judge is unable to attend the trial for objective reasons.

The layout of the courtroom must reflect the principle of equality of arms in terms of seating of the judge, prosecutors and lawyers.

In Title II - Courts we find the legal provisions relating to the organization, jurisdiction, management and panels of the High Court of Cassation and Justice, the status of assistant magistrates, respectively the organization, jurisdiction, management and panels of courts of appeal, tribunals, specialized tribunals and courts, as well as military courts, organization, etc.

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[2] Republished in the Official Gazette of Romania, Part I, no. 826/13.09.2005, with subsequent amendments and additions.

[3] Approved with amendments and additions by Law no. 45/2007, with subsequent amendments and additions.

The files of disputes pending before the courts are drawn up and filed in paper format. At the same time, the national electronic case file is being implemented at court level, which will allow the parties, in compliance with the law, to have access to the case file via the Internet, to communicate procedural documents electronically and to submit documents to the case file in the same way. Judgments may also be signed by qualified electronic signature.

The Ministry of Justice contributes to the proper organization and administration of justice as a public service and exercises the powers of a central authority in the field of international cooperation, within the limits of the competences provided for by law.

The High Court of Cassation and Justice is the only supreme court in Romania, with its own legal personality, based in Bucharest, whose main role is to ensure the uniform interpretation and application of the law by the other courts. The courts of appeal and tribunals are also courts with their own legal personality, while specialized courts and magistrates' courts do not have legal personality.

The President of the High Court of Cassation and Justice may authorise the judges to inquire at the courts' premises on matters relating to the correct and uniform application of the law, making known the case law of the High Court of Cassation and Justice, and to ascertain situations justifying proposals for improving the law.

Title III - Public Ministry regulates the powers and organization of the Public Ministry, with reference to the Prosecutor's Office of the High Court of Cassation and Justice, the Directorate for the Investigation of Organized Crime and Terrorism, the National Anti-Corruption Directorate, the prosecutor's offices of the courts of appeal, courts, juvenile and family courts and judges, and the organization of military prosecutors' offices.

The public prosecutor attends court hearings, in accordance with the law, and has an active role in establishing the truth, and is free to present to the court the conclusions that he or she considers to be justified, taking into account the evidence in the case.

The Directorate for the Investigation of Organized Crime and Terrorism and the National Anti-Corruption Directorate operate within the Prosecutor's Office of the High Court of Cassation and Justice as autonomous structures with their own legal personality.

The head of each prosecutor's office assigns prosecutors to sections, services and offices according to their training, specialization and skills, and assigns prosecutors' files according to their specialization.

The general prosecutors of the prosecutor's offices of the courts of appeal and through the prosecutors of the prosecutor's offices of the courts also exercise management and control functions over the administration of the prosecutor's office where they work, as well as over the prosecutor's offices in their district. The first prosecutors of the prosecutor's offices attached to the juvenile courts and the first prosecutors of the prosecutor's offices attached to the courts shall also exercise the powers of administration of the prosecutor's office.

The military prosecutor's offices operate alongside the military courts and carry out criminal prosecution in cases concerning criminal acts committed by Romanian military personnel deployed on the territory of other states, within the framework of international forces, under the conditions that, according to an international convention, Romanian jurisdiction may be exercised on the territory of the receiving state. Criminal prosecution is carried out by the military prosecutor when the person under investigation is an active military person, regardless of the military rank of the person under investigation.

Title IV - Organization and functioning of the National Institute of Magistracy contains the legal provisions of the public institution with legal personality, under the coordination of the Superior Council of Magistracy, which carries out the initial training of magistrates, continuous training of magistrates in office, training of trainers, in accordance with the law, and the organization and conduct of examinations or competitions, in accordance with the law, etc.

The National Institute of Magistracy is not part of the national education and training system and is not subject to the legal provisions in force concerning the accreditation of higher education institutions and the recognition of diplomas.

In Title V - Judicial assistants we find provisions relating to judicial assistants who are appointed by the Minister of Justice, at the proposal of the Economic and Social Council, for a term of five years, from among persons with at least five years' seniority in legal functions and who meet the conditions laid down by law, namely the stability they enjoy during their term of office, their delegation which may be ordered by the president of the court to which they have been appointed, their duties, offences and disciplinary sanctions applicable as in the case of magistrates, their evaluation every two years, etc.

Title VI - Specialist ancillary departments of the courts and public prosecutor's offices lays down rules on registrars, court registries, archives, information and public relations offices, court libraries, legal documentation and information departments of the High Court of Cassation and Justice, the courts of appeal, the public prosecutors' offices, the National Anti-Corruption Directorate and the Directorate for the Investigation of Organized Crime and Terrorism, the classified documents departments of the courts and military prosecutors' offices, etc.

Title VII - Security of Courts and Public Prosecutor's Offices, regulates the security and protection of magistrates, the security of the premises of courts and public prosecutor's offices, their property and valuables, the surveillance of access and the maintenance of the internal order necessary for the normal conduct of business in their premises, being provided free of charge by the Romanian Gendarmerie, respectively by the military police in the case of military courts and public prosecutor's offices.

In Title VIII - Economic-financial and administrative management of courts and public prosecutor's offices, we find the legal provisions concerning the organization of the economic-financial and administrative department, namely the budgets of courts and public prosecutor's offices. The activity of the courts and prosecutors' offices is fully financed from the state budget.

Title IX - Transitional and final provisions concerning the trade register offices and other structures that may operate in addition to the courts, judges' assistants, the Rules of Procedure of the courts, etc.

Law no. 305/2022 on the Superior Council of Magistracy entered into force in December 2022, consisting of four Titles, *i.e.,* 96 articles, plus the Annex on the indicators and procedure for evaluating the professional activity of judicial inspectors.

Title I - General Provisions refers to the role of the Superior Council of Magistracy, which has its own legal personality and is subject only to the law in its work, as guarantor of the independence of justice.

In Title II - Organization, functioning and powers of the Superior Council of Magistracy we find provisions concerning the structure of the Superior Council of Magistracy, *i.e.,* the 19 members and the two sections (for judges and for prosecutors), the election of members of the Superior Council of Magistracy, the functioning of the Superior Council of Magistracy, the powers of the Plenary of the Superior Council of Magistracy, the powers of the sections of the Superior Council of Magistracy, the common powers of the sections of the Superior Council of Magistracy concerning the career of judges and prosecutors, the powers of each section, the powers of the Superior Council of Magistracy in the field of disciplinary liability of judges and prosecutors, the statute of the members of the Superior Council of Magistracy, the apparatus of the Superior Council of Magistracy.

The members of the Superior Council of Magistracy are elected from among judges and prosecutors appointed by the President of Romania, with at least 7 years of seniority in the position of judge or prosecutor and who have not been disciplined in the last 3 years, unless the sanction has been cancelled.

From the High Court of Cassation and Justice are elected as members of the Superior Council of Magistracy 2 judges, respectively a prosecutor from the Prosecutor's Office of the High Court of Cassation and Justice or from the National Anticorruption Directorate or from the Directorate for the Investigation of Organized Crime and Terrorism, who have obtained the highest number of votes in the general assemblies. If two or more candidates have obtained an equal number of votes, the magistrate with the longest effective seniority as judge or prosecutor is declared elected. Under the previous rules, if no candidate obtained a majority of votes, the second round of elections was held in which the judges and prosecutors who came first and second were elected, with the candidate who obtained the highest number of votes being elected in the second round of elections.

The Superior Council of Magistracy verifies the legality of the appointment and election procedures, ex officio or at the request of any judge or prosecutor.

Appeals concerning the legality of the appointment and election procedures may be lodged with the Plenary of the Superior Council of Magistracy within 15 days from the date on which the result of the vote was established, *i.e.,* they shall no longer be lodged with the corresponding section of the Superior Council of Magistracy, as provided for in Law no. 317/2004.

Representatives of civil society may be elected as members of the Superior Council of Magistracy if they meet the following conditions: a) they are specialists in the field of law, with at least 10 years of experience in a legal profession or in higher legal education; b) they enjoy a high professional and moral reputation; c) they have not been part of the intelligence services before or after 1990, have not collaborated in any way with them and do not have a personal interest that influences or could influence the performance of the duties provided for by law with objectivity and impartiality. They shall make a sworn statement to the effect that they have not been

operational workers and have not collaborated in any way with any intelligence service before or after 1990; d) they are not and have not been a member of a political party for the past 6 years and have not held public office for the past 6 years.

With regard to the last condition to be met, we note the change from the previous regulation where the candidate from civil society had to not be a member of a political party and not have held a position of public dignity in the last 5 years.

If it is objectively impossible for some members to attend meetings of the Plenary or of the sections of the Superior Council of the Magistracy, meetings may be held by videoconference, by electronic means of direct remote communication, or, where appropriate, in mixed format, with physical participation and by videoconference, while respecting the secret nature of the vote.

The relevant sections of the Superior Council of Magistracy have the right and the correlative obligation to take action, ex officio, to protect judges and prosecutors against any act of interference in their professional activity or in connection therewith which might affect their independence or impartiality, as well as against any act which might create suspicions concerning them. The sections of the Superior Council of Magistracy also protect the professional reputation of judges and prosecutors. Complaints concerning the defense of the independence of the judicial authority as a whole are dealt with by the Plenary of the Superior Council of Magistracy, either on request or *ex officio*.

The Plenary of the Superior Council of Magistracy, the sections, the President and the Vice-President of the Superior Council of Magistracy, upon the request of a judge or prosecutor who considers that his or her independence, impartiality or professional reputation is affected in any way or ex officio, shall refer the matter to the Judicial Inspectorate for verification, in order to protect the independence, impartiality and professional reputation of judges and prosecutors.

In cases where the independence, impartiality or professional reputation of a judge or prosecutor is affected, the appropriate section of the Superior Council of Magistracy shall order the necessary measures and ensure their publication on the website of the Superior Council of Magistracy, may refer the matter to the body competent to decide on the necessary measures or may order any other appropriate measure, in accordance with the law.

The Superior Council of Magistracy ensures compliance with the law and the criteria of professional competence and ethics in the professional career of judges and prosecutors.

The Superior Council of Magistracy draws up and keeps the professional files of judges and prosecutors.

The Superior Council of Magistracy is the competent authority for supervising the processing of personal data by the courts in the exercise of their judicial functions, within the meaning of art. 55 para. (3) of Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27th, 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation).

The Superior Council of Magistracy may carry out cooperation actions with institutions of the judicial systems of other countries.

As regards the powers of the Plenary of the Superior Council of Magistracy, we indicate powers relating to the career of judges and prosecutors, powers relating to admission to the judiciary, training and examinations of judges and prosecutors, powers relating to the organisation and functioning of courts and prosecutors' offices, adopts the Code of Ethics of Judges and Prosecutors, the Regulation on the organization and functioning of the Superior Council of Magistracy, the Regulation on the procedure for the election of members of the Superior Council of Magistracy, as well as other regulations and decisions provided by law, it shall approve draft normative acts concerning the activity of the judicial authority, it shall approve draft regulations and orders to be approved by the Minister of Justice, in the cases provided for by law, it may refer to the Minister of Justice the need to initiate or amend normative acts in the field of justice, it shall draw up annually a report on the state of justice and a report on its own activity, which it shall submit to the Chambers of the Romanian Parliament by February 15th of the following year, and shall publish them in the Official Gazette of Romania, Part III, and on the website of the Superior Council of Magistracy.

The sections of the Superior Council of Magistracy shall have the following powers regarding the career of judges and prosecutors: a) propose to the President of Romania the appointment and dismissal of judges and prosecutors; b) appoint trainee judges and prosecutors on the basis of the results obtained in the National Institute of Magistracy graduation examination; c) dismiss probationary judges and prosecutors; d) appoint

judges and prosecutors to managerial positions, in accordance with the law; e) order the promotion of judges and prosecutors, in accordance with the law; f) order, in accordance with the law, the delegation and secondment of judges and prosecutors; g) settle appeals against the qualifications awarded by the committees for the evaluation of the professional activity of judges and prosecutors, set up in accordance with the law; h) take measures to deal with complaints received from litigants or other persons concerning the misconduct of judges and prosecutors; i) order the suspension from office of judges and prosecutors; j) approve, in accordance with the law, the transfer of judges and prosecutors; k) perform any other duties established by law or by the Rules of Organization and Functioning of the Superior Council of Magistracy.

The Section for Judges of the Superior Council of Magistracy appoints and removes from office the President, Vice-Presidents and Presidents of Chambers of the High Court of Cassation and Justice.

The Section for Prosecutors of the Superior Council of Magistracy shall, in accordance with the law, approve the proposal of the Minister of Justice for the appointment and dismissal of the Prosecutor General of the Prosecutor's Office of the High Court of Cassation and Justice, his first deputy and his deputy, the Chief Prosecutor of the National Anticorruption Directorate and of the Directorate for the Investigation of Organized Crime and Terrorism, their deputies, the Chief Prosecutors of the Prosecutor's Office of the High Court of Cassation and Justice, of the National Anticorruption Directorate and of the Directorate for the Investigation of Organized Crime and Terrorism.

The Judges' Section and the Prosecutors' Section of the Superior Council of Magistracy shall authorize the search, detention, preventive arrest and house arrest of judges and prosecutors respectively. The Section for Judges and Prosecutors of the Superior Council of Magistracy shall approve the measure of judicial supervision and judicial supervision on bail if the obligation not to exercise the function of judge or prosecutor is to be ordered. These provisions on search and detention do not apply in the case of a flagrante delicto offence.

The Superior Council of Magistracy, through its sections, acts as a court of law in the field of disciplinary liability of judges and prosecutors for acts provided by law as disciplinary offences.

Disciplinary action in the case of misconduct committed by judges and prosecutors is exercised by the Judicial Inspectorate, through the judicial inspector.

In the disciplinary procedure before the sections of the Superior Council of Magistracy, the judge or prosecutor against whom disciplinary action is taken and the Judicial Inspectorate must be summoned. The judge or prosecutor may be represented by another judge or prosecutor or may be assisted or represented by a lawyer. The non-appearance of the judge or prosecutor under investigation at the trial of the action shall not prevent the further conduct of the trial.

The Disciplinary Division is obliged to submit to the parties all requests, exceptions, factual circumstances or legal grounds put forward by them in accordance with the law or raised of its own motion. The Disciplinary Tribunal shall first rule on defenses which make it unnecessary to adjudicate on the merits of the disciplinary action.

In the disciplinary proceedings before the divisions of the Superior Council of Magistracy, it is not admissible to submit requests for ancillary intervention, but it is admissible to submit requests for recusal if the disciplinary action concerns them, their spouse or their relatives up to and including the fourth degree, respectively whenever, in view of the quality of the person concerned by the disciplinary action, their impartiality could be affected, as well as in case of conflict of interest.

Until the date of communication of the decision to the judge or prosecutor concerned, the decisions of the sections of the Superior Council of the Magistracy which have settled the disciplinary action shall have no effect on the career and rights of the magistrate.

An appeal may be lodged against the decisions of the sections of the Superior Council of Magistracy which have resolved the disciplinary action within 15 days from the communication by the sanctioned judge or prosecutor or, as the case may be, by the Judicial Inspection.

The competence to decide on the appeal lies with the 5-judge panel of the High Court of Cassation and Justice. The five-judge panel may not include voting members of the High Council of the Judiciary or the judge who has been disciplined.

In this situation, the appeal is a devolutive appeal and suspends the execution of the decision of the section of the Superior Council of Magistracy applying the disciplinary sanction.

The disciplinary liability of judges and prosecutors is prescribed within 4 years from the date of the disciplinary offence. The limitation period for disciplinary liability shall be suspended for the duration of the

suspension of the disciplinary proceedings. Disciplinary liability shall be time-barred however many suspensions occur, if the 4-year period is exceeded by a further year.

Title III - Judicial Inspectorate contains general provisions on the Judicial Inspectorate concerning its own legal personality, the security of its premises, its management, the number of posts within its own apparatus, the organization of the Judicial Inspectorate and the status of judicial inspectors (chief inspector, deputy chief inspector, management college of the Judicial Inspectorate, general assembly of judicial inspectors, judicial inspectors and their duties, organization of competitions to fill posts, evaluation of work, etc.).

Judicial inspectors have the following main tasks: (a) in disciplinary matters, order and carry out the preliminary disciplinary investigation with a view to disciplinary action against judges, prosecutors, including those who are members of the Superior Council of Magistracy, under the terms of this law; (b) checks the courts' compliance with the procedural rules on the receipt of applications, the random allocation of cases, the setting of time limits, the continuity of the panel, the delivery, drafting and communication of judgments, the forwarding of cases to the competent courts, the enforcement of criminal and civil judgments, and informs the Section for Judges of the Superior Council of Magistracy, making appropriate proposals; (c) checks the prosecutor's offices for compliance with procedural rules on the receipt and registration of cases, the allocation of cases on the basis of objective criteria, continuity in the work allocated and the independence of prosecutors, compliance with deadlines, the drafting and communication of procedural documents and informs the Section for Prosecutors of the Superior Council of Magistracy, making appropriate proposals; (d) checks the managerial efficiency and the way in which the duties arising from laws and regulations are carried out in order to ensure the proper functioning of the court and the Public Prosecutor's Office and the appropriate quality of the service, points out the shortcomings observed and formulates appropriate proposals for their removal, which are submitted to the appropriate section; (e) verifies the complaints submitted to the Judicial Inspection or makes ex officio referrals concerning the activity or misconduct of judges, prosecutors, including those who are members of the Superior Council of Magistracy, or concerning the violation of their professional obligations; (f) carry out the checks for the settlement of applications concerning the defense of the independence, impartiality and professional reputation of judges and prosecutors and submit to the appropriate section of the Superior Council of Magistracy the report containing the outcome of the checks; and (g) carry out any other checks or controls ordered by the Plenum of the Superior Council of the Magistracy, the sections of the Superior Council of the Magistracy or the Chief Inspector of the Judicial Inspection, in accordance with the law.

Title IV - Transitional and final provisions deals with the number of posts in the Superior Council of Magistracy, its premises and security, the protection offered to the members of the Council and the repeal of the provisions of Law 317/2004.

The Annex on the indicators and procedure for the evaluation of the professional activity of judicial inspectors is an integral part of the Law and includes: (i) indicators for evaluating the professional performance of judicial inspectors with executive function - efficiency of work, quality of work, integrity, communication, participation in other activities in the area of competence, (ii) indicators for evaluating the managerial work of directors of inspection directorates - leadership and organizational capacity, control capacity, coordination capacity, decision-making capacity and assumption of responsibility, behavior and communication, integrity, evaluation committees and evaluation procedure.

3. Conclusions

Among the novelties of Law no. 303/2022 on the status of judges and prosecutors we note that: (a) the duration of training courses for judicial auditors is now three years, instead of two years as provided for in the previous regulation, (b) the duration of the traineeship of trainee judges and prosecutors is now one year, instead of two years, (c) the reduction of litigation given to trainee judges, (d) acts of non-compliance with the decisions of the Constitutional Court or decisions handed down by the High Court of Cassation and Justice in the settlement of appeals in the interest of the law, as well as manifestations prejudicial to professional honor or probity or to the prestige of justice, committed in the exercise or outside the exercise of official duties, are no longer considered disciplinary offences.

Among the novelties of Law no. 304/2022 on the judicial organization we note: (a) the implementation of the electronic file, although the rule remains that files are prepared and archived in paper format, (b) court decisions can be validly signed by means of a qualified electronic signature, (c) the reasoned notification of the

measures and solutions adopted by the prosecutor by the hierarchical superior prosecutor or by the Prosecutor General of the Prosecutor's Office of the High Court of Cassation and Justice, when they are deemed to be unlawful or unreasonable, and the reasoned reversal of measures and decisions taken by prosecutors of the National Anticorruption Directorate and the Directorate for the Investigation of Organized Crime and Terrorism only by the senior prosecutor or by the chief prosecutor of the directorate when they are deemed to be unlawful or unreasonable.

Among the novelties of Law no. 305/2022 on the Superior Council of Magistracy we note: (a) the organization of the meetings of the Sections and/or the Plenary of the Superior Council of Magistracy by videoconference or mixed system, under the conditions provided for by law, (b) the persons who wish to be members of the Superior Council of Magistracy as representatives of civil society, specialists in the field of law, must have at least 10 years of experience in a legal profession or in higher legal education, (c) the candidates for the positions of members of the Superior Council of Magistracy as representatives of the civil society must not be and must not have been a member of a political party in the last six years and must not have held public office in the last six years, instead of five years as provided in the previous regulation.

In the light of the new laws, given the new provisions as well as the amendments, it remains to be seen whether they will add value to the judicial system and the substantive administration of justice.

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PHILOSOPHICAL-LEGAL CONCEPTUAL FOUNDATIONS REGARDING THE RULE OF LAW AND ITS EVOLUTION. THE CORRELATION BETWEEN POLITICAL POWER, LAW AND THE RULE OF LAW

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Abstract

The rule of law has been written about and will always be written about. Considered by some to be a seemingly nebulous reality, everyone talks about it, even if most of the time without explaining it. The phrase is invoked, in its name decisions are made, options are made and actions are argued.

And so it becomes postulated, considered by many as a last bastion of defense against abuses of power.

Throughout his life, man, an essentially social person, endowed with intelligence, felt the need to live in various forms of association, in which he shared his customs, moral and religious norms or, finally, his interests.

Human activity, as a great Italian jurist and philosopher stat [1] it can be considered as being regulated by a complex system of rules; and, indeed, in every historical phase we find such a system.

Keywords: *rule of law, intelligent person, moral norms, religious norms, complex of norms.*

1. Introduction

It was perfected in societies, constantly producing social relations[2], his entire social journey being crowned by the construction of the rule of law, a construction whose defining feature is the protection of individual rights. An edifice in which the law provides the general and binding rules, according to which state power is exercised, and the state ensures the obligation of legal norms and their transposition in life.

The concept of the *rule of law* reaches, through its evolution to a universal dimension, a reference element for assessing the degree of development and civilization of a country.

The permanent and indisputable actuality of the rule of law can only be explained by the permanence of the need to look for concrete means to make the concept an uncontradicted everyday record[3].

The concept of *„rule of law"* evokes a juridical construction of great scientific interest, with a history that has kept alive the concern for its research for several centuries; today, however, the risk of this wonderful construction slipping down the pejorative slope increases alarmingly, mainly through its easy pronunciation.

The scientific achievements of the doctrinaires, although brilliant, make it impossible to exhaust the subject, ensuring its perpetuity and, demonstrating with each contribution, if it was still necessary, the possibility of perfectibility.

2. Content

The rule of law is, we dare to say, like Brâncusi's column, infinite in its construction and lasting over generations through the simplicity of the creative genius.

All the theories and opinions regarding the concept of the rule of law are the result of reflection on relatively long, contradictory historical evolutions, with successes, failures and horizons always to be researched of the two interdependent phenomena: *the state and the law*[4].

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[3] S. Ionescu, *Justiție și jurisprudență în statul de drept*, Universul Juridic Publishing House, Bucharest, 2009, p. 5.

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The **state-law** correlation is distorted or optimized depending on the political regime understood as *„the way of engaging political relations, as an expression of the adequacy of the state to the purposes of power and the purpose of its exercise*”.[5] As it was appreciated, *„the wide range in which political regimes are established and evolve, from those with a democratic character to totalitarian ones, is closely related to the degree of reflection of the will and interests of the citizens at the establishment of these regimes*”.[6]

The analysis from the historical but also synchronic perspective, as it is presented in contemporaneity, underlines various aspects of the connection political power - right of which the legal doctrine mentions:[7]

- **the role of law as an instrument to preserve the dominance over the vast majority of the population in the community,** born at the crossroads between the archaic world and the world of culture, as a sign of progress and civilization, when the old models based on morals and customs no longer satisfy the interests of the evolving society;
- **law provides confidence and protection to dominant groups**, for the contribution made as an instrument of order but also for the great majority of individuals in the community who feel somewhat protected by his principles; thus one could sense the immense value of law for the organization of social structures and the role it will continue to play in the evolution of societies;
- **power did not consist, not even at its origin,** only **in brute force but on the contrary, it expressed both the social condition of man and the force of the rules imposed for the exercise of power and its preservation;**
- **law is at the service of political objectives, but as society evolves, it no longer exclusively accepts the uncensored model of order**, based on an arbitrarily imposed will, but the **motivational model**, *i.e.,* the relationships are no longer arbitrarily established, but more and more depend on the legal values that enter the community's consciousness. Politics and law merge through the values to which they are subsumed and which aim to realize them;
- **social life is marked by irremediable contradictions between two opposite processes:** one of manipulation, expression of the dominance of the groups in power, the other, conversely, of cultural dynamics, starting from within the groups and allowing the overturning of the situation of the dominant categories. But if the power is dominated by the legal element, *i.e.,* by its consent, the recognition of those entitled to exercise power as a result of the popular majority, then the contradictions and the dispute become acute only to the extent that the power is exercised in such a way that it causes obvious dysfunctions in the relationship with the right;
- in the situation where **the legal argument has value status, and the power is legally consecrated, the relations of law are not of opposition**, but **of integration;**
- **the power does not have the obligation to submit to the legal argument, but it can appropriate this argument**. Law, however, in the face of power only has the solution of submission, not of confrontation, but, in the end, law wins, to the extent that it is based on the argument and the legal maturity of the society in question, these not being censored by power but by culture;

Historically, the functionality and optimization of the power-politics-law relationship is gradually built up, always confronting and overcoming contradictions inherent in social life, not exempt from deformed expressions, such as those existing in the states that went through the totalitarian experience.

Analyzing the **relationship** between **political power, law** and **the rule of law**, Professor Ion Deleanu notes the diverse, surprising and contradictory evaluations of the rule of law, reviewing numerous *„doctrinal perceptions*” including:

- the rule of law corresponds to an anthropological necessity (H. Ryffel);
- it is a myth, a postulate and an axiom, a veritable dogma (J. Chevallier);
- a pleonasm, legal nonsense (H. Kelsen);
- a useless concept that arbitrarily mutilates two other concepts (A. Hauriou)[8] *et al.*

Such evaluations are the expression of approaches from different perspectives of the premises and mechanisms of the state phenomenon in correlation with the legal phenomenon that led to the awareness of multiple meanings of the concept *„rule of law*”.

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[6] C. Vărlan (coord.) *et al.*, *Politologie,* Didactică şi Pedagogică Publishing House, Bucharest, 1992, p. 43.
[7] I. Craiovan, *Filosofia Dreptului sau Dreptul ca Filosofie*, Universul Juridic Publishing House, Bucharest, 2010, p. 293-300.
[8] I. Deleanu*, Drept constituțional și instituții politice*, *Tratat*, Europa Nova Publishing House, Bucharest, 1996, p. 100-101.

Here are some of them:

- the rule of law means the subordination of the state to the law (J. Picquel);
- is an organizational system in which all social and political relations are subordinated to the law (J.P. Henry);
- the state in which power is subordinate to the state, all manifestations of the state being legitimized and limited by law (M.J. Edor);
- the rule of law means fundamental guarantees of public liberties, the protection of the order of laws (J.L. Quermonne);
- the rule of law implies the existence of constitutional rules that are imposed on everyone (G. Duhamel);
- the state is able to reconcile freedom and authority (M. Miaille);
- the rule of law is the hierarchical and thematized legal order (J. Dabin)[9].

The concept of the state. The definitions given to the state, in the Romanian doctrine, preserved the classical elements of the concept. Thus, professor **Constantin G. Dissescu** wrote that the state is a unit made up of the meeting of several people on a determined territory in the form of the governors and the governedr[10]. **Anibal Teodorescu** noted that ***„the state is the superior form of human society endowed with the exclusive power of command over the collective of individuals located on a determined territory, which belongs to it properly"***[11], and **Professor George Alexianu** showed in his turn that the state is a group of individuals, united by a national bond on a determined territory and governed by a power superior to individual wills.[12].

3. Conclusions

In the current doctrine, the state is defined as an institution „supported by a group of people located on a delimited space, capable of determining its own competence and organized in order to exercise activities that can be grouped into the following functions: legislative, executive and jurisdictional"[13], and more recently, it is appreciated that the state is, in a restrictive and concrete sense, the set of political governing bodies and that it designates the directing apparatus of the political society [14], or represent the organized form of people's power, more precisely the mechanism or state apparatus"[15].

In our opinion, the notion of state signifies the set of bodies and authorities whose prerogatives are exercised over a delimited territory on which a determined population is located, individualized by language[16], customs, historical traditions, culture, in order to achieve its specific functions domestically and internationally.

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[9] I. Deleanu, *op. cit*., p. 114-115.

[10] C.G. Dissescu, *Drept constituţional,* Atelierele grafice Socec, Bucharest, 1915, p. 429.

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[14] I. Deleanu, *Drept constituţional şi instituţii politice*, vol. 2, Iaşi, 1992, p. 8.

[15] I. Muraru, *Drept constituţional şi instituţii politice,* Actami Publishing House, Bucharest 1995, p. 89.

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APPLICATION OF THE LOYAL COOPERATION PRINCIPLE IN PUBLIC ADMINISTRATION

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Abstract

The aim of this study is to highlight the significance of the loyal cooperation principle in public administration (and not only). In order to achieve the objectives of this approach, using the comparative and logical method, we shall analyse specific legislation, specialized literature, CCR decisions, but also the relevant CJEU case-law.

The analysis shall have as a starting point the principle of separation of powers in the rule of law, a principle with a rich history in the doctrine, and then we shall come to the emergence and development of the increasingly strong concept of „loyal cooperation". Thus, we reach the point where such has been elevated to the rank of principle, first at European level by art. 4 para. (3) TEU, and subsequently the CJEU has developed a constant practice with reference to the application of this principle, often alongside two other principles, that of equivalence and that of effectiveness. In a generally accepted definition, the principle of loyal cooperation has been defined as the Union and the Member States, acting within the limits of their competences, must assist each other in the performance of this task.

At national level, starting from the provisions of art. 1 para. (4) of the Romanian Constitution, according to which the State is organised according to the principle of the separation and balance of the legislative, executive and judicial powers within constitutional democracy, in the CCR case-law, the principle of loyal cooperation has increasingly been outlined, which has been considered as „an extension of the principle of the separation and balance of the legislative, executive and judicial powers within constitutional democracy" (dec. no. 1431/03.11.2010, published in the Official Gazette of Romania, Part I, no. 758/12.11.2010).

Furthermore, with the appearance of the Administrative Code, in Part III, dedicated to local public administration, among the principles applicable to local public administration, art. 75 para. (1) lit. e), the principle of collaboration. Starting from this, a first question naturally arises: why did the legislator feel the need to expressly mention this principle in the situation of local public administration? Should collaboration not be valid in public administration in general? On the other side, the (obviously loyal) cooperation principle would not even need to be expressly regulated, as it is, in my opinion, the very essence of good administration.

In a second view, we shall try to examine whether and to what extent the loyal cooperation principle enshrined in the CCR decisions is also fully valid at the level of public administration, or whether it exclusively refers to the relationship between the three branches of the rule of law (legislative, judicial and executive) and the relationship between them.

Keywords: *separation of powers in the rule of law, CCR, CJEU, loyal cooperation principle, Administrative Code.*

1. The principle of sincere cooperation at the EU level. The CJEU practice

In a common sense, sincere cooperation supposes both mutual trust and the fulfilment in good faith of obligations and compliance with the rules contained in the various legal deeds governing the multitude of legal relationships relevant to each situation.

The principle of sincere cooperation has been a constant element in all Treaties, governing over time relations between Member States, between the Union and them, as well as their actions in pursuit of common objectives. As has been stated in doctrine, the essence of the obligation of sincere cooperation has remained constant over time, „*what has evolved over the course of the amendments to the founding treaties is the general*

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context and the actual situations in which the obligation of sincere cooperation is placed today in the treaties governing the EU"[1].

As early as art. 5 TEC, it was stated that: *The Member States shall take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. Member States shall facilitate the achievement of the Community's tasks. Member States shall refrain from taking any measures which would jeopardise the attainment of the objectives of this Treaty.*

Nevertheless, it is only in art. 4 (3) TEU, the principle of sincere cooperation is expressly provided for, to the effect that: *„Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.*

The Member States shall take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives".

Thus, a difference can be noticed from the first regulation of the principle in the TEC, which was addressed only to the Member States, to the extension of the scope not only to relations between Member States, but also between them and the Union. Thus, from the current perspective of European law, sincere cooperation is represented by two elements: *mutual respect* and *mutual assistance* between the Union and the Member States in the performance of their tasks under the Treaties.

Also, in relation to the subject of this scientific approach, the provisions of art. 13(2) TEU according to which: *„Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation".* So, at Union level, we are talking about cooperation and loyalty both between the Member States and the Union and between the Union institutions. On the other hand, it can be seen that the Treaty provides on the one hand a separation of duties between each institution, but also of cooperation while observing the limits of each institution. In this context, it has been noted in the literature that " *sincere cooperation leads us to think of the principle of institutional balance, which comprises the following concepts: separation of powers between the institutions and cooperation among them*"[2].

At the CJEU level, the principle of sincere cooperation is closely linked to the principle of equivalence and effectiveness, which is seen as a real triad. It will be noticed from the cases in which the Court has ruled that the three principles are analysed together. One of the landmark cases which analyses them as a triad, being closely linked, is Case C-200/14[3] in which it was held that *„as meaning that it precludes a Member State from adopting provisions making repayment of a tax held to be contrary to EU law by a judgment of the Court, or whose incompatibility with EU law results from such a judgment, subject to conditions relating specifically to that tax which are less favourable than those that would have applied, in their absence, to such a repayment; it is for the referring court to determine whether that principle has been complied with in the present case. The principle of equivalence must be interpreted as precluding a Member State from providing less favourable procedural rules for actions based on an infringement of EU law than those applicable to similar actions based on an infringement of national law. It is for the referring court to carry out the necessary checks to ensure that that principle is complied with in relation to the rules applicable to the dispute before it. The principle of effectiveness must be interpreted as precluding a system for the reimbursement of amounts due under EU law, the amount of which has been established by enforceable judicial decisions, which provides for the reimbursement of those amounts to be spaced-out over five years and which makes the enforcement of such decisions conditional on the availability of funds collected by virtue of another charge, without the litigant being able to compel the public authorities to fulfil their obligations if they do not do so voluntarily".*

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[1] M.A. Dumitrașcu, O.M. Salomia, *European Union Law II*, University Course, Universul Juridic Publishing House, 2020, Bucharest, p. 11.

[2] *Ibidem*.

[3] CJEU dec. from 20.06.2016, at *https://curia.europa.eu/juris/document/document.jsf?text=&docid=181104&pageIndex=0&doclang=ro&mode=lst&dir=&occ=first&part=1&cid=864142*; in the same sense is also CJEU dec. from 30.06.2016, ruled in Case C-288/14; CJEU dec. from 14.10.2020, ruled in Case C-677/19.

Moreover, in a recent Communication[4] from the European Commission, the three principles are analysed together in Chapter 2: *General Principles*, so that it is possible to see the importance given to them by raising them to the rank of valid and binding general principle.

With regard to the principle of sincere cooperation, the Commission notes that it *„requires Member States to facilitate the achievement of the Union's tasks* and *requires the Union and the Member States, acting within the limits of their respective competences, to assist each other in achieving those tasks".* The Commission further states that the national courts[5], are also bound by this principle in the sense that they *receive support from the Commission when they apply EU law*[6], but that the Commission also receives support from the national courts in the performance of its task.

It can be noticed that, from the Commission's perspective, the principle of sincere cooperation applies in the relationship between the Union and the Member States, between the Commission and the national courts, between the EU institutions, each acting within the limits of its own competence but helping the other, all in the fulfilment of the EU's tasks.

2. Separation of powers in the State. Decisions of the Constitutional Court. Elevating the duty of loyalty to a principle

An old principle that was one of the main demands of the French Revolution, following which art. 16 of the Declaration of the Rights of Man and of the Citizen, proclaimed on 26.08.1789, stated that *„A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all*", the separation of powers in the State remains the prerogative of Baron de Montesquieu who, in Chapter IV of the work which consecrated it[7], stated that *„in every State there are three kinds of powers: the legislative power, the executive power dealing with those things which depend on the law of nations, the executive power dealing with those issues which depend on civil law"* stressing that *" any accumulation of these powers (two or all of them together) means the annihilation of political freedom".*

Regardless of authors or times, by virtue of this principle, *„the power of the rule of law must be divided into several different compartments, each with its own independent responsibilities and powers. The most commonly used form of separation of powers in the state is the tripartite form, which divides power into legislative power, judicial power, and executive power, all three of which may not be held by the same person or institution. Powers are usually divided between the government, parliament, the civil service and independent judges. This creates a balance of powers, maintained by checks and balances designed to protect citizens from despotic actions by the state"*[8].

The principle was expressly mentioned in the Romanian Constitution until its revision in 2003. Thus, as a starting point we have the provisions of art. 1 para. (4) of the Romanian Constitution, according to which *„The State is organised according to the principle of separation and balance of powers - legislative, executive and judicial"*. Among the powers conferred on the Constitutional Court by the legislator is that of resolving conflicts of a constitutional nature arising among the three branches of government. Thus, according to art. 146(e) of the Constitution, the Court *„resolves legal conflicts of a constitutional nature between public authorities, at the request of the President of Romania, one of the Presidents of the two Chambers, the Prime Minister or the President of the Superior Council of the Magistracy".* In the same sense are the provisions of art. 11 para. (1) letter e) of Law no. 47/1992, according to which the Constitutional Court *„resolves legal conflicts of a constitutional nature between public authorities at the request of the President of Romania, one of the Presidents of the two Chambers, the Prime Minister or the President of the Superior Council of Magistracy.*"

Although in theory things seem clear-cut, the reality is far from ideal. Thus, especially in recent years, there has been an increasing involvement of politics in the relations between the three powers, often leading to real imbalances, which have been found as such by the Constitutional Court, and real constitutional conflicts have arisen as a result of one of the powers in the state overstepping the limits of its competence, especially and above all because of the political factor that decides.

[4] *https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:52021XC0730(01)&from=RO*.

[5] CJEU dec. from 22.10.2002, *Roquette Frères*, C-94/00, ECLI:EU:C:2002:603, item 31.

[6] CJEU dec. from 11.07.1996, *SFEI & others*, C-39/94, ECLI:EU:C:1996:285, item 50; CJEU dec. from 28.02.1991, *Delimitis/Henninger Bräu*, C-234/89, ECLI:EU:C:1991:91, item 53.

[7] *On the spirit of laws,* Montesquieu, Revolution Antet, Bucharest, 2011, p. 198-209.

[8] *https://www.transparency.org.ro/sites/default/files/download/files/14%20-%20Separarea%20Puterilor%20in%20Stat.pdf*.

Legal conflict of a constitutional nature has been defined by the Constitutional Court since 2005[9], as *„involving concrete deeds or actions by which one or more authorities arrogate to themselves powers, duties or competences which, according to the Constitution, belong to other public authorities, or the omission of public authorities, consisting in a decline of competence or a refusal to carry out certain acts falling within their obligations*". Also, in another decision[10], the Court held that a *„legal conflict of a constitutional nature exists between two or more authorities and may concern the content or scope of their powers under the Constitution, which means that they are conflicts of competence, whether positive or negative, and which may create institutional deadlocks*." Last but not least, more recent decisions of the Court have also ruled that a legal conflict of a constitutional nature means *„concrete deeds or actions by which one or more authorities arrogate to themselves powers, duties or competences which, according to the Constitution, belong to other public authorities, or the omission of some public authorities, consisting in declining competence or refusing to carry out certain deeds falling within their duties „*[11]. What should be noted from the Constitutional Court's case law is that the prerequisites for a conflict of a constitutional nature can only exist in the relationship between the authorities provided for by the Constitution under TITLE III – *Public authorities, i.e.,* Parliament, the President of Romania, the Government and central and local public administration.

In conclusion, legal conflicts of a constitutional nature imply that a public authority wrongfully assigns to itself powers that do not belong to it, creating a conflict of competence that can create an institutional deadlock. This is why the amendment of the Constitution gave the Constitutional Court the role of resolving conflicts of a constitutional nature, the aim being to remove possible institutional deadlocks. It is worth mentioning at this point that in the 2013 draft revision of the Constitution, the principle of sincere cooperation was expressly mentioned in the proposal to amend art. 4 para. (1), which enshrines the separation of powers in the state[12], but this initiative did not materialize. Although the obligation of constitutional loyalty is not expressly enshrined[13] and it seems that the legislator did not want to take steps in this direction, in the jurisprudence of the Constitutional Court of Romania, the principle of sincere cooperation has been increasingly outlined, which has been considered as *„an extension of the principle of separation and balance of powers - legislative, executive and judicial - in the framework of constitutional democracy*)" [14]. As mentioned in the literature, *„the rule of law ensures the supremacy of the Constitution, the consistency of laws and all regulatory acts with it, the existence of the regime of separation of public powers, which must act within the limits of the law (...) one of the conditions for achieving these fundamental objectives of the state is the proper functioning of public authorities, with respect for the principle of separation and balance of powers in the state"*[15].

With reference to the provisions of art. 4 para. (3) TFEU governing the principle of sincere cooperation at EU level, the Constitutional Court ruled in a decision that *„As regards the possibility that art. 4 para. (3) TFEU to be qualified as a rule interposed to the reference rule represented by art. 1 para. (3) of the Constitution, the Court notes that, according to its case-law, the use of a rule of European law in the context of a review of constitutionality as a rule interposed on the reference rule implies, pursuant to art. 148 para. (2) and (4) of the Romanian Constitution, a cumulative condition: on the one hand, that rule must be sufficiently clear, precise and unequivocal in itself or its meaning must have been clearly, precisely and unequivocally established by CJEU and, on the other hand, the rule must be within a certain level of constitutional relevance, so that its normative content supports the possible infringement by the national law of the Constitution - the only direct rule of reference in the context of constitutionality review. However, art. 4(3) TFEU has no constitutional relevance, but is a principle which is exclusively subject to European law, so that it cannot be considered an interposed norm to the reference*

[9] Dec. no. 53/28.01.2005 on the requests for resolution of the legal conflict of constitutional nature between the President of Romania and the Parliament, submitted by the President of the Chamber of Deputies and the President of the Senate, published in the Official Gazette of Romania, Part I, no. 144/17.02.2005.

[10] Dec. no. 97/07.02.2008 on the request made by the President of Romania, Mr. Traian Băsescu, regarding the existence of a legal conflict of a constitutional nature between the Government of Romania and the Supreme Council of National Defence published in the Official Gazette of Romania, Part I, no. 169/05.03.2008.

[11] Dec. no. 26/16.01.2019 on the request for resolution of the legal conflict of constitutional nature between the Public Ministry - Prosecutor's Office of the High Court of Cassation and Justice, the Romanian Parliament, the High Court of Cassation and Justice and the other courts published in the Official Gazette of Romania, Part I, no. 193/12.03.2019.

[12] For details, I. Cochințu, *Constituționalizarea principiului loialității constituționale*, material is available at *https://www.ccr.ro/wp-content/uploads/2021/01/cochintu2013.pdf*.

[13] M. Safta, *Separation of Powers and Constitutional Loyalty*, material available at *https://www.tribunajuridica.eu/arhiva /An3v1/art8.pdf*, p. 171.

[14] Dec. no. 1431/03.11.2010, published in the Official Gazette of Romania, Part I, no. 758/12.11.2010.

[15] *https://www.juridice.ro/wp-content/uploads/2017/05/Interventia-dl.-judector-Daniel-Marius-MORAR.pdf*.

norm represented by art. 1 para. (3) of the Constitution"[16]. Therefore, what the Constitutional Court concluded is that the principle of sincere cooperation is not directly applicable to domestic law, as stated in art. 4 TFEU. The Constitutional Court Judge probably held a kind of national *egoism* with which we do not necessarily agree, especially since at national level, although there was a chance to regulate the principle in the Constitution with its revision, this did not happen.

Nevertheless, the Constitutional Court has, in specific cases in which it has been entrusted with the resolution of conflicts of a constitutional nature, established certain guiding benchmarks on basis of which the public authorities involved can shape their conduct in order to observe the principle of sincere cooperation.

In its case-law, the Court has stressed the importance, for the proper functioning of the rule of law, of cooperation between the powers of the State, which should be conducted in the spirit of the rules of constitutional loyalty, sincere conduct constituting a guarantee of the principle of the separation and balance of powers in the State[17]. The Court also ruled that, in terms of sincere cooperation between State institutions/authorities, *„a first meaning of the concept of the rule of law is observance for the rules of positive law, in force at a given time, which expressly or implicitly regulate the competences, prerogatives, powers, obligations or duties of State institutions/authorities. [...] the loyalty of State institutions/authorities must always be shown to constitutional principles and values, while inter-institutional relations must be governed by dialogue, balance and mutual respect „*[18].

In another decision, *„the Court finds that the emergency ordinance was adopted in violation of art. 61 para. (1) and art. 115 par. (6) of the Constitution by regulating an issue of social relations which falls within the scope of the law and cannot be subject to legislative delegation. The Government has unconstitutionally arrogated to itself the power to extend the term of office of local public administration authorities, disregarding the exclusive competence of Parliament in this area. Contrary to the Government's submissions, the Court points out that Parliament has the discretionary power to reject an emergency ordinance or to repeal, amend or supplement it, as the case may be, in compliance with the principles and provisions of the Constitution, so that there is no question of Parliament itself infringing the Government's delegated power to legislate. Instead, it is the Government which, in exercising this power, must ensure that it does not prejudice the power and role of Parliament. In the present case, the Government has appropriated an exclusive competence of Parliament by redrawing the distribution of competences established by the Constitution by its own will. Consequently, the Court holds that, by issuing GEO no. 44/2020, the Government has infringed the rules of constitutional loyalty derived from art. art. 1 para. (4) and warranted by art. 1 para. (5) from the Constitution*[19]*, which demonstrates that it has disregarded the principle of constitutional loyalty which it was required to show to Parliament".*[20] In view of the rich jurisprudence of the Constitutional Court, it has been appreciated in the literature that *the express establishment of the obligation of constitutional loyalty represents a significant enrichment of the principle of the separation of powers in the State*[21].

From the whole practice of the Constitutional Court, it can be noted that the Constitutional Court has been consistent in retaining the concept of *sincere cooperation* between powers in the rule of law, and has been reluctant to explain why it felt the need to combine the two words: *cooperation* and *loyal*. Can cooperation also be disloyal? Shouldn't relations between the authorities of the rule of law be based on their good faith in the exercise of their powers, without overstepping these limits of competence and on basis of which they can collaborate/cooperate with each other?

[16] Dec. no. 428/2020 on the dismissal of the exception of unconstitutionality of the provisions of art. 2 of Law no. 340/2009 on the making by Romania of a declaration on basis of art. 35(2) TEU, published in the Official Gazette of Romania, Part I, no. 977/22.10.2020.

[17] Dec. no. 972/21.11.2012, published in the Official Gazette of Romania, Part I, no. 800/28.11.2012.

[18] Dec. no. 611/03.10.2017, published in the Official Gazette of Romania, Part I, no. 877/07.11.2017, para. 106 and 112.

[19] Dec. no. 449/06.11.2013, published in the Official Gazette of Romania, Part I, no. 784/14.12.2013, pct. IX.

[20] Dec. no. 240/03.06.2020 on the objection of unconstitutionality of the Law on the approval of GEO no. 44/2020 on the extension of the terms of office of local public administration authorities for the period 2016-2020, some measures for the organization of local elections in 2020, as well as the amendment of GEO no. 57/2019 on the Administrative Code, and of GEO no. 44/2020, published in the Official Gazette of Romania, Part I, no. 504/12.06.2020.

[21] M. Safta, *op. cit.*, p. 172 *et seq.*

3. The principle of sincere cooperation in public administration. The road from Constitutional Court decisions to the Administrative Code

Among the authorities to which the Constitutional Court has imposed an obligation to observe the principle of sincere cooperation are those of central and local public administration.

With the issuance of the Administrative Code, in Part III, dedicated to local public administration, among the principles applicable to local public administration, art. 75 para. (1) letter e), the principle of collaboration. A first question arises as to whether *cooperation* and *collaboration* can be equated. An answer in this regard was provided by the CCR dec. no. 875/2018[22] which, combining the two concepts, ruled that „*The principle of sincere cooperation and collaboration among public institutions implies the intention and the totality of their actions to create together the necessary premises for the execution of their constitutional or legal duties and obligations in a common final sense and objective, that of the good functioning of the State. Inter-institutional cooperation and collaboration must be sincere, i.e., in good faith, in the spirit of observance for the letter and spirit of the law and in the sense of achieving the purpose protected by the law, and not in the opposite sense, of mutually hindering or blocking the activity of a State institution. The Court has consistently emphasised the obligation of principle which all public authorities have, in the exercise of State power, to cooperate for the proper functioning of the State, the Constitution and the laws providing sufficient tools by which institutions can cooperate and collaborate"*. Thus, the Constitutional Court Judge considered it necessary to separate the two concepts, an approach that we do not share, given that, from the perspective of the explanatory dictionary of the Romanian language, the two words are rather synonymous[23], meaning essentially the same thing: *To take part with others in carrying out an action that is carried out jointly* or *To work together with someone, to bring one's contribution.*

On the other hand, the Decision underlines what is meant by *sincere*, *i.e., in good faith*. It follows from this that State institutions must collaborate and/or cooperate sincerely.

In the doctrine[24], it has been rightly considered that as regards inter-institutional cooperation, but especially sincere cooperation, „*it is not sufficiently well understood in the work of public administration, both central and local, but also as regards relations between other institutions, other than those of the executive power",* and it has been pointed out that „*there are permanent hindrances. This is reflected not only in the way in which each public authority operates, where power and opposition practically tear each other apart, but also in the existence of disputes in which the deliberative body acts against the executive body or vice versa, as well as in disputes in which members of deliberative bodies of local self-government take legal action against the collegiate body to which they belong, seeking the annulment of administrative deeds in the adoption of which they did not participate*."

At the level of local public administration, the legislator has felt the need, since the regulation prior to the Administrative Code, namely Law no. 215/2001[25], which in art. 6 para. (1) stated that „*Relations between local public administration authorities in communes, towns and municipalities and public administration authorities at county level are based on the principles of autonomy, legality, responsibility, cooperation and solidarity in solving the problems of the entire county*".

Also, art. 23 of the Framework Law on Decentralisation no. 195/22.05.2006[26] stipulated that „*(1) In exercising shared competences, local public administration authorities at the level of municipalities and cities shall cooperate with public administration authorities at the central or county level, as appropriate, under the conditions established by law. (2) In the exercise of shared competences, the local public administration authorities at county level shall cooperate with the public administration authorities at central level, under the conditions established by law".*

[22] On the request for resolution of the legal conflict of constitutional nature between the President of Romania, on the one hand, and the Government of Romania, represented by the Prime Minister, on the other hand, published in the Official Gazette of Romania, Part I, no. 1093/21.12.2018.

[23] *https://dexonline.ro/definitie/cooperare , https://dexonline.ro/intrare/colabora/11510*.

[24] V. Vedinaș, *Annotated Administrative Code. News. Comparative examination. Explanatory notes*, 3rd ed., revised and added, Universul Juridic Publishing House, Bucharest 2021, p. 106.

[25] Law on Local Public Administration, republished, published in Official Gazette of Romania no. 123/20.02.2007, repealed.

[26] Published in the Official Gazette of Romania no. 453/25.05.2006, repealed by the Administrative Code.

Also, Law no. 90/2001 on the organisation and functioning of the Government of Romania and the Ministries[27] stipulated in art. 11 that: *in the performance of its functions, the Government shall fulfil as its main task cooperation with the social bodies concerned*.

The Administrative Code has come up with a novelty, providing in art. 75 - *Specific principles applicable to local public administration*, expressly the principle of cooperation as a distinct principle at the level of local public administration (lit. e).

At the same time, a reference to the concept of *collaboration* is also found in art. 27 of the Administrative Code - Government relations with autonomous administrative authorities, according to which *the Government is in a collaboration relationship with autonomous administrative authorities*. From this legal text we understand that there is no obligation to cooperate, but only an option, as the autonomous authorities are often subordinate to or under the coordination of Parliament.

This naturally raises a first question: why did the legislator expressly mention this principle in the case of local government? Shouldn't collaboration be specific to public administration in general? On the other hand, it can be seen that originally, in previous regulations, collaboration was established by reference to the decentralisation process at the level of local public administration, as distinct from what the Constitutional Court has ruled by the concept of sincere cooperation or the loyalty of cooperation between public authorities.

4. Conclusions

The principle of sincere cooperation enshrined in the decisions of the Constitutional Court of Romania is also fully valid at the level of public administration and does not refer exclusively to the relationship between the three branches of government (legislative, executive and judicial). On the other hand, we believe that the principle of sincere cooperation does not need to be expressly regulated, which is why we believe that it is at the very heart of the functioning of a good administration and the rule of law in general.

As long as there is cooperation/collaboration between public authorities/institutions, the state will function. Otherwise, the Constitutional Court may even become overburdened with the resolution of legal conflicts of a constitutional nature, often arising from political egos.

Therefore, regardless of whether it is expressly provided for or only in the case law of the Constitutional Court, it is up to political decision-makers to understand that collaboration/cooperation among state authorities/institutions is absolutely necessary for the proper functioning of the State, in which each must exercise its powers within the limits provided by law.

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[27] Published in the Official Gazette of Romania no. 164/02.04.2001, repealed by the Administrative Code.

DIFFERENCES IN THE ENFORCEMENT OF CLAIMS BELONGING TO PUBLIC INSTITUTIONS FINANCED ENTIRELY FROM THEIR OWN REVENUES VERSUS THOSE FINANCED ENTIRELY OR PARTIALLY FROM THE LOCAL OR STATE BUDGET

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Abstract

This article aims to address the differences that exist throughout the country with regard to the power to enforce a claim belonging to a public institution but financed entirely from its own revenues. Moreover, the claim in question belongs strictly to the budget of the institution and is therefore not a claim which first goes to the state budget and then is redirected to the budget of the institution. This raises the practical question of whether the traditional bailiff is competent to enforce the claim in question on behalf of the institution, or whether there is an obligation to have recourse to tax executors, taking into account, in particular, the purpose of the claim, its course and the fact that it is not a tax claim in the true sense of the word.

Keywords: *tax claim, enforcement, public institution, bailiff, own revenue.*

1. Introduction

We intend to take as a case study the example of the State Inspectorate for Road Transport Control, which is the specialised permanent technical body of the Ministry of Transport and Infrastructure designated to inspect and control compliance with national and international regulations in the field of road transport. According to Art. 3 lit. c) GO no. 26/2011[1] on the establishment of the State Inspectorate for Road Transport Control with subsequent amendments and additions, the institution is financed entirely from its own revenue which is constituted as follows:

„c) by way of derogation from the provisions of art. 8 para. (3) and (4) of GO no. 2/2001 on the legal regime of contraventions[2], approved with amendments and additions by Law no. 180/2002, with subsequent amendments and additions, a percentage of 30% of the amounts collected following the application of contraventions, other than the amounts collected following the application of:

- art. 61 para. (1) of GO no. 43/1997[3] on the road system, republished, as subsequently amended and supplemented;

- art. 8 para. (1) of GO no. 15/2002 on the application of user charges and tolls on the national road network in Romania[4], approved with amendments and additions by Law no. 424/2002, as subsequently amended and supplemented;

- art. 8 para. (1) of GD no. 1373/2008[5] on the regulation of the supply and carriage of divisible goods by road on public roads in Romania, as amended and supplemented;

- art. 6 of GD no. 1777/2004[6] on the introduction of traffic restrictions on certain stretches of motorways and European national roads (E) for road vehicles, other than those intended exclusively for the transport of persons, on Fridays, Saturdays, Sundays and public holidays, as subsequently amended and supplemented".

As such, it is clear that we are referring to a classic example of a public institution that is financed by its own revenue.

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[1] Published in the Official Gazette of Romania no. 625/02.09.2011, with subsequent amendments and completions.

[2] Published in the Official Gazette of Romania no. 410/25.07.2001, with subsequent amendments and completions.

[3] Republished in the Official Gazette of Romania no. 237/29.06.1998, with subsequent amendments and completions.

[4] Published in the Official Gazette of Romania no. 82/01.02.2002, with subsequent amendments and completions.

[5] Published in the Official Gazette of Romania no. 749/06.11.2008, with subsequent amendments and completions.

[6] The normative act was applied until May 1st 2018, being repealed by GD no. 239/2018, published in the Official Gazette of Romania no. 376/02.05.2018, with subsequent amendments and completions.

2. The bailiff is competent to enforce the 30% percentage and is currently the only one with this possibility

A public institution would, as a general rule, have four possibilities of recovering debts arising from enforceable titles, as follows:

- *by voluntary payment by the debtor*: In view of the fact that it has been necessary to have recourse to last solution, meaning enforcement by a bailiff, it is more than clear that the debtor's obligation has not been performed voluntarily.
- *by having recourse to tax executors:* We bring into question Act no. 3197/14.06.2017 issued by the National Tax Administration Agency, filed in a case before the Hațeg Court, by which it expressly stated that: „we confirm receipt of the enforceable title (...) for the tax obligation to pay in the amount of 6,300 lei, representing 70% of the amount of the fine established by the institution report no. (...). *Please note that the amount of 2,700 lei is the responsibility of the State Inspectorate for Road Transport Control and is not to be paid to the state budget*" (document attached to this request). Therefore, even the central fiscal authority considers that it is not competent to enforce the 30% percentage related to the subscribed amount, the central tax authority recognizing that it is not a claim that is part of the state budget, refusing to enforce the amount due to the institution.
- *through their own enforcement bodies.* Tax executors are public officials within the units subordinated to the central tax authority who carry out the enforcement measures and the entire enforcement procedure, in order to recover the tax debts of economic agents and individuals to the general consolidated budget of the State. They must also hold a service badge which they must present in the exercise of their activity, being empowered before the debtor and third parties by means of a tax executor's badge and delegation issued by the enforcement body (art. 223 of the Tax Procedure Code[7]). From this derives their quality of public officials, the tax executor performing a public function in the sense of the Administrative Code, with even the provisions of Law no. 188/1999 on the Status of Public Officials[8], as amended by GEO no. 57/03.07.2019 on the Administrative Code[9] being applicable to him.

However, we are dealing with a public institution without its own enforcement bodies, and there is no possibility of setting up such bodies, since the institution's staff are not public officials, from an administrative point of view. Moreover, the legislation in force at the moment does not allow the establishment of own enforcement bodies within this particular institution. Note that this would have been the perfect way of recovering the percentage.

If the institution would have been fully or partially financed from the state budget, only then could we have had recourse to the central tax authority, respectively to the tax executors. We refer to point 3, below, detailing that the deadline for entry into force of Law no. 352/2015 has been successively extended and the law is therefore currently not in force.

- *by bailiff, according to the provisions of the common law:* In view of what has already been detailed in relation to non-execution by the tax executors, *i.e.,* the lack of any of the institution's own enforcement bodies, it follows that this is the only way in which this particular institution has any legal recourse or action of any sort.

Thus, if we do not have the option of enforcement under ordinary law, it follows that the institution's object of activity becomes obsolete and the institution ends up in a situation of inability to pay, since the central tax authority considers the 30% as an extra-budgetary debt and, as such, does not recover it.

Consequently, the 30% share of the amounts relating to the enforcement of fines, not being a revenue due to the State budget as a whole, represents extra-budgetary revenue which is, in practice, operating expenditure, ensuring the continuation of the institution's activity, and therefore falls within the competence of the bailiff.

- *the role of enforcement by bailiff.* Enforcement by bailiff is important because it ensures that individuals and companies pay their debts to their creditors. This process involves the use of a court order or a warrant from a designated authority to recover the debt owed. Bailiffs act on behalf of the court to enforce court orders and judgments, including the seizure of assets and properties, freezing of bank accounts, and the sale of assets to recover debts owed. Before bailiffs are appointed, court orders or judgments must first be obtained by the creditor. For instance, a creditor may seek a court order for enforcement by a bailiff against a debtor who has

[7] Law no. 207/2015, published in the Official Gazette of Romania no. 547/23.07.2015, with subsequent amendments and completions.
[8] Republished in the Official Gazette of Romania no. 365/29.05.2007, with subsequent amendments and completions.
[9] Published in the Official Gazette of Romania no. 555/05.07.2019, with subsequent amendments and completions.

failed to pay their debt, or for possession of a property or asset that is in dispute. Once a court order is obtained, a bailiff is appointed to enforce the order, and to recover the debt owed.

The procedures involved in the enforcement by bailiff vary depending on the type of court order or warrant being executed. In most cases, bailiffs are required to give notice of their intent to carry out the enforcement action. This notice is usually given in writing, and it informs the debtor of the planned enforcement action and the date and time at which it will be carried out.

During the execution of the enforcement action, the bailiff may seize certain assets, such as vehicles, jewellery, and furniture, and may also freeze bank accounts or garnish wages, depending on the terms of the court order or warrant. In situations where the bailiff is authorized to remove assets or goods, they may sell them to raise funds to settle the debt owed.

In conclusion, enforcement by bailiff is a crucial aspect of the legal system, as it ensures that debts owed by individuals and companies are recovered on behalf of creditors. Bailiffs play an important role in enforcing court orders and judgments, and carry out a range of duties, including seizing assets, freezing bank accounts, and selling goods and assets to settle debts owed. The procedures involved in an enforcement by bailiff vary, but generally involve giving notice of the intent to carry out an enforcement action and carrying out the action in accordance with the terms of the court order or warrant. Overall, enforcement by bailiff serves as an important tool in maintaining the integrity of the legal system and ensuring that justice is served.

3. Extension of the entry into force of Law no. 352/2015 until April 1st 2023

Precisely in order to remove the inconsistencies and contradictions that may arise in the work of the institution, the legislator considered that it was necessary to amend the legal framework, through Law no. 352/23.12.2015[10] which is amending and supplementing GO no. 26/2011 on the establishment of the institution. Thus, Law no. 352/2015 aims to change the way the institution is financed, in the sense that, in the future, it would be fully financed from the state budget. Currently, this particular institution is financed from its own revenues.

Article III of the aforementioned law states that the regulation will enter into force on 01.01.2017. However, this deadline has been successively extended[11], with Law no. 352/2015 never entering into force to this day and, therefore, not being applied or even relevant to take into consideration from a practical point of view. Thus, the institution remained a public institution financed from its own revenues, as expressly provided for in art. 3 of GO no. 26/2011, in force.

4. The 30% percentage is not public revenue but an extra-budgetary claim

Given that the allocation of 30% of the amount of the fine is established by a special normative act, including an express derogation from the provisions of GO no. 2/2001, and as the money goes directly to the budget of the institution, it is clear that the legislator himself intended to exclude this money from the category of budgetary or fiscal claims, the amount resulting from the application of the percentage being paid into the accounts of the institution and therefore, the aforementioned percentage, which is paid directly to the budget of the institution, is exempt from the provisions of art. 8(3) and (4) of GO no. 2/2001 on the judicial system of contraventions.

We would like to draw attention to an essential difference made by the legislator, namely that found in the Tax Procedure Code, *i.e.,* art. 220 and art. 226 para. (10) and para. (11). Strictly in relation to public institutions which do not have their own enforcement bodies, the legislator's choice is clear, as follows:

Public institutions financed in whole or in part from the state budget or the local budget are obliged to send enforceable titles to the competent tax authority, central or local, as the case may be. The wording 'will forward' does not grammatically allow for any other possibility.

On the other hand, public institutions financed entirely from their own revenue, irrespective of whether they are under central or local authority, have the option of choosing whether to appeal to the central or local tax enforcement authorities. As such, the wording 'may forward', analysed from a grammatical point of view,

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[10] Published in the Official Gazette of Romania no. 979/30.12.2015, with subsequent amendments and completions.

[11] According to the sole article of Law no. 309/23.12.2021, published in the Official Gazette of Romania no. 1226/24.12.2021, which amends the sole article of the GO no. 82/27.12.2019, the term provided for in art. III of Law no. 352/2015 is extended until 01.01.2023. The deadline was subsequently extended until 01.04.2023.

means that the choice of enforcement body is at the discretion of the public institution, which may have recourse to either the tax executor or the bailiff. However, the option of choosing the tax executor remains a simple benefit, not an obligation, which can be waived precisely by the use of the verb 'may'. It is in this context that the relationship between the verbs 'may' and 'will' should be seen. 'Will' can also imply 'may', whereas 'may' can never imply 'will', as in 'must'. Depending on their character, rules are differentiated into mandatory rules, which stipulate what must or must not be, or what must or must not be done, on the one hand, and permissive rules, which stipulate what may or may not be, or what may or may not be done, on the other.

Accordingly, since the law clearly distinguishes as to who has the obligation and who has the option to have recourse to the enforcement bodies of the fiscal authorities, it follows that we cannot accept an interpretation to the effect that the institution, as a public institution financed entirely from its own revenue, can only have recourse to fiscal enforcement, since such an interpretation would be an addition to the law.

In the same sense is also the dec. no. 16/2019 delivered by the High Court of Cassation and Justice[12], which considered a single criterion for changing the nature of a claim, namely the final destination, the reasoning being summarized as follows: if the claim (or part of it) is part of the general consolidated budget, it follows that it is a tax claim, respectively a budgetary claim, as appropriate, falling within the scope of enforcement by tax executors. *Per a contrario*, if the claim (or part of it) is not part of the general consolidated budget, it is a civil claim, falling within the scope of enforcement by bailiffs.

5. Conclusions

To consider that the percentage of 30%, expressly individualized by the legislator, by supplementing the provisions of the Code of Civil Procedure with those of the Code of Tax Procedure, without taking into account the grammatical interpretation and the choice of the legislator with respect to art. 226 para. (10), para. (11), para. (12), par. (13), would be an unjustified and unfounded widening of the competence of fiscal enforcement. Art. 227 para. (1) of the Code of Tax Procedure expressly specifies that „enforcement may extend to the income and property owned by the debtor, which may be pursued in accordance with the law, and their recovery shall be carried out only to the extent necessary for the realization of tax claims and enforcement costs".

Art. 1 points (7) to (12) of the Tax Procedure Code contains the definitions of budgetary and tax claims, both principal and accessory, the essential criterion being that the principal revenue must be intended for the general consolidated budget. Further on, also in art. 1, but in points 13-14 of the Code of Fiscal Procedure, a reading of these paragraphs shows that the institution is not a fiscal or budgetary creditor in any way. The position of the debtor, on the other hand, is that which must be circumscribed, with reference to art. 1, points 15-16, of the Code of Fiscal Procedure, namely the individualisation of the amount of the fine by the legislator. Thus, for the amount of 70% owed to the general consolidated budget, the person penalised is a tax debtor, whereas for the 30% owed to the institution, the person penalised is a civil debtor. The institution will not be able to enforce the part relating to the general consolidated budget, just as the tax executors will not be able to enforce, on behalf of the institution or the central tax authority, the 30% part, as it is not a tax or budgetary claim and therefore does not form part of the general consolidated budget and, implicitly, is excluded from the scope of tax enforcement.

If the institution had been financed from the state budget, the issue would have been completely different, but, in view of the applicable legal realities, the institution's 30% would have to be considered not as public revenue but as an extra-budgetary claim. See also CCR dec. no. 942/2008[13], as an example providing that the legislator has full power to establish a derogatory regime, regardless of the field, which has happened in this case, by clearly identifying the part of the fine that will be part of the general consolidated budget, respectively the part of the same fine that has a completely different purpose, being an income of a company that is financed entirely from its own revenues, the latter having no direct or indirect link with the general consolidated budget.

Recovering revenue is important for an institution for several reasons. Firstly, revenue makes it possible for an institution to provide the services it is tasked with effectively. Without revenue, the quality of the services offered would be compromised, potentially leading to dissatisfaction and even unrest among the public. Secondly, revenue is essential for any institution to fulfill its mandates and meet its obligations. For example, a corporation that fails to realize its revenue projections may be unable to meet its financial obligations like paying

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[12] Published in the Official Gazette of Romania no. 402/22.05.2019, available on the website *www.iccj.ro*, consulted on 01.02.2023.

[13] Published in the Official Gazette of Romania no. 716/22.10.2008, available at ***https://legislatie.just.ro***, consulted on 01.02.2023.

salaries or paying suppliers. If this occurs, it can lead to a financial crisis that could ultimately put the business at risk of bankruptcy. Similarly, a government agency that does not recover its revenue may fail to meet its budgetary obligations, leading to budget deficits, debts, and the inability to make vital investments. Thirdly, recovering revenue enhances an institution's capacity to earn additional funds. For example, a business that recovers all its funds will have more resources to engage in investments that can increase its revenue streams, like expanding its product line or entering new markets. Similarly, a government agency that recovers its revenue can have the liberty to invest in revenue-generating programs that can improve its fiscal position and capacity for future investments. Finally, recovering revenue is important to an institution's reputation. An institution that is seen as successful in recovering its revenue can attract new investment, partners, and clients. Conversely, an institution that fails to recover its revenue can have difficulty in attracting new partners, clients or investors, leading to a negative impact on its credibility and future prospects.

In conclusion, regardless of what will happen with the provisions of Law no. 352/2015, *i.e.,* whether the deadline for entry into force will be further extended or not, the issues addressed in this article will also be of interest in the future for any public institution in an identical or similar situation in terms of financing and enforcement. This is precisely why, given that practice in the territory is divided, with final decisions either admitting or rejecting requests for enforcement submitted by the bailiff, the promotion of an appeal in the interest of the law seems to be a matter of particular utility and urgency.

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THE ADMINISTRATIVE MEASURE OF ESCORTING TO THE POLICE STATION, ANALYZED IN THE RECENT JURISPRUDENCE OF THE CONSTITUTIONAL COURT REGARDING THE INDIVIDUAL FREEDOM

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Abstract

Of natural origin, individual freedom is part of the category of inviolability, an essential component of first-generation civil rights, currently guaranteed by art. 23 of the Romanian Constitution and international legal acts in the field of human rights, as art. 3 of the Universal Declaration of Human Rights, Article 9 of the International Covenant on Civil and Political Rights, art. 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6 of the Charter of Fundamental Rights of the European Union. The actual importance of the constitutional and legal protection mechanisms for ensuring the necessary guarantees for the observance of individual freedom also results from the cases in which the Constitutional Court, in terms of domestic legal reality, or the supranational courts, in international terms, were called to rule on possible violations of this freedom. Hence, the freedom is protected from any possible violations.

The present study proposes an analysis of the recent jurisprudential aspects, highlighted in the practice of the Romanian Constitutional Court, developed as a result of the referral made by the Romanian Ombudsman regarding the violation of the provisions of art. 23 of the Constitution that establishes the inviolability of individual freedom and personal safety. The main regulations in the matter will be presented in this way, including from a historical perspective, being highlighted the legal norms, by which the measure escorting to the police station is regulated in the current legal system. The study emphasizes the effectiveness of the functioning of the fundamental institutions of state governed by the rule of law, in which the rights and freedoms of citizens represent supreme values and are concretely and effectively guaranteed.

Keywords: *escorting to the police station, individual freedom, constitutional and legal mechanism of human rights protection, Ombudsman, CCR.*

1. Introduction

Guaranteed by the Romanian Constitution adopted in 1991 and revised in 2023, individual freedom and personal safety is one of the fundamental rights with complex values in direct connection with the natural possibility of any person to move and behave freely, correlatively benefiting from a system of legal guarantees intended to ensure compliance with this right in the situations when public authorities take certain measures that concern the freedom of the person[1]. From the perspective of the jurisprudence of the Constitutional Court, „The notion of individual freedom, used in the content of art. 23 of the Romanian Constitution, designates the physical possibility of the person to express himself within his natural limits, without being subject to other restrictions or stops than those established by the legal order"[2].

In the framework organized at the state level, individual freedom is not and cannot be absolute, the limits being drawn in relation to a series of fundamental values and principles, among which the observance of laws, the protection of the rights and freedoms of all citizens or the exercise of rights and freedoms with good faith. Conceived in this way, the constitutional norms aim to ensure a balance between individual rights, freedoms and interests and those of the society organized in the democratic state, concerned with the well-being of all its citizens. Therefore, from the perspective of the state authorities, no one can be deprived of his freedom, not even for a short period of time, „except in the cases and with the procedure provided by law"[3].

This constitutional conception is reflected in the legislative plan, so that whenever the legislator intervenes to regulate some measures that interfere with the individual freedom, it is obliged to comply with the

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[1] See I. Muraru, E.S. Tănăsescu, *Constitutional Law and Political Institutions*, 15 ed., vol. I, C.H. Beck Publishing House, p. 166.

[2] See CCR dec. no. 132/18.04.2002, published in the Official Gazette of Romania, Part I, no. 305/09.05.2002.

[3] See art. 23 para. (2) of the Romanian Constitution.

constitutional requirements and, consequently, to show increased attention regarding the establishment cases and conditions in which individual freedom is limited. One of the measures with an impact on individual freedom is the escorting to the police station, whose legal regulation was recently at the attention of the Ombudsman and it was the subject of an exception of unconstitutionality raised directly before the Constitutional Court.

Integrated with the permanent concerns highlighted by specialized literature in the matter of the protection of fundamental rights and freedoms, the present study proposes the analysis of some aspects of the recent jurisprudence of the Constitutional Court, which found the unconstitutionality of certain legal provisions that concerned the measure of escorting to the police station, in order to highlight the effectiveness of the constitutional control mechanism exercised by the Constitutional Court upon referral to the Ombudsman for the defence of human rights and freedoms. The example selected for analysis within the stage reveals both the essential character of individual freedom, the actuality of the imperative of its protection, both from the perspective of the citizens, as well as of the legislator and the public authorities who have the obligation to enforce the law, in the conditions where „the state has an obligation positive to protect civil liberties and to refrain from any action that would embarrass their exercise."[4]

2. Content

The measure of escorting to the police station benefits from regulation in the Romanian legislative system, having the legal nature of an administrative measure[5]. Currently, the Basic Law does not include rules by which this administrative measure is regulated, thus it does not have constitutional status. Regarding the constitutionalising of this measure, it is worth mentioning the proposal to revise the Constitution, formulated in 2014 by few members of Parliament. Thus, the proposed law of Constitution revision included, among other, the amendment of art. 23 regarding individual freedom, in the sense of the express introduction into the body of the Fundamental Law the measure of escorting to the police station, distinct from that of detention and arrest. In the wording proposed, art. 23 para. (8) of the Constitution had the following content: „*The person who is administratively escorted to the police station, detained or arrested shall immediately be informed, in the language he understands, of the reasons for the escorting to the police station, detention or arrest, and the accusation, as soon as possible; the accusation is made known only in the presence of a lawyer, elected or appointed ex officio*".

Analyzing this proposal on the occasion of the *a priori* constitutionality review[6], the Constitutional Court found that the measure of escorting to the police station does not represents a suppression of individual freedom or any guarantee thereof; on the contrary, it constitutes a genuine guarantee of individual freedom, to the extent that it regulates the conditions for escorting to the police station and the rights available to the person subject to this measure; thus, the police officer - in the exercise of his legal duties - can only take this measure under the conditions established by law.

Therefore, the Court specified that the measure of escorting to the police station must be clearly delimited from the preventive measures that can be ordered during the criminal process, and in relation to its possible normative consecration in the very text of the Constitution, the Court emphasized that it must be presented as a true guarantee of individual freedom.

Consequently, the Court recommended to the Parliament the reformulation of the proposed amendment regarding art. 23 para. (8) of the Constitution. Regarding the legislative course of the law proposal to revise the Constitution, it is noted that it was closed in 2016[7].

On a legislative, infra constitutional level, the administrative measure of escorting to the police station is regulated by a series of normative acts with primary legislative force, which establish the cases and conditions under which this measure operates. We recall here the GEO no. 104/2001 regarding the organization and

[4] See C. Ionescu, C.A. Dumitrescu (coord.), *The Constitution of Romania, Comments and explanations*, C.H. Beck Publishing House, Bucharest, 2017, p. 320.

[5] With regard to the legal nature of the measure of escorting to the police station and the similarities between the administrative measure and preventive measures depriving of liberty, of a criminal nature (as, for instance the detaining or arrest), see F. Ciopec, A. Fanu-Moca, *Driving at the police headquarters. A new measure depriving freedom?*, Universul Juridic Premium, 2022, available on *https://www.universuljuridic.ro/conducerea-la-sediul-politiei-a-new-deprivation-of-liberty-measure/*, last time consulted on 24.04.2023.

[6] See CCR dec. no. 80/16.02.2014, published in the Official Gazette of Romania, Part I, no. 246/07.04.2014.

[7] According to the information available on the official website of the Romanian Senate, at the address: *https://www.senat.ro/legis/list.aspx#ListaDocumente*, last time consulted on 24.04.2023.

operation of the Romanian Border Police[8] (*e.g.,* art. 27 para. 1 letter b), art. 27^4-27^8), Law no. 218/2002 regarding the organization and operation of the Romanian Police,[9] (*e.g.,* art. 31 para. 1 letter b), art. 36-40), Law no. 550/2004 regarding the organization and functioning of the Romanian Gendarmerie,[10] (see art. 35), Local Police Law no. 155/2010[11], (see art. 20 para. 1 letter h). In terms of the duration of the measure, it is noted that, currently, the legal norms in the matter provide for a maximum duration of 12 hours (Law no. 218/2002, amended by Law no. 122/2022), and Law no. 155/2010.

Also, art. 2, point 36 of Law no. 61/1991 for the sanctioning of acts of violation of norms of social coexistence, public order and peace[12] regulates the sanctions of contravention nature in case of preventing, in any form, the bodies charged with maintaining public order from fulfilling their service obligations regarding the identification or escorting to the police station or another state body or to take the necessary measures to maintain or restore public order.

The measure of escorting to the police station is regulated, by normative acts, also in other member states of the European Union. *The statement of reasons* for Law no. 192/2019, which amended Law no. 218/2002[13] details, with examples, the normative solutions, which enshrine this measure under different names, for example, „taking into custody", „detention", „arrest without a warrant", „administrative arrest". From the perspective of the duration of the measure, the examples presented in the *statement of reasons*, in the case of Greece and Finland, are significant. Thus, it is shown that, in Greece, "persons escorted to the police station stay at its headquarters only for the time absolutely necessary for the purpose for which they have were brought", according to Presidential Decree no. 141/1991. In Finland, the policeman is obliged to release the person as soon as he has obtained information about the name, ID series or date of birth, nationality or residence, but not later than 24 hours, according to Police Act 872/2011.

Recently, the legal regulation of escorting to the police station contained in art. 36 para. (4) and (5) from Law no. 218/2002[14], was subjected to the *a posteriori* constitutionality control exercised by the Constitutional Court as a result of the referral to the Ombudsman, by way of an exception of unconstitutionality raised directly[15]. Invoking the violation of the provisions of the Constitution contained in art. 1 para. (5) regarding the obligation to respect the Constitution, its supremacy and the laws and art. 23 para. (1) regarding individual freedom and the safety of the person, the Ombudsman reported a series of unconstitutionality defects generated, in essence, by the absence of establishing a maximum duration of this measure. The purpose of the approach is limited to the constitutional role of the Ombudsman and aims to „protect citizens from the arbitrariness and discretionary nature of the measure of administrative escorting to the police station, favoured by the omission of the regulation of a deadline for this measure."[16] The criticisms made by the Ombudsman were not directed against the rule of substantive law, contained in art. 31 para. (1) lit. b) from Law no. 218/2002, which regulates the measure of escorting to the police station, but against the conditions regarding the disposition of this measure, established by art. 36 para. (4) and (5) from the Law no. 218/2002. The Ombudsman noticed that the situations provided by the law, in which the policeman is entitled to escort a person to the police station, were those when: his/her identity could not be established or there are plausible reasons to suspect that the declared identity is not real or the documents presented are not true; due to the behaviour, the place, the moment, the circumstances or the assets found on him, there are credible reasons to suspect that he/she is preparing or has committed an illegal act; through his/her actions, the targeted person endangers his/her or another person's life, health or bodily integrity, or public order; taking legal action on the spot could create a danger to this person or to public order. According to art. 36 para. (4) and (5) from Law no. 218/2002, the

[8] Published in the Official Gazette of Romania, Part I, no. 351/29.06.2001, as amended and supplemented by Law no. 192/2019 for the amendment and completion of some normative acts in the field of public order and safety, published in the Official Gazette of Romania, Part I, no. 269/28.10.2019.

[9] Republished in the Official Gazette of Romania, Part I, no. 170/02.03.2020, amended by Law no. 122/2022.

[10] Published in the Official Gazette of Romania, Part I, no. 1175/13.12.2004.

[11] Published in the Official Gazette of Romania, Part I, no. 339/08.05.2014.

[12] Republished in the Official Gazette of Romania, Part I, no. 125/18.02.2020.

[13] Available at *https://www.cdep.ro/proiecte/2019/200/50/4/em346.pdf*.

[14] Republished in the Official Gazette of Romania, Part I, no. 170/02.03.2020.

[15] The legal provisions under control had the following content: „(4*) The verification of the factual situation and, as the case may be, the taking of legal measures against the person escorted to the police station shall be carried out immediately.*

(5) *The policeman has the obligation to allow the person to leave the police headquarters immediately after completing the activities according to paragraph (4) or of the legal measures that are imposed."*

[16] See the Report of activity of the Romanian Ombudsman institution for the year 2020, submitted to Parliament, available at *https://avp.ro/wp-content/uploads/2021/01/raport_2020_avp.pdf*.

verification of the factual situation and, as the case may be, the taking of legal measures against the person escorted to the police station is carried out *„immediately"*, and leaving the police headquarters after the completion of the mentioned activities or the legal measures that are imposed takes place *„immediately"*.

Thus, in justifying the unconstitutionality, the Ombudsman argued, in essence, that the criticized legal provisions violate art. 23 para. (1) and art. 1 para. (5) of the Constitution, as a maximum duration of the administrative measure consisting in escorting to the police station is not provided by the law. In relation to the provisions of art. 23 of the Constitution, the actions of the authorities to restore the rule of law must be strictly delimited and conditioned, so that individual freedom is respected and no innocent person is unjustly deprived of their freedom.

The Ombudsman emphasized that, unlike the previous regulation, which established, in the case of escorting to the police station, the verification activities and the taking of legal measures *„within 24 hours at the most"*, the legislative solution, established as a result of the amendment of the Law no. 218/2002, by Law no. 192/2019, no longer provides for a maximum duration of this measure.

In the Ombudsman opinion, the measure of escorting to the police station, although it has the legal nature of an administrative measure, ordered by the policeman, can be characterized, in the terms of art. 23 of the Constitution, as a detention - included in the category of custodial measures, also representing a custodial measure, which falls under art. 4 para. (2) of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (which defines deprivation of liberty as „any form of detention or imprisonment or placing a person in a public or private place of detention on who cannot leave him at will, by order of any judicial, administrative or other authority").

Under these conditions, the regulation of the measure of escorting to the police station does not ensure a fair balance between the public and the individual interest. Hence, such a measure must be limited in time.

In support of the criticisms of unconstitutionality, the Ombudsman invoked a constitutional precedent (CCR dec. no. 132/18.04.2002), as well as the provisions of art. 5 ECHR which affirms the right of every person to freedom and security and determines at the same time the cases and conditions in which it is permissible to derogate from this principle, especially in order to ensure public order, and aspects from the ECtHR jurisprudence (for example: ECtHR Judgment, 17.07.2012, Case *Munjaz v. the United Kingdom*; ECtHR Judgment, 04.04.2000, Case *Witold Litwa v. Poland*, para. 78; ECtHR Judgment, 19.05.2016, Case *J.N. v. the United Kingdom*, para. 77).

The Ombudsman also claimed the violation of art. 1 para. (5) of the Constitution which enshrines the principle of legality, because the criticized legal provisions, due to the lack of a clear and precise term regarding the maximum duration of the administrative measure of escorting to the police station, are unclear and imprecise. The lack of a temporal delimitation of the measure leads to the unpredictability of the criticized legal text, as the measure can be decided arbitrarily, creating the premise of its application as a result of arbitrary interpretations or assessments by the police, contrary to the principle of legal security that constitutes a fundamental dimension of the rule of law.

Also, the omission of establishing a maximum length of time during which the measure of escorting to the police station can take place leaves room for arbitrariness and leaves it up to the discretion of the authority to decide on the moment of termination of the measure. Moreover, according to the Romanian Constitution, the duration of detention, a preventive measure, of a criminal nature, is 24 hours. It follows that, being similar, the measure of escorting to the police station must not exceed this term.

Consequently, the Ombudsman emphasized that the disposition of the measure of administrative management escorting to the police station must be carried out in a clear, precise and predictable normative framework, both for the person subject to this measure and for the police bodies. The constitutional standard for the protection of individual freedom requires that its limitation be carried out in a normative framework that expressly establishes the maximum duration of the limitation of this constitutional value, and, on the other hand, provides in a clear, precise and predictable way the duration this measure.

By dec. no. 215/07.04.2022[17], CCR decided on the exception of unconstitutionality raised by the Ombudsman and found that the legislative solution contained in art. 36 para. (5) from Law no. 218/2002, which does not limit the duration of the measure of escorting to the police station, is unconstitutional. At the same time, the Court decided to reject, as unfounded, the exception of unconstitutionality of the provisions of art. 36

[17] Published in the Official Gazette of Romania, Part I, no. 603/21.06.2022.

para. (4) from Law no. 218/2002 stating that these norms are constitutional in relation to the criticisms formulated[18] .

By the considerations contained in dec. no. 215/07.04.2022, above mentioned, CCR carried out an analysis of the legislative evolution in the matter and, at the same time, retained relevant aspects contained in its jurisprudence and that of the ECtHR.

Thus, the Court highlighted the fact that, under a substantial aspect, the measure of escorting to the police station is regulated by art. 31 para. (1) letter b) from Law no. 218/2002, which establishes the right of the police officer to escort a person to the police station, as an administrative measure, under the law.

Regarding the conditions established by law regarding this measure, the Court considered relevant the provisions of art. 36-40 of Law no. 218/2002, which establish the cases in which the policeman is entitled to escort a person to the police station, the rights of the person escorted to the police station, as well as the obligations of the policeman.

The Court also observed that the provisions of art. 40 para. (1) from Law no. 218/2002 establish the obligation of the police officer to draw up a report in which he records, among other things, the time of the initiation of the movement to the police station and the completion of the verification of the person's situation and the taking of legal measures. Consequently, the Court retained the temporal limits of the measure of escorting to the police station, which begins at the time of the initiation of the movement to the police station and ends at the time of completion of the verification of the person's situation and the taking of legal measures, when the policeman has the obligation to allow the person to leave, immediately, the police station. Within these limits, the measure involves a series of activities undertaken by the police officer, for example, identity verification, taking statements, requesting the signing of documents or other measures taken on this occasion. Under the aspect of the conditions regulated in the case of the measure of escorting to the police station, the Court observed that the provisions of art. 36 para. (4) and (5) from Law no. 218/2002, uses the phrase „*immediately*" regarding the verification of the factual situation and, as the case may be, taking legal measures against the person escorted to the police station, as well as regarding the possibility to leave the police station after completing the activities or measures laws that are imposed. However, a maximum duration of the measure is not regulated by the law.

From the perspective of the evolution of the legislative framework in the matter of the measure of escorting to the police station, regarding its duration, the Court observed that this measure was before regulated by Law no. 218/2002[19], according to which: „the verification of the situation of these categories of persons and the taking of legal measures, as the case may be, shall be carried out in no more than 24 hours, as an administrative measure". The Court observed that this regulation established a maximum duration of the administrative measure of escorting a person to the police headquarters, established by law through the phrase „in no more than 24 hours".

Prior to this regulation, the provisions of art. 16 letter b) of Law no. 26/1994 regarding the organization and operation of the Romanian Police[20], also established a maximum duration of 24 hours for carrying out police activities within the measure of escorting to the police station.

The legal provisions subject of the constitutional control had the criticized content since 2019[21].

From the perspective of its jurisprudence in the matter, the Court held that, previously, in its dec. no. 132/18.04.2002[22], it examined the constitutionality of the provisions of the law regarding the measure of escorting to the police station. The Court held that „Article 31 para. (1) letter b) from Law no. 218/2002 establishes a complex of activities specific to the police bodies, namely the escorting to the police station. Although the content of the text does not provide for the express taking of the detention measure against the persons subject to verification, it is beyond doubt that the verification activity carried out by the police - an activity defined as an „administrative measure" - involves the restriction of the exercise of individual freedom and can be characterized, in the terms of art. 23 of the Constitution, as a restraint".

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[18] For arguments related to the unconstitutionality of art. 36 para. (4) of Law no. 218/2002, see the separate opinion, formulated by one of the CCR judges, opinion published together with dec. no. 215/07.04.2022.

[19] Published in the Official Gazette of Romania, Part I, no. 305/09.05.2002.

[20] Published in the Official Gazette of Romania, Part I, no. 123/18.05.1994, currently repealed, according to art. 52 of Law no. 218/2002.

[21] See art. II point 5 of Law no. 192/2019 for the modification and completion of some normative acts in the field of public order and safety, published in the Official Gazette of Romania, Part I, no. 868/28.10.2019.

[22] Published in the Official Gazette of Romania, Part I, no. 305/09.05.2002.

The constitutionality solution, pronounced by the CCR dec. no. 132/18.04.2002 was based, mainly, on the fact that the administrative measure of escorting to the police station, as it was regulated at that time, was limited to at most 24 hours, the time limits provided for in art. 23 para. (3) being respected from the Constitution, according to which „detention cannot exceed 24 hours".

From the perspective of the ECtHR jurisprudence in the matter of art. 5 para. 1 ECHR, regarding the right to freedom and the safety of the person, the Constitutional Court held that the European Court analyzed the incidence of the notion of „deprivation of liberty" by referring to the measure of escorting and the presence of the person in police station, in which sense it invoked, for example, Judgment of 31.01.2017, Case *Rozhkov v. Russia*, para. 79, or the Judgment of 06.12.2016, Case *Ioan Pop and others v. Romania*, para. 81 and 83. According to the European Court, to determine whether someone was „deprived of liberty" in the sense of art. 5 ECHR, the starting point must be its concrete situation and a whole range of criteria must be taken into account such as the type, duration, effects and way of implementing the measure, bearing in mind that art. 5 para. 1 can also apply to very short-term deprivations of liberty (see, for example, Judgment of 23.02.2012, Case *Creangă v. Romania*, para. 93, Judgment of 21.06.2011, Case *Shimovolos v. Russia*, para. 48-50, or Judgment of 07.05.2015, Case *Emin Huseynov v. Azerbaijan*, para. 82). In a similar sense, see ECtHR Judgment of 26.05.2020, Case *Aftanache v. Romania*, para. 78-80.

Starting from the considerations retained in the jurisprudence above mentioned, Constitutional Court held that „the administrative measure of escorting to the police station represents an interference with individual freedom, whose regulation, in order to comply with the provisions of art. 23 of the Constitution, must comply with a system of effective legal guarantees, which would protect the person in the situation where the public authorities, in the application of the law, take certain measures that concern individual freedom". The provisions of art. 36 para. (4) from Law no. 218/2002 impose such guarantees, establishing that, within the measure of escorting to the police station, the activity of verifying the factual situation and, as the case may be, taking legal measures against the person escorted to the police station is carried out „*immediately*". The Court found, therefore, that the provisions of art. 36 para. (4) from Law no. 218/2002 respects the requirements of clarity, precision and predictability that must characterize the legal norms, according to art. 1 para. (5) of the Constitution, and ensures, at the same time, the guarantees of individual freedom, enshrined in art. 23 of the Constitution.

At the same time, however, the Court reached a contrary conclusion regarding the constitutional validity of the provisions of art. 36 para. (5) from Law no. 218/2002. The Court held that the criticized text of law marks the end of the measure of driving the person to the police headquarters, establishing that at the moment of completion of the verification of the person's situation and the taking of the legal measures taken on this occasion, the person has the right to leave the police headquarters immediately. And in this case, the use of the phrase „*immediately*" represents a „guarantee of individual freedom, which, although necessary, is not sufficient". Thus, Court held that regarding the measure of escorting to the police station, „the legislative solution contained in the provisions of art. 36 para. (5) from Law no. 218/2002, as benchmark *ad quem* of the measure, does not limit its duration". The same conclusion, in the sense of the non-existence of a legal regulation regarding the maximum duration of the measure, also results from the analysis of the legal provisions criticized in the whole normative framework in the matter. Under these conditions, the Court held that, from the perspective of art. 23 para. (1) of the Constitution, the guarantees provided by art. 36 para. (5) from Law no. 218/2002 are not sufficient. Hence, in order to comply with the Constitution, it is mandatory to consolidate them. Thus, the Court ruled that, in order to comply with the constitutional requirements regarding individual freedom, the administrative measure of escorting to the police station cannot exceed the maximum duration of detention, respectively „*cannot exceed 24 hours*".

Consequently, the Court found that in this case a positive obligation of the state whose object is the regulation, within the domestic legislation, of a limited duration of the measure of escorting to the police station, which allows the removal of any possible arbitrary action and of the possible violation of individual freedom. Undoubtedly, the establishing the maximum duration of the administrative measure of escorting to the police station is within the margin of appreciation of the legislator, who has the role of issuing appropriate, accessible rules , clear and predictable, to ensure effective protection of individuals against any illegal interference in the exercise of individual freedom.

Shortly after the pronouncement of the CCR dec. no. 215/07.04.2022, Law no. 122/2022 for the amendment and completion of art. 36 of Law no. 218/2002 entered into force on May 6, 2022[23]. It is to mention here the positive action of the Parliament that regulated a time limit of the measure of escorting a person to the police station. Thus, regarding the verification of the factual situation and, as the case may be, the taking of legal measures against the person escorted to the police station, the law establishes a term of 8 hours „from the moment of the initiation of the movement", which can be extended up to 12 hours „from the moment of the initiation of the movement".

Therefore, the current legislative solution contained in Law no. 218/2002, with further amendments, in accordance with the decision of the Constitutional Court, expressly establishes a maximum duration of the measure of escorting the person to the police station, which cannot exceed 12 hours.

3. Conclusions

Starting from a concrete example in which a rule of legal is subject to constitutionality review, in order to establish its validity in relation to the constitutional provisions characterized by supremacy, the study highlights the effectiveness of the control mechanism, through the efficient contribution of all institutional actors.

The Ombudsman triggered the constitutional review, thus acting, based on its fundamental role of defender of citizens' rights and freedoms, as a genuine „watchdog" within the democratic state[24].

Referred to by way of the exception of unconstitutionality, the Constitutional Court ensured, through the constitutional review, the guarantee of the supremacy of the Constitution, in its component regarding the guarantee of individual freedom and the safety of the person. At the same time, the legislator (Parliament) intervened in order to adopt a normative solution compatible with the constitutional requirements of individual freedom, so that, at present, the measure of escorting to the police, cannot exceed 12 hours.

Of course, it is the legislator's role to intervene, in order to harmonize all the legislative solutions contained in the normative acts that regulate the same measure (*e.g.,* GEO no. 104/2001).

Being an example of good practice, the selected case positively highlights how the action of state institutions and authorities, within the limits and according to their constitutional powers, is integrated with the loyal constitutional behaviour[25], to ensure, for the benefit of the individual, the fundamental goal of defending citizens' rights and freedoms, supreme values of the rule of law and democracy. This is how the dictum „***hominum causa omne ius constitutum est***" is and must remain, without any time limit, current**.**

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[23] Official Gazette of Romania, Part I, no. 431/03.05.2022.

[24] The phrase is already enshrined in the ECtHR jurisprudence, which uses it to designate the role of mass media in the state, for example, Judgment of 06.10.2022, Case *Khural and Zeynalov v. Azerbaijan*, para. 38.

[25] The principle is developed in the CCR jurisprudence, for example, dec. no. 1257/07.10.2009, published in the Official Gazette of Romania, Part I, no. 758/06.11.2009, dec. no. 1431/03.11.2010, published in the Official Gazette of Romania, Part I, no. 758/12.11.2010, dec. no. 51/25.01.2012, published in the Official Gazette of Romania, Part I, no. 90/03.02.2012, dec. no. 727/09.07.2012, published in the Official Gazette of Romania, Part I, no. 477/12.07.2012, dec. no. 924/01.11.2012, published in the Official Gazette of Romania, Part I, no. 787/22.11.2012, dec. no. 260/08.04.2015, published in the Official Gazette of Romania, Part I, no. 318/11.05.2015, dec. no. 611/03.10.2017, published in the Official Gazette of Romania, Part I, no. 877/07.11.2017, or dec. no. 609/14.09.2020, published in the Official Gazette of Romania, Part I, no. 980/23.10.2020.

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TRUTH AND RECONCILIATION COMMISSIONS AND LEGAL ORDER

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Abstract

The transition periods from abusive regimes to democratic ones put into action, among others, mechanisms such as Truth and Reconciliation Commissions, non-judiciary instruments of transitional justice, through which generalised abuses committed in the recent past of a country are investigated. Legal order is considered an indispensable foundation in establishing a state and in maintaining and, respectively, consolidating democracy. Starting from the theoretical-explanatory model of law philosophy that places the human being at the centre of lawmakers' preoccupations, the present paper intends to show, at least at the theoretical level, the connection between the founding/functioning of Truth and Reconciliation Commissions and legal order. In the first part of the paper I will define legal order and the insoluble connection between it and judicial order. In the second part, I will explain the peculiarities of Truth and Reconciliation Commissions so as to show, in the last part, how the principles and their manner of functioning constitute the premises necessary for the configuration of the new rule of law, in societies marked by transition periods, as a result of experiencing systematic and generalised abuses.

The paper has a heuristic value by showing, through the issue set forward, the concept of law as the art of good and equity – jus est are boni et aequi – promoted by Celsius.

Keywords: *Truth and Reconciliation Commissions, transitional justice, legal order, judicial order, judicial norm.*

1. Introduction

The autonomy of law is not equivalent with its isolation from social and political contexts. The theoretical lens of law philosophy promotes the idea that the state, the constitution, and the institutions have a historical, political, judicial, and social character. When a state creates its rule of law and guarantees its fulfilment, it bases it on certain principles[1] such as justice, equity, respect for individuals' fundamental rights, for human dignity. How can these desiderata be fulfilled? What connection is there between legal order and the rule of law? The rule of law is founded on the principles of separation of powers in a state – which does not exclude the interaction between them – and the independence of the act of justice, on respecting human rights and on equality before the law of all citizens, no matter whether they are part of the governing or the governed. It is worth mentioning that in the case of totalitarian and authoritarian regimes these principles are not practically applicable.

On the other hand, Maurice Hauriou[2] considers that without legal order, neither the stability of a state nor the maintenance and, respectively, the consolidation of democracy can be conceived. Legal order signifies an organization of social relations based on judicial norms that form judicial order. However, legal order presupposes respecting individuals' liberties, rights, and integrity, of the rule of law, and of its functioning mechanisms and, on the other hand, it is determined by the latter.

Legal order becomes a democratic principle, guaranteed by state bodies. Judicial order represents the normative base of the legal order, while its state bodies ensure its applicability framework. Putting these mechanisms in operation ensures the security of individuals and societies. The main purpose of legal order is to offer consistency to individual rights and liberties within a society, to materialise the principle of equality before the law, in the interest of both the individuals and the state. All of these desiderata regarding legal order represent real challenges for the societies that have been confronted in the past with periods of systematic and generalised abuses. In this sense, transitional justice entails a series of actions as a response to the massive human rights violations, namely: exposing the truth about past abuses, holding the perpetrators responsible,

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[1] „If the principle of legality was added by states into the most important normative acts, both nationally and internationally, the same cannot be said about morality" (my translation) authored by E.E. Ştefan, *Legalitate şi moralitate în activitatea autorităţilor publice*, in Revista de Drept Public no. 4/2017, Universul Juridic Publishing House, Bucharest, p. 96.

[2] M. Hauriou, *Aux sources du droit, Le pouvoir, l'ordre et la liberté,* Paris: Caen, Centre de Philosophie Politique et Juridique.

offering reparations to the victims and fundamentally reforming the state and social institutions. Pablo de Greiff considers that *penal justice represents an endeavour against those guilty, without direct focus on the victim*.

Transitional justice brings a novelty element, namely, focus on the victim and proposal of a set of material and/or symbolic set of reparatory measures. The Truth and Reconciliation Commissions represent a specific instrument of transitional justice, which, together with judicial processes, reparatory programmes, and institutional reform, ensure the transition towards a new type of legal order, towards a new type of society. In fact, the *four main mechanisms* of transitional justice are in accordance not only with the obligations of the *states* in international law, but also with respecting *individual* rights that correspond to these obligations.[3] *Judicial processes* represent the states' obligation to investigate and punish those guilty of abuses, thus ensuring, at the individual level, *the right to justice and an adequate solution*. *The Truth and Reconciliation Commissions* implement the states' obligation to investigate and identify abusers and victims that, at the individual level, is equivalent to *the right to the truth*. *Reparatory programmes* involve the states' obligation to implement restitutions and compensations for the victims' whose rights were violated, in other words, *an individual right to reparations*. *Institutional reform* signifies the reform of institutions from the judicial, administrative, political etc. systems and reiterates the states' obligation to prevent similar acts, meaning the individuals' right to have *non-repetition* guaranteed. The present paper proposes a focus on the relationship between the principles that govern the creation/functioning of Truth and Reconciliation Commissions and legal order. Law philosophy considers the human being as being the centre of lawmakers' concerns. This central position given to the human being represents one of the basic resources of law, as an art of good and equity. Starting from these considerations, the paper captures the importance of the functioning of Truth and Reconciliation Commissions during transitional periods, as an instrument that paves the path toward a new legal order founded on justice, truth, equity, the victims' right to have their suffering recognised, to be rehabilitated, and to benefit from reparations.

2. Legal Order

Any human community founds its existence on a set of judicial and social norms through which they regulate the behaviour of their members. Thus, in any society, a special place is first and foremost held by a system of judicial norms, which have as a central function the regulation of social behaviours and relations, with the purpose of ensuring social order. This ensemble of legal rules, created in a system that governs the society at a certain point, is defined as being *judicial order.*[4] „The judicial norm is the basic cell of the law, of the elementary judicial system." (my translation)[5] The set of judicial norms that form judicial order is articulated around the value of justice both at the individual and societal levels, having as a purpose ensuring a coherent framework for human rights to be applied, a framework in which individual liberty is respected without altering the liberty of other individuals.

How is *judicial order* understood and applied at the individual and community levels, what mechanisms are applied to put into practice this ensemble of judicial norms? Is the internalization of the set of judicial norms and relations that stem from these a natural process or are coercion mechanisms needed to penalise or, respectively, reward behaviour? In fact, in regards to individuals respecting the norms, Kelson wonders in turn if the obligation manifested by individuals is a result of will and consent or is made without their will and consent?[6]

Judicial norms, as well as the judicial relations they determine, *regulate* social relations and are, in turn, according to societal changes over time, influenced by the latter. Kelson emphasised that:

„The concept of norm signifies that a certain thing must exist or take place ... that a person needs to behave in a certain manner ... A norm that is not applied ... meaning a norm that does not benefit from minimum efficiency, is not recognised as an objectively valid judicial norm." (my translation) [7]

Moreover: „… if a norm is authentically conceived, is also presupposes the possibility of a con-conforming behaviour. Only when there is a nonconforming behaviour toward the judicial norm, which means that behaviour

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[3] United Nations, Economic and Social Council, Question of the impunity of perpetrators of human rights violations (civil and political), *Revised final report prepared by Mr. Joinet* pursuant to Sub-Commission decision 1996/119, E/CN.4/Sub.2/1997/20/Rev. 1, available at *https://digitallibrary.un.org/record/245520?ln=en*, consulted March 2023.

[4] R.M. Beşteliu, *Drept internațional. Introducere în dreptul internațional public*, Al Beck Publishing House, Bucharest, 2003, p. 2.

[5] N. Popa, *Teoria generală a dreptului*, 6th ed., C.H. Beck Publishing House, Bucharest, 2020, p. 138.

[6] H. Kelsen, *Théorie pure du droit*, translated in French by Charles Eisenman, Paris: Brylant LGDJ, 1999, p. 275.

[7] *Idem*, p. 19.

that contradicts the prescription of norm needs to exist for the latter to be justified as a judicial norm (my translation)"[8].

Legal order is thus a result of the manner in which judicial order, defined as the ensemble of norms and judicial relations stipulated by the legal system, is reflected in the social relations at the individual, inter-systemic, inter-institutional and societal levels. Legal order represents the basic condition for ensuring social order, a vaster, integrating concept, without which individual rights cannot be exercised and institutions cannot be functional. „Legal order is the nucleus of social life, the guarantee of fulfilling essential rights of individuals and of the correct functioning of institutions." (my translation)[9]

The Constitution, as a fundamental judicial norm, regulates both the responsibilities of the state's bodies starting from the basic principle of separating the legislative, executive and judicial powers, and the relations between public authorities and citizens.[10] Constitutional order is the source for judicial norms and laws issues in accordance with the constitution, on the basis of which legal order is founded. Although it has the constitutional order as a principle, legal order is more comprehensive than the former.

Through which mechanisms and institutions is legal order ensured? Institutionalised coercion represents the path through which societal order, organization and security is ensured, while the former has as a foundation a system of specific and depersonalised instruments called norms. Moreover, as Nicolae Popa emphasised: „… the established norms need to find a minimum framework for *legitimacy* in order to be the condition for the possible existence of a community. The law is the principle of direction, social cohesion, it ensures society its trait as a finite corpus, of coherence since *before becoming a normative reality, law is a state of mind*". (my translation) [11]

Between *judicial order* and *legal order* there is a certain relation of determination that can be noticed, so that, the former represents the normative basis for the latter which presupposes the activation of the mechanisms that ensure order and coercion.

Fuller[12] mentions that: „… in order to regulate behaviours, the law must fulfil a set of conditions: to be a public rule known to its recipients, to be comprehensible, non-contradictory, permanent and the conditions for it to be respected need to exist." (my translation)

If we admit that the rule of law is an instrument meant to protect individuals' liberties, normative functions will be entrusted with different powers. To this end, Montesquieu[13] underlined the following: „…if in the same person or the same body of magistracy, the legislative power is reunited with the executive power there will be no liberty ... there is no liberty if the power to judge is not separated from the legislative and executive ones. If the power to judge was combined with the legislative power, the criteria regarding citizens' life and liberty would be arbitrary since the legislator would be judge. If the power to judge was combined with the executive power, the conditions for the judge to become oppressor would arise".[14] (my translation)

The rule of law imposes the existence of certain institutional mechanisms through which the possibility to control the hierarchy of norms and the sanctioning of rule violations would be created. The rule of law if foremost *a judicial concept and has a normative* and *institutional format*. The judicial perspective offers a *formal approach* to the rule of law. Beyond this formal perspective, its *substance* is found when its utility within a society is questioned. Thus, the rule of law represents *an instrument for the fulfilment of certain values* without which individuals do not have the freedom to act and consolidate their membership to a society. Positive liberty, in the sense of collective autonomy, represents the possibility for a community to decide on its future.[15] It designates the possibility to directly or indirectly participate in the determination of the norms for common living. The rule of law and democracy maintain consolidation relations but also ones of potential competition.[16]

First of all, the connection between the *rule of law as a governing instrument* (law is a governing instrument, a guide for it) and the *rule of law that presupposes that every social actor be protected by the legal*

[8] N. Popa, Gh. Dănișor, I. Dogaru, D.C. Dănișor, *Filosofia dreptului,* C.H. Beck Publishing House, Bucharest, 2010, p. 364.

[9] N. Popa, *Teoria generală a dreptului, op. cit.*, pp. 138-139.

[10] See also E.E. Ștefan, „Constituție ca izvor al dreptului", in *Drept administrativ Partea I, Curs universitar,* Universul Juridic Publishing House, Bucharest, 2019, pp. 41-42.

[11] N. Popa, *Teoria generală a dreptului, op. cit.*, pp. 36 and 49.

[12] L.L. Fuller, *The Morality of Law*, New Haven: Yale University Press, 1969, p. 201.

[13] Montesquieu, *Œuvres complètes*, tome II, Paris: Bibliothèque de la Pléiade, 1958, p. 397.

[14] *Idem*, p. 395.

[15] D. Godefridi, *État de droit, liberté et démocratie*, in Politique et Sociétés, 2004, 23, (1):143-169.

[16] *Ibidem*.

system within a society cannot be omitted. The constitutional limits of power (a central element of democracy) can be fulfilled only by using the rules of law. *Second of all*, at a social level, the rules of law presuppose a solid constitution, an efficient electoral system, consensus regarding gender equality, laws for the protection of minorities and other vulnerable groups, and a strong civil society. From this perspective, the rules of law supported by an independent justice system could offer a guarantee that the set of rights and civil and political liberties can be respected. Following this logic, governing while paying attention to the interests and needs of the majority is in direct connection with the functioning of institutions and their capacity to act in the interest of citizens. As stated by the UN general secretary: „…the rule of law is the principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards."[17]

3. Truth and Reconciliation Commissions

A standard definition of Truth and Reconciliation Commissions is that offered by Priscilla Hayner.

„A Truth and Reconciliation Commission focuses its activity on past events, investigates the models of violence/abuses against human rights that took place during a certain period of time, directly and comprehensibly targets the affected population, based on information about their experience, functions for a limited period of time, is officially recognised and authorised to function by the states in question, has as a final result the elaboration of a report which presents the results of its activity but also a series of recommendations for reforms."[18] (my translation)

Another series of similar definitions, though not as comprehensible, followed the one offered by Hayner. Tietel[19] considers that a Truth and Reconciliation Commission is an official body, generally created by a national government to investigate, document and report on the abuses on human rights in a certain country, in a certain period of time. In Bronkhorst's perspective,[20] the Truth and Reconciliation Commission is a temporary body, founded by an official authority (president, parliament)[21] to investigate grave violations on human rights committed during a certain period in the past, in order to publish a public report, which includes reviews and recommendations with the purpose of consolidating justice and reconciliation. For Freeman,[22] the Truth and Reconciliation Commission is an ad-hoc, autonomous and victim-centred investigative commission, founded and authorised by a state to investigate and report the main causes and consequences of violence and repressions from the relatively recent past, in order to formulate recommendations, rectify and prevent similar situations.

They are called *truth* commissions because *the right to the truth*, in its individual and collective dimensions, has represented a basis in their creation. For instance,[23] in practice, there are situations when the right to the truth is cited in their formation act, as a legal basis for the creation of the Commissions. Moreover, they are called this because they are constituted similar to an organised framework that invited the victims but also the aggressors to present the truth about the causes, repercussions, acts, sufferings, and aggressions committed.

The right to the truth is inalienable, autonomous, underogating, not subjected to limitations.[24] The 66/2005 Resolution of the UN Commission for human rights[25] recognises, in paragraph 1, the importance of respecting and ensuring the right to the truth, with the purpose of contributing to the fight against impunity and to the promotion of human rights. According to principles 2 and 4, from the report by the independent expert Diane Orenthicher,[26] *the right to the truth* refers to the inalienable right of victims and families to know the truth about

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[17] UN General Assembly, „*Delivering justice: programme of action to strengthen the rule of law at the national and international levels*", 16.03.2012, A/66/749, para. 2, available at *http://archive.ipu.org/splz-e/unbrief12/sg-report.pdf*, accessed March 2023.

[18] P.B. Hayner, *Unspeakable Truths: Transitional Justice and the challenge of Truth Commissions*, 2nd ed., Routledge, 2011, p. 1.

[19] R. Teitel, *Human Rights in Transition: Transitional Justice Genealogy*, in Harvard Human Rights Journal, 16(69): 69-94.

[20] D. Bronkhorst, *Truth Commission and Transitional Justice. A Short Guide,* Amnesty International, Dutch Section, Amsterdam, 1995.

[21] Regarding the concept of authority, see also E.E. Ștefan, *Disputed matters on the concept of public authority*, in the Proceedings of *CKS eBook*, 2015, Pro Universitaria Publishing House, Bucharest, 2015, p. 535 *et seq*.

[22] United Nations, Economic and Social Council, Promotion and Protection of Human Rights, *Study on the right to the truth*, Report of the Office of the United Nations High Commissioner for Human Rights, E/CN.4/2006/91, p. 23, available at *https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/106/56/PDF/G0610656.pdf?OpenElement*, accessed March 2023.

[23] *Ibidem*.

[24] *Idem*, p. 15.

[25] UN Commission on Human Rights, Human Rights Resolution 2005/66: *Right to the Truth*, E/CN.4/RES/2005/66, available at: *https://www.refworld.org/docid/45377c7d0.html*, accessed March2023.

[26] Report of the independent expert to update the Set of principles to combat impunity, D. Orentlicher, *op. cit.*

human rights violations according to international law, about the circumstances in which the abuses took place, about the fate of those missing or deceased. Principle 2 (from the Chicago Principles on Post-Conflict Justice)[27] mentions that the victim has the right to know the truth regarding the commission of past abuses, the circumstance in which they took place, the fate of those missing or deceased and the identification of those responsible.

The right to the truth also has a collective character, thus being a right of societies, as a whole, to *find out the truth* about past abuses. The Inter-American Court on Human Rights was a pioneer to this end. In the case of *Ellacuria et al. v. El Salvador*[28] it is mentioned in para. 221 that the right to know the truth about human rights violations and the identity of those who committed the acts constitutes an obligation of the states towards victims' families and society, as a whole. In para. 224 it is emphasised that the right to the truth is a collective right, essential for the functioning of a democratic system. For instance, in the case of *The Massacres Of El Mozote and Nearby Places v. El Salvador*,[29] it is mentioned in paragraphs 25, 244 and 270 that the right to *social truth* specific to societies as a whole allows them access to information that is important in order to prevent abuses. In the case of *Contreras et al. v. El Salvador,*[30] the Inter-American Court of Human Rights, on the basis of art. 1(1), 8, 13, 25 that protect the right to the truth, emphasises that the society has the inalienable right to know the truth about past events, about the circumstances and the causes that lead to abuses, to avoid their reocurrence in the future and to set up a democratic society (para. 170, 173, 210, 212).

The Human Rights Chamber for Bosnia Herzegovina[31] in the *Srebrenica case* mentions (para. 127, 188, 191, 198, 212) that the investigations done by the authorities of the Republika Srpska regarding the Srebrenica massacres must be detailed and coherent, so as to make the events known to the plaintiffs, the family members and to the public at large. According to Principle 3 from the Orentlicher Report, *the right to the collective truth*, in fact offers the state the right to stock evidence regarding the violence committed, to facilitate its knowledge, with the purpose of maintaining the collective memory, to protect against revisionism and the reoccurrence of similar acts.[32] According to Principle 5, the states have the duty to respect the right to the truth and to encourage investigations of the abuses committed in the past, by founding Truth Commissions or other similar instruments.[33]

The surplus of past abuses and violence involves the victims' desire to have access to the truth, to make it known to the public at large and, at the same time, the need for it to be officially recognised. The search for the truth is animated by a vast series of reasons through which it is worth mentioning: moral rehabilitation, recovery of damages, the desire for such atrocities to never be repeated, becoming free from the weight of the past, the desire to get justice. The right to the truth is, according to para. 11, 22, 24 (Principles and application norms regarding rehabilitation), in connection to the right to rehabilitation and reparations,[34] with the right to combat impunity foreshadowed in the basic principles (para. 1, 2, 3 and 4). Public hearings represent a distinctive element of these commissions. The South Africa Commission marked a turning point, since it incentivised public hearings and, what is more, public hearings centred on the victim.[35]

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[27] The International Human Rights Law Institute, *The Chicago Principles on Post-Conflict Justice*, 2008, pp. 37-41, available at *https://law.depaul.edu/about/centers-and-institutes/international-human-rights-law-institute/projects/Documents/chicago_principles.pdf*, consulted March 2023.

[28] Organization of American States, Inter-American Commission on Human Rights, *Ignacio Ellacuria et al. v. El Salvador*, Report nr. 136/99, Case 10.488, available at *https://web.archive.org/web/20210425203049/https://cidh.oas.org/annualrep/99eng/Merits/ElSalvador10.488.htm*, accessed March 2023.

[29] Inter-American Court of Human Rights, Case *The Massacres of El Mozote And Nearby Places v. El Salvador*, Judgment of October 25, 2012 (Merits, reparations and costs), available at *http://www.corteidh.or.cr/docs/casos/articulos/seriec_252_ing1.pdf*, consulted March 2023.

[30] Inter-American Court of Human Rights, Case *Contreras et al. v. El Salvador*, Judgment of August 31, 2011 (Merits, Reparations and Costs), available at *http://www.corteidh.or.cr/docs/casos/articulos/seriec_232_ing.pdf*, consulted March 2023.

[31] Human Rights Chamber for Bosnia and Herzegovina, Decision on Admissibility And Merits (delivered on 07.03.2003), *The Srebrenica Cases* (49 applications against Republika Srpska), available at *http://hrc.ustavnisud.ba/ENGLISH/DEFAULT.HTM*, consulted March 2023.

[32] *Report of the independent expert to update the Set of principles to combat impunity,* D. Orentlicher, *op. cit.*

[33] *Ibidem.*

[34] UN, General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/RES/60/147, available at *https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation*, consulted March 2023.

[35] M. Freeman, P. Hayner, *Truth-Telling*, in David Bloomfield, Teresa Barnes & Luc Huyse (eds.) 2003, *Reconciliation After Violent Conflict: A Handbook*, International Institute for Democracy and Electoral Assistance, available at *https://www.idea.int/sites/default/files/publications/reconciliation-after-violent-conflict-handbook.pdf*, consulted March 2023.

Beside the truth term, in the name of the Commissions, there is also that of *reconciliation*, since Truth and Reconciliation Commissions focus on the victims' discourse in order to make forgiveness possible. In this paper there is no promotion of an idyllic image of the role that Truth and Reconciliation Commissions can have. In the specialised literature there is also this perspective that Commissions can have magical effects such as the forgiveness practiced between abuser and victims, the healing of societies, etc.[36]

The process of forgiveness is private, individual, so states cannot offer forgiveness in the victims' name. In practice, there are situations when those who committed abuses not only do not ask for the victims' forgiveness, but also reclaim the acts and consider them justified. However, the states' efforts to empower Commissions to function represent a deliberately official act that translates the intention of not perpetuating past abusive practices, of recognising them and of proposing measures so that human rights violations would not be repeated. All of these intentions and actions fall under the general efforts to obtain reconciliation.

A Truth and Reconciliation Commission has, however, as stated by Mattarollo, the role to self-evaluate and self-investigate, so that it is created to mark a state's/society's attempt to *repair and regenerate itself*.[37] The resolutions of the UN Security Council and General Assembly[38] pointed out that establishing the truth about crimes, genocide, human rights violations is part of the reconciliation process. *Reconciliation*, in practice, can manifest under various forms: the official recognition of the traumatic past by new governments, by those who committed the human rights violations, the adoption of a new constitution that guarantees fundamental rights and liberties, free and transparent elections according to international standards, the freeing of political prisoners etc.

4.Truth and Reconciliation Commissions and Legal Order

Without justice, societies cannot make the transition from generalised abuses to the respect for human rights, from illegalities to a new legal order. As previously mentioned, societies made vulnerable as a result of abuses and repressions impose, beside traditional justice, another type of justice during the transitional periods, namely transitional justice. Transitional justice is not similar to a wand that does miracles but can be a useful instrument in a comprehensible and responsible approach to recurrent cycles of violence, impunity, corruption, and generalised abuses lived by a society in its past.

There could be a tendency to confuse traditional justice (penal trials) with the transitional one. It could be believed that the two types of justice overlap. In practice however this is not valid if the distribution of tasks is clear.[39] To this end, Claude Jorda's, the former president of the International Penal Court, position is illuminating. He argues, in one of his interventions at The Hague in 2001, in favour of founding a Truth and Reconciliation Commission in Bosnia Herzegovina. Jorda mentions that the actions of such a commission could *complement* and even *consolidate* the actions of the International Penal Court in its mission to reach reconciliation.[40]

Truth and Reconciliation Commissions could be, in Jorda's view, a framework where the *subordinate-executers* who resorted to reprehensible acts could be audited and could confess to the abuses committed, which would mean the recognition of the victims' suffering; a framework where, on the basis of victims' testimonies, Truth and Reconciliation Commissions propose reparations for the losses suffered; a framework where the pattern of past violent acts, historical, political, sociological, and economic causes could be analysed in order to prevent similar situations from repeating; a framework of dialogue, collective debates that generate information for the configuration of a conflict memory.[41]

In what follows I will argue for the manner in which the principles involved in the functioning of Truth and Reconciliation Commissions, their purpose and activities represent relevant instruments in the configuration of the legal order whose main purpose is, on the one hand, to accomplish essential rights of individuals and, on the other hand, to accomplish the correct functioning of institutions.

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[36] M. Freeman, *Truth Commissions and Procedural Fairness*, Cambridge: Cambridge University Press, 2006, p. 11.

[37] R. Matarrollo, *Truth Commissions*, in Cherif Bassiouni (ed), *PostConflict Justice*, (Leiden: Brill- Nijhoff, Netherlands, 2002), 297-8.

[38] UN, Security Council: Resolution S/RES/1468 (2003); Resolution S/RES/1470 (2003). General Assembly: Resolution A/RES/57/105 (2003); Resolution A/RES/57/161(2003).

[39] See also B.E. Radu, *Judicial advances in combating systematic and generalised abuses on human rights*, Proceedings of *CKS eBook*, „Nicolae Titulescu" University Publishing House, Bucharest, 2022, pp. 363-372.

[40] *Le Tribunal Pénal International et la Commission vérité et conciliation en Bosnie-Herzégovine*, Communiqué de presse, available at *http://www.icty.org/fr/press/le-tribunal-pénal-international-et-la-commission-vérité-et-conciliation-en-bosnie-herzégovine*, consulted March 2023.

[41] B.E. Radu, *Judicial advances in combating systematic and generalised abuses, op. cit.*

First of all, Truth and Reconciliation Commissions carry out investigations on those responsible of the abuses committed in the old regime, thus contributing to the recognition of the sufferings. The existence of the Commissions justifies the transitional phase, meaning the *wider* concept *of justice*, motivated by the exigency of *searching for the truth*, of the need to have the sufferings known and recognised. They focus on the victims' discourse, on their personal experiences, ensuring their right to human dignity, the right to integrity, and the right to make the sufferings they underwent known.

Moreover, the Truth and Reconciliation Commissions do not only translate the effort to discover the *individual truth* – what happened in specific, individual cases – but also the *general truth*, in other words the truth about the practices and methodologies used at the societal level that lead to human rights violations, the political, social, and cultural context that favoured the perpetuation and generalisation of abuses. This recognition is essential in configuring the new legal order, on other fundamentals, which are not to generate the same practices of systematised violence and abuses. Elie Wiesel's famous saying *Never again* has a strong symbolic value since it draws attention on the necessity for generalised and systematised abuses to not be repeated, as they produce unimaginable damages both individually and collectively. However, *Never again* can be materialised only by approaching the truth about the abuses committed and the practices they generated with accountability and by taking responsibility. Moreover, the official recognition of the truth about human rights violations makes the state accept the political and moral responsibility that results from this truth.[42] In other words, the state is invited to take on the duty to repair the prejudices, the victims' losses as well as the responsibility to prevent such actions from repeating.

Furthermore, in connection to those previous mentioned, another argument in favour of the present endeavour consists in the fact that Truth and Reconciliation Commissions intend to prevent and stop the abuses from the past from happening again. In many countries that have been faced with abuses and conflicts, they have proved to be recurrent, or it has been concluded that there is the risk of recurrence. The percentages vary between 57% and 90%.[43] By preventing similar abuses and practices, the Commissions propose respecting individuals' right to safety and security. At the societal level, preventing mass abuses represents an essential condition for societal stability and the state's permanence, for its social and cultural reproduction, indispensable to the new legal order.

The Truth and Reconciliation Commissions propose reparation packages for the victims to rehabilitate their judicial and social statuses. At the individual level, the right to rehabilitation, to returning to the condition before the abuse is respected; at the collective level, the reparation packages translate the state's efforts to promote in praxis the values of equity and justice, essential for the new legal order.

Another argument regarding the role of Truth and Reconciliation Commission in the configuration of the new legal order is related to *the right to know* that the former promote. At the individual level, *the right to know* can lead to a possible forgiveness, in other words, to the reconciliation manifested under various forms: discussions, dialogue during negotiations, etc. At the societal, state level reconciliation can manifest through the adoption of a new constitution that guarantees fundamental rights and liberties, free and transparent elections in accordance with international standards, the freeing political prisoners, etc.

5. Conclusions

The present study has emphasised the connection between legal order and the functioning principles of Truth and Reconciliation Commissions, as a useful instrument in the *reparation* and *regeneration* of a society in whose past there were generalised and systematic human rights violations. In other words, the idea that transpires is the one according to which a society fragmented by cleavages and repressive practices cannot be constructed on solid bases unless it decides to honestly and responsibly confront the repressive past and the generalised violence to which a part of its population was subjected. The repressive practices from a society's past were possible because violence generating models were activated; they were possible because institutions put into practice mass oppressions on the victims. All of these practices are specific to authoritarian and totalitarian regimes, where the legal order represents, first and foremost, an instrument adapted at the discretion of ruling elites. However, the legal order represents, according to the authors presented, a source of

[42] Regarding the concept of responsibility, see also E.E. Ştefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ,* Pro Universitaria Publishing House, Bucharest 2013, pp. 11-16.

[43] ICTJ, *About us*, available at ***https://www.ictj.org/about***, consulted March 2023.

order and balance, of security and equity, a common good of a society as well as of every individual in part, a fundamental of democratic societies.

Legal order animates judicial order, on the principles and in the purpose of the principles of the individual and social good and equity. In the entire study the holistic and comprehensible perspective of the philosophy of law promoted by Professor Nicolae Popa transpires. The reconstruction of a society on the foundation of a rule of law can only be understood in the perspective proposed by professor Nicolae Popa, where the historic, social, and political elements intertwine and model the judicial element. In fact, the connection between legal order and the functioning principles of the Truth and Reconciliation Commissions cannot be understood except from this comprehensible and interdisciplinary perspective.

Just as the study advances, present societies have at their disposable, at this time, mechanisms of transitional justice such as Truth and Reconciliation Commissions that focus all the existing resources during transitional periods for the recognition of the truth both at the individual and collective levels. The official recognition of the truth brings about the consolidation of a solid basis in the reconstruction of societies and legal order. Without this recognition, the process of rehabilitation and of awarding reparations to the victims is annulled and, as a result, the social reproduction of cleavages and oppressive practices. In this case, the new legal order can no longer be called *new*, but becomes a continuation, under other facets, of the old order, founded on the old practices: abuses, insecurity, oppression, cleavages between victims and abusers and, above all, a profoundly generalised sentiment of injustice at the individual and collective levels.

However, the study has emphasised precisely the avoidance of this reproduction and the necessity of consolidating a new legal order starting from a real respect for individual rights: the victims' and other citizens' right to the truth, the victims' right to have their sufferings recognised, their right to rehabilitation and reparations, etc. Only thus, in this filigree between the judicial, the social, the political and the historic, can individual rights become the centre of the lawmakers' preoccupations as well as the substance, the foundation of legal order. Only thus, does law become the art of good and equity.

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PARAFISCAL CHARGES AND THEIR LEGAL REGIME

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Abstract

There are several hundred parafiscal charges in Romania, which collectively constitute the parafiscal system. These taxes are not officially designated as such, and they exist in the gray or black areas of the country's financial economy. This form of taxation is not a part of the official tax system and lacks consistent and clear guidelines that would apply to all its components. It is essentially a hidden tax, masquerading under a new term in legal jargon, which adds to its enigmatic nature. The realm of parafiscal charges is highly unpredictable, volatile, and precarious. With their sheer number and potential hazards, it wouldn't be far-fetched to liken it to quicksand using a metaphorical lens.

The parafiscal charges, despite sharing some similarities with compulsory tax levies, exhibit several differences owing to the various names they go by. Parafiscal charges are akin to taxes and other fiscal duties in that they are imposed by an authoritative body and carry legal obligations. However, they are closer in nature to taxes than they are to fiscal duties in that, often, their payment does not entail direct and immediate consideration. In conceptual terms, parafiscal charges differ from fiscal levies mainly because their objective is not primarily to generate public revenues to cover expenses made for the general welfare - this is the main purpose of taxes and fiscal duties. Rather, parafiscal charges are intended to secure financing and income for specific entities and activities, such as OSIM and the health system or various social and cultural initiatives. They also indirectly provide state aid to private entities or individuals by compelling consumers of products and/or services to make payments for this purpose directly to the beneficiaries, with such payments being concealed in the price of the product/service (e.g., cultural stamp). Parafiscal charges are also distinct from compulsory fiscal levies in that they are not subject to administration and utilization in accordance with fiscal and budgetary laws. To be more precise, parafiscal charges ought not to be managed in conformity with fiscal and budgetary regulations. If they were, they would then be considered as taxes or fiscal duties. Moreover, some of these charges are either treated as fiscal claims or are a (incoherent) combination of tax and non-tax aspects.

Parafiscal charges have received severe criticism from both the business community and experts. These charges have been described as moldy, abracadabrant, taxation-outclassing, out of control, discretionary, ineffective, and aberrant, among other epithets. However, certain quasi-fiscal charges that have been subject to constitutional scrutiny, such as the clawback tax, cultural stamp, and judicial stamp duties, have been declared constitutional. However, among the numerous parafiscal charges that have not yet undergone constitutional scrutiny, some are unconstitutional or, as the case may be, unlawful (not all of them are established by law, such as the parking fee). It is not, however, possible to make a blanket statement regarding the constitutionality or unconstitutionality of parafiscal charges as a whole.

The Romanian authorities have made several attempts to decrease the number of parafiscal charges, some of them successful, although in relation to less important ones that had no major impact on revenues. However, the Romanian legislator does not consider the French model of completely abolishing such charges. The desire to maintain and increase the number of parafiscal charges can be attributed to two factors: firstly, the increasing need for revenue by the government, and secondly, the apprehension of the public's response to an increase in the number and amount of taxes and fiscal duties.

There are other explanations for keeping parafiscal charges alive and for instituting new such charges. As such, a number of these charges are concealed within the prices of products and/or services, either to go unnoticed or to shift dissatisfaction onto the supplier of the product or service provider, who collects the price along with the parafiscal charge. This model is similar to that of indirect taxes like VAT and excise duties. Finally, a crucial reason for the persistence of parafiscal charges is that they are not subjected to the strict fiscal and

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budgetary rules of administration and control. Typically, parafiscal revenues are collected and used by the beneficiaries themselves, outside of the regular budgetary system. This lack of accountability for both the collection and use of these funds absolves both the beneficiaries and the state of the need to justify their methods. As a result, it is impossible to determine the exact proportion of parafiscal revenues in the overall revenue generated by the state and local communities, as well as in the country's gross domestic product. Additionally, it is unclear how much money are spent for such charges by those who are obliged to pay them.

Parafiscal charges have a wide variety, and they are identified by different names: contributions, solidarity contributions, tariffs, taxes, payments, royalties, and more. They can cover various fees, from parking fees and cultural stamps to cadastral fees, fees for services provided by public entities, fees for gambling activities, museum visiting taxes, offset, and clawback taxes. The variety and complexity of parafiscal charges, coupled with their inconsistent regulatory framework and diverse beneficiary types, make it difficult to establish a universally accepted definition of such charges. In this context, it is sufficient to state that all payment obligations that are established by an authoritative body and are not of a strictly fiscal nature fall under the category of parafiscal charges.

Keywords: *parafiscality, fiscal taxes, disguised taxation, definition, mandatory payments, legal regime, constitutionality.*

1. Introduction. The concepts of parafiscality and parafiscal charges

The formation of compound words by combining the prefix **„para"** (derived from Greek, meaning **„beyond"**) with a second word that has a separate meaning, which is often merged with the first word to create a new word with a similar or completely different meaning, is not only prevalent in everyday language but also in technical jargon: paranormal, paradox, paraliterature, paraphrase, paramilitary, parapsychology, paramedic, paraclinical, parabiotic, para-intellectual property etc. This process of language enrichment, where the form of a word is altered by association with another word, resulting in a new utterance, is referred to as **paralogy** or **paralogical,** words that also contain the prefix "para". The term **„parafiscal"** is a product of this linguistic process, where two words are combined to create a new word with a distinct meaning. In this case, the words **„para"** and **„fiscal"** are fused together to create an adjective that implies a connection to taxation but with a difference. As with other such compound words, it is challenging to define as it contains an inherent contradiction, defies conventional logic, and does not conform to expectations. The concept of parafiscality is neither entirely true nor entirely false because it should be distinct from taxation (otherwise the very concept of parafiscality would be completely useless), but it is not completely unrelated to taxation either. Parafiscality appears to be a ... paradox[1], meaning it is something that is absurd and contradictory, but despite this, it exists not only in Romania but also in other countries. However, in our case, it is even more paradoxical.

In the absence of a legal definition, the ambiguous nature of the compound word „parafiscal" allows for individual interpretation based on personal will and interests. Even explanatory dictionaries of the Romanian language fail to provide a clear definition for the compound word "parafiscal"; instead, they simply define the two separate words that make up this term along with its derivatives. We also consulted an „artificial intelligence" named Catgut, and it confirmed that while ChatGPT is helpful, it is currently just another machine that collects and processes data, which qualifies it more as an advanced search engine than as a generative artificial intelligence. Therefore, we do not believe that it would pass the Turing test, even if the interlocutor were less knowledgeable about taxation and parafiscal charges.

To establish credibility, this is the definition given by ChatGPT: *„Parafiscality pertains to the entities, charges, and levies established by public authorities or entities under their jurisdiction, but which are not considered traditional taxes or fees. These entities and charges are known as parafiscal because they are established and managed to fund particular activities or services, such as public health, environmental protection, social assistance, or economic development. Unlike taxes and duties, which are established and managed by the government, parafiscal charges are established and managed by designated organizations or authorities that are authorized to provide certain services or activities. Parafiscal charges can be collected either directly from citizens or from other organizations, or they can be incorporated into the prices of the products or services offered.*

[1] The term "paradox" originates from Greek, being formed by combining the words "para", meaning "beyond", and "dokein" meaning "to think." The resulting word denotes something that is contrary to expectations. Paradox Definition & Meaning - Merriam-Webster.

Parafiscal institutions and charges encompass a range of levies, including compulsory social contributions, taxes for environmental protection, vehicle registration fees, and charges aimed at financing the healthcare system".

From this definition (for which we equally express amazement and even appreciation but also partial disapproval) the following are not accurate: (i) the statement that „taxes and duties are established and managed by the government", because taxes and duties are established by law enacted by the parliament; (ii) the statement that parafiscal charges are established and managed solely by designated organizations and authorities that are authorized to provide certain services or activities, and (iii) the statement considering mandatory social contributions, which in our legal system are regulated not only by special laws but also by the Fiscal Code and the Fiscal Procedure Code, as parafiscal charges, without qualification.

„Para" serves as both a standalone word (either a noun or a verb) and as a morpheme that can be used as a prefix or a suffix to form **a wide range of adjectives and nouns**. In Romanian, „para" serves as a compositional element with various meanings that are relevant to our topic. These meanings include „hard," "very," "strong," "too numerous,"[2] "similar," "near," "next to," and "besides." But also "against", "to defend against", "to protect against..."[3]. We assert that parafiscal charges **share similarities with taxes and fiscal duties**, as they **are compulsory payments established by the authority**. However, they **differ from taxes and duties**, as they are **not administered under budgetary and fiscal laws**, and **are not primarily meant to be used for public expenses**. If parafiscal charges were subject to budgetary and fiscal laws, they would be categorized as mere taxes or fiscal duties.

Upon a thorough examination of the **parafiscal charges existing in our legal system**, it is evident that sometimes they stem from a contract rather than a law. In such cases, the law merely specifies the amount owed and the method of calculation, as is the case with mining, oil, and agricultural royalties. Additionally, some parafiscal charges, despite being non-fiscal, are treated as fiscal claims (such as the three types of royalties), while others are a peculiar blend of non-fiscal and fiscal components. For instance, the literary stamp generates income for the Writers' Union and writers, while penalties for late payment constitute income for the state budget, although categorized as non-fiscal income[4].

Parafiscal charges are certainly mandatory payments established by an authoritative means, but they do not fit squarely into either the purely fiscal or non-fiscal categories. Their legal regime is ambiguous and lacks uniformity, leaving precise rules for establishment[5] and administration wanting, with no applicability to all. This category comprises various taxes, contributions, and tariffs that are not explicitly referred to by this name in the Constitution, financial laws, fiscal laws, or budgetary indicator classifications. Indeed, the generic terms "parafiscality"[6] and "parafiscal charges" are not explicitly defined in any law. However, these terms are commonly used in Romanian legal doctrine[7] and case law[8], including decisions made by the Romanian common law courts and the Constitutional Court, which have held that such charges are constitutional[9]. Additionally, the concept of parafiscal charges is recognized in foreign legal literature[10], in laws (such as in France until 31 December 2003 and in Brazil to this day), and in the European Union's case law[11].

Based on the premise that any income stipulated by law as fiscal or non-fiscal can only have the nature and regime provided by law, *i.e.,* either fiscal or non-fiscal, but numerous payment obligations have a regime that cannot be classified as purely fiscal or non-fiscal, it follows, in our opinion, that it is not wrong to believe that the

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[2] Dicționar Explicativ al Limbii Române, Univers Enciclopedic, 2016, p. 850.

[3] Dicționar Enciclopedic, Editura Enciclopedică, 2004, vol. V, p. 193.

[4] See Annex 1 to the state budget laws from recent years).

[5] For a critical position on this issue, see G. Lăcrița, *Taxele nefiscale numite și taxe parafiscale* [Non-fiscal taxes also called parafiscal taxes], article from 13 March 2018, available on ***https://legestart.ro/taxele-nefiscale-numite-si-taxe-parafiscale/***.

[6] M. Bouvier, M.-C. Esclassan, J.-P. Lassale, *Finances publiques*, 8th ed., LGDJ, Paris, p. 846.

[7] M. Ștefan Minea, *Despre constituționalitatea taxelor parafiscale instituite în România [About the constitutionality of parafiscal taxes established in Romania]*, article available on ***https://www.ccr.ro/wp-content/uploads/2021/01/minea.pdf*** (accessed on 13.11.2022) and R. Bufan, *Tratat de drept fiscal, vol. I. Teoria generală a dreptului fiscal [Treaty of fiscal law, vol. I. General theory of fiscal law]*, Hamangiu Publishing House, 2016, p. 94-95.

[8] CCR dec. no. 475/2019 which qualified the "clawback tax" as a parafiscal charge and developed the concept.

[9] CCR dec. no. 310/2021 regarding the plea of unconstitutionality of the provisions of art. 21(1)(k) and 21(2) of GO no. 51/1998 regarding the improvement of the funding system of programs, projects and cultural actions.

[10] J. Grosclaude, Ph. Marchessou, B. Trescher, *Droit fiscal général*, 13th ed., Dalloz, 2020, p. 2.

[11] For example: The Judgment of the EU Court in case T-251/11 on December 11, 2014, and the Judgment of the CJEU in case C-74/18 on January 17, 2019, which ruled that "(...) when an insurance company established in a Member State offers insurance covering the contractual risks associated with the value of the shares and the fairness of the purchase price paid by the buyer in the acquisition of an undertaking, an insurance contract concluded in that context is subject exclusively to the indirect taxes and **parafiscal charges** on insurance premiums in the Member State where the policyholder is established."

terms "parafiscality" and "parafiscal charges" can be considered generic terms that refer to payment obligations imposed on certain entities with a regime that is different from that of traditional fiscal or non-fiscal revenues. We emphasize once again that although these terms are not explicitly stated in our country's laws, it would be incorrect to deny the existence of parafiscality and parafiscal charges based solely on this fact.

2. The French parafiscal model and its abandonment since 2004

Official documents of EU institutions use the terms fiscality and parafiscality[12], while an author from Brazil, a country where parafiscality is part of the national tax system, being regulated under that name[13], claims that the term "parafiscal" was already used in the financial and fiscal language of France in 1946[14], as evidenced by a document prepared by order of Robert Schuman[15], which inventoried the state's budgetary resources and identified certain payment obligations that were sometimes considered taxes, sometimes fees, and sometimes a combination of both[16].

According to a French author who wrote a book on parafiscality in 1977, the term has been used in the legal language of France since 1935. The author defines parafiscality as all taxes and duties that are collected for the benefit of public or private persons, other than the state, local communities, or public institutions. These taxes and duties are known as "assigned taxes" as they were paid directly to their designated beneficiaries at the time of collection[17].

In France, **parafiscality and parafiscal charges are now history** as they were replaced by compulsory levies with tax-like characteristics on 1 January 2004.

While they were in existence, there was a legal basis for establishing parafiscal charges in France (specifically, art. 4 of Ordinance no. 59-2 of 2 January 1959, in conjunction with a decree of 24.08.1961, which was later replaced by another on 30.10.1980). The laws that provided a legal basis for the establishment of parafiscal charges in France were repealed by Organic Law no. 2001-692 of 01.08.2001[18], with effect from 01.01.2004. The parafiscal charges[19], which **do not fall under the category of *"taxes of any nature"*** established only by law enacted by the Parliament, as provided by art. 34 of the Constitution of the French Republic, were replaced by levies with tax-like characteristics[20]. Under the previous legal regime in France which was in force until 2003, parafiscal charges were defined as compulsory charges imposed for the economic or social benefit of a private law entity or a public industrial and/or commercial enterprise[21]. In the language of both the law and taxpayers, the term "parafiscal" remains in use and is employed to describe and identify social security contributions, value added tax, and even corporate tax[22]. The doctrine also deems it essential to recall and examine parafiscality and parafiscal charges from both the legal and the historical perspective.[23]

We will examine them in greater detail because the French regulations may serve as a basis for comparison and/or a source of inspiration. Even though they have been repealed, they can still offer valuable insights into their regulation. According to article 4 of the 1959 Ordinance, parafiscal charges were "*collected for the economic or social* ***benefit of a legal entity of public or private law, other than the state, local authorities, and their public administrative institutions***". These charges were established by a "*decree of the Council of State*", not by the Parliament. Nonetheless, parafiscal charges could only be collected after January 1 of the year following their

[12] *https://ec.europa.eu/commission/presscorner/detail/ro/IP_86_628*, European Commission press release on General guidelines relating to "parafiscal" charges, IP/86/628.

[13] Samora dos Santos Silva, *Sistema tributário nacional: fiscalidade, parafiscalidade e extrafiscalidade*, article available on Sistema tributário nacional: fiscalidade, parafiscalidade e extrafiscalidade | Jusbrasil. According to the author, the Brazilian tax system has five sources *(pode-se afirmar que são cinco as espécies tributárias que compõem o sistema tributário brasileiro: impostos, taxas, contribuições de melhoria, contribuições especiais e empréstimos compulsórios),* but our tax system, as currently regulated, consists in taxes, duties and mandatory social contributions).

[14] M. Hugo da Rocha, *Contribuições parafiscais*, article available on Marcelo Hugo da Rocha - Jus.com.br | Jus Navigandi [952181].

[15] Les problèmes budgétaires (Dépenses publiques. Impôts, Trésor) of 1946 available on Ch. XIV. — Les problèmes budgétaires (Dépenses publiques. Impôts, Trésor) - Persée (persee.fr).

[16] Contribuições parafiscais - Jus.com.br | Jus Navigandi.

[17] F. Quérol, *La parafiscalité*, CNRS éditions, Paris, 1997.

[18] Organic law no. 2001-692 of 1 August 2001 on financial laws - Légifrance (legifrance.gouv.fr).

[19] J. Lamarque, O. Negrin, L. Ayrault, *Droit fiscal general*, LexisNexis, 2nd ed., 2011, pp. 74-79, 282 and 294-295.

[20] Art. 34: *The law establishes the rules regarding (…):* ***the basis, rate and methods of collecting taxes of all types;*** *the regime of issuing money.*

[21] J. Lamarque, O. Negrin, L. Ayrault, *op. cit.*, p. 75.

[22] Tout savoir sur la taxe parafiscale ! - ERP Gestimum. Everything you need to know about the parafiscal tax! - Gestimum ERP.

[23] J. Lamarque, O. Negrin, L. Ayrault, *op. cit.*, p. 75.

establishment and only if they were authorized by the annual budget laws. In simpler terms, a parafiscal charge could be established and collected only if:

- its collection was established for economic or social purposes;
- the recipient (assignee) was a legal entity of public or private law, other than the state, a local authority, or a public administrative institution thereof;
- the establishment of the parafiscal charge was done through a decree of the Council of State, which needed to be renewed every 5 years;
- the charge was authorized for each year by the budget laws.

3. The temptation to define and characterize the concepts of parafiscality and parafiscal charges

Parafiscal charges are challenging to define due to the numerous types that exist in our country, but also elsewhere (several hundred in Romania and over a thousand in other countries[24]). Additionally, they vary considerably in terms of content and administrative regulation. The revenue generated from these charges has a specific destination, and their recipients (usually, the entities responsible for their collection, but the charges may have other destinations or recipients[25]) are also designated by the act of establishment, which not always a law. In our legal system, these beneficiaries can be individuals, whether under public or private law, which further adds to the complexity of defining parafiscal taxes.'

Each parafiscal charge is named in a way that facilitates its identification, along with the corresponding good or service in whose price the charge is embedded, to a smaller or greater extent, the collecting entity, and its designated purpose. Examples include: literary stamp, parking fee, judicial stamp fee, etc.). Some of the parafiscal charges existing in Romania are listed below: fees charged for issuing certificates such as birth, marriage, death, and other documents, criminal or fiscal records, registration and identity documents, stamp duties for literary, artistic, musical, cinematographic, folkloric and judicial works, parking fees, fees for courses organized by public educational and other institutions, fees for the exclusion of *extra-muros* land from agricultural circuits, licensing fees, and fees and tariffs for services offered by various entities such as the State Office for Inventions and Trademarks (GO no. 41/1998), the Romanian Copyright Office (GD no. 401/2006 and GD no. 1086/2008) and the National Trade Register Office (Law no. 265/2022 on the Trade Register, Order no. 1082/C/2014, and GD no. 962/2017), etc.

We believe that defining parafiscal taxes in a universally accepted manner is a challenging, if not impossible, objective due to their vast number, diversity, and differing purposes for which they are established and administered. The Ministry of Public Finance's unclear stance on the matter contributed to this difficulty, as it defined a parafiscal charge as *„a tax charged by a state institution as its own income and established through a normative act approved by the government".* In other words, the Ministry of Public Finance excludes taxes established by law or order, as well as those not collected by a state institution, from the definition of parafiscal charges. Therefore, only the benefits established by government decision and whose beneficiaries are state institutions would constitute parafiscal charges.

The Larousse Dictionary defines a parafiscal charge as a compulsory tax paid by taxpayers, which is not intended to cover general interest expenses but rather specific and diverse expenses. This definition has allowed for the inclusion of social contributions, which are equivalent to mandatory social contributions in our tax system, as a type of parafiscal charge in France. To this day, social contributions are not considered taxes or fiscal duties in France. However, such a qualification is not possible in our legal system, as currently regulated, because mandatory social contributions are not only established by special laws, but are also subject to special rules of the Fiscal Code and collected under fiscal law (as outlined in art. 29 and art. 335 of the Fiscal Procedure Code, which defines the authority of fiscal bodies). It is worth noting that in France, the distinction between social

[24] In 2008, there were almost 500 such charges in Romania (adding to the 74 taxes and fiscal duties) but the minister of finance at that time declared that he did not know how many there were in reality. Ministers of finance have often announced that their number will be decreased. But even to this date their number exceeds 200. However, there are countries where the parafiscal system is much more extensive than that of Romania. For instance, Montenegro has approximately 1700 parafiscal charges. This information is available on New report on parafiscal charges and burdens: 12 recommendations to Government to improve business environment in Montenegro (ilo.org).

[25] As an example, art. 5 of GD no. 962/28.12.2017, which approves the fees for certain operations carried out by the National Trade Register Office and trade register offices attached to the courts, provides that „The National Trade Register Office and trade register offices attached to the courts collect fees for certain activities and/or funds with a specific purpose and transfer them to the account of the legal entities designated as beneficiaries by law."

contributions and taxes or fiscal duties has significant legal implications, as **taxes and duties** *„must be established by a law voted by Parliament, while social contributions are established by a simple government decree"*[26].

Professor Mircea Șt. Minea, quoting French authors as well, shows that: ***„parafiscal charges** refer to the monetary sums collected based on legal rules established specifically for this purpose. These charges are collected either by the tax authorities or directly by the entities that benefit from the respective revenues. However, they are paid into the accounts of specific public institutions or other collective entities, whether public or private, other than local public collectives or administrative establishments".*[27]

In another work, professors M. Șt. Minea and Flavius C. Costaș claim that *„taxes are collected with the dual aim of enforcing a specific conduct in the socio-economic sphere and **of financing the common and general needs of society, whereas parafiscal charges are solely collected to provide supplementary revenues to the legal recipients of these funds**"*[28].

The opinion of professor M. Șt. Minea is also found in two decisions of the Constitutional Court of Romania which qualify parafiscal charges as ***„genuine dismemberment of taxes and fiscal duties"***, being close to the value added tax given their method of collection.[29]

In an attempt to expand on the existing definition, **we define parafiscal charges** as mandatory payments imposed on individuals who purchase specific goods or services that, typically, have a unique destination apart from the state budget. These payments benefit collectors or other authorized entities through the authorization of collections made under this title. Parafiscal charges are not considered fiscal budget revenues and are not managed under fiscal law.

To put it simply, a parafiscal charge is a mandatory payment that is established by a constitutional or (special?) law empowered entity, in exchange for a product, service, or other advantage. This obligation is not administered under pure fiscal law and the collected amount represents income for the collecting entity or another entity established by the act that instituted the contribution. Or even more briefly, any compulsory levy that is not intended towards general interest budgets and is not managed under fiscal law or, as the case may be, is managed as purely non-fiscal income is a parafiscal charge. We do not believe that this category can encompass revenues that are non-fiscal but are treated as fiscal claims in their administration under the law, such as royalties from oil, mining, and agriculture.

4. What are the criteria for differentiating parafiscal charges from taxes and fiscal duties?

The term „parafiscal charges” implies a certain association with taxes and fiscal duties, and their compulsory nature and establishment through authoritative means provide supporting evidence for such a connection. A connection that is sometimes closer, sometimes distant. What would be the criteria for differentiating parafiscal charges from with a taxes and duties of a purely fiscal nature? We will present the parafiscal charges that we have identified, but it should be noted that our parafiscal system does not have universally applicable rules. Thus:

- If the compulsory payment is collected for the benefit of the state, a territorial administrative unit, or a public institution, and is included in their budget, it is considered a tax or a fiscal duty. We should note that sometimes the parafiscal charges bear more resemblance to taxes than to fiscal duties. This is because, similar to taxes, parafiscal charges do not require a direct and immediate exchange. However, there are instances where the collector may offer a service in exchange for the parafiscal charge, such as: OSIM, ONRC, ORDA. *Per a contrario*, if the entity that benefits from the income, *i.e.*,, the beneficiary, is a person under public or private law, then we can consider it as a parafiscal charge. In our parafiscal system, the rule is not always absolute as some revenues obtained from parafiscal charges may also be included in the state budget or territorial administrative units' revenues, like ORDA's revenues from specific activities such as expert reports and registration fees;
- We can identify a tax or fiscal duty when the income collected is intended to cover expenses in the general interest. If the mandatory payment is intended to generate income for specific entities, whether public or private, then it has a parafiscal nature. There are exceptions to this rule as well, as many parafiscal charges

[26] É. Anceau, J.-L. Bordron, *Histoire mondiale des impôts. De l`Antiquité à nos jours*, Passés/Composés, 2023, p. 10.

[27] M.Șt. Minea, *Despre constituționalitatea taxelor parafiscale instituite în România [About the constitutionality of parafiscal taxes established in Romania]*, article available on *https://www.ccr.ro/wp-content/uploads/2021/01/minea.pdf*.

[28] M.Șt. Minea, C.F. Costaș, *Dreptul finanțelor publice [Public finance law]*, vol. II, p. 368.

[29] CCR dec. no. 310/2021 and CCR dec. no. 495/2017.

are collected and considered as revenues for state or local community budgets (such as licensing fees, court stamp duties, etc.).

- If the levy is administered under pure fiscal law, then we are facing a tax or a fiscal duty. On the contrary, if the levy is administered outside the rules of fiscal law and is considered non-fiscal income, the levy has the nature of a parafiscal charge. However, this rule cannot always be considered as absolute.

We would like to recall that some parafiscal charges (not few) **are actually levied on consumers when they purchase products and/or services, and therefore they can be considered as additional taxes on consumption.** A simple example that can be verified is the eight types of stamps established by Law no. 35/1994, which include literary, cinematographic, theatrical, musical, folklore, fine arts, architectural, and entertainment stamps[30]. Here, it is worth noting the combination of regulations involved, starting with the law, followed by methodological norms issued by the Ministry of Culture and the Ministry of Public Finance, and the mix of beneficiaries of the parafiscal charges: the stamp is collected by the unions of creators, but the state budget receives **a penalty of 0.2% for any amounts that are not transferred on time.** Collections resulting from literary, cinematographic, theatrical, musical, folklore, fine arts, architectural, and entertainment stamps are not subject to taxation. But according to art. 5(3) of the law, if the amounts collected and due are not paid on time, a penalty of 0.2% is applied for each day of delay, **which is paid to the state budget.** Given the circumstances, determining the legal nature of the stamp regulated by Law no. 35/1994 appears to be an arduous task. Nevertheless, it is worth noting that the Constitutional Court of Romania had to assess the constitutionality of the stamp duty established by this law and found it to be constitutional.

5. What are the advantages and disadvantages of parafiscality and parafiscal charges

As previously stated, the state (at least the Romanian state) is inclined to maintain parafiscal charges. However, we acknowledge that from both the perspective of the state and the parties involved, parafiscal charges have both advantages and disadvantages. Like taxes and fiscal duties, they have their strengths and weaknesses, constituting both a benefit and a detriment at the same time.

[30] Law no. 35/1994, the 8 categories of stamps that form the object of this law are established as follows:

the literary stamp, worth **2% of the sale price of a book** and which is added to the book price;

the cinematographic stamp, worth **2% of the sale price of a ticket** and which is added to the ticket price;

the theatrical stamp, worth 5% of the sale price of a ticket and which is added to the ticket price;

the musical stamp, worth 5% of the sale price of a ticket and **2% of the sale price of any record, any printed material, video or audio tape of a musical nature**, other than folklore records, which are added to the respective prices;

the folklore stamp, worth **5% of the sale price of a ticket and 2% of the sale price of any record,** any printed material, video or audio tape, which are added to the respective prices;

the fine arts stamp, worth 0**.5% of the sale price of the work of art**, and which is added to the respective work of art price;

the architecture stamp, worth **0.5‰ of the investment value**, regardless of the beneficiary or its destination;

the entertainment stamp, worth **3% of the sale price of a ticket** and which is added to the ticket price.

The literary stamp is applied to each copy of fiction books sold through units of any kind, either published in Romania or not.

The stamps provided for in paragraph (1) letters b) - e) are applied to each ticket sold at cinematographic, theatrical, musical and folklore performances organized in the country and are added to the ticket sales price.

The stamp provided for in paragraph (1) letter g) **is added to the value of the investment and is paid together with the building permit fee**.

The stamp provided for in paragraph (1) letter h) is applied to each ticket sold at artistic and sport performances, other than the ones subject to other stamp duties, as well as at circus performances, organized in the country and are added to the ticket sales price.

Article 2 - (1) The units responsible for collecting the stamp fees are required to transfer the collected amounts, which represent the value of the stamp, on a monthly basis to the accounts of the creators' organizations. The transfer process should follow the methodological norms that have been developed by the Ministry of Culture and Cults, in collaboration with the Ministry of Public Finance. The creators' organizations should also be consulted during the development of these norms.

Article 3 - **The amounts due to the creators' organizations will be used for**:

supporting cultural projects of national interest;

participation in interpretation and creation contests in the country and abroad;

promotion of actions with the participation of Romanians abroad;

supporting and protecting cinematographic, theatrical and musical art;

supplementing the funds intended to support the activity of young creators, performers and artists;

material support for retired creators, performers and artists;

material support of specialized magazines belonging to creative unions;

supporting the registration of valuable works of art in the national and international circuit;

honoring and perpetuating the memory of Romanian cultural personalities and national minorities, both in the country and abroad;

enhancing the folklore and ethnographic heritage of Romania;

financial support of shows in which creative works are presented whose authors are Romanians or representatives of national minorities in Romania;

financial support of awards given to creators and performers.

- **Our analysis reveals the following advantages of parafiscality:**
  - it allows for some institutions and activities to be taken off the budget, thereby reducing budgetary pressure (for instance, OSIM is self-financing, the health system benefits from increased funds due to the clawback tax, social and cultural actions, etc.);
  - they are easier to establish compared to taxes and fiscal duties since they are not subject to the same constraints and rigorous conditions required for the establishment and modification of taxes and fiscal duties (as stated in art. 4 of the Fiscal Code);
  - the collection of parafiscal taxes is usually carried out by the beneficiaries themselves, thereby relieving the fiscal bodies of their administration, and the use of the revenues is more flexible than public funds in the budgetary regime;
  - they are often hidden in the price of goods and services, which means that payers are less likely to perceive them as tax burdens, and their complaints are typically directed at the suppliers or service providers who include them in their prices;
  - the non-payment of parafiscal charges when due may not result in the same sanctions as those applied to taxes and fiscal duties, making them less burdensome for payers. However, it is important to highlight that in some cases, parafiscal charges are considered similar to taxes and fiscal duties in terms of administration and fiscal claims.
- **We have identified the following disadvantages of parafiscality:**
  - in our fiscal and parafiscal system, the boundary between taxes, fiscal duties, and parafiscal charges is fragile and permeable. Some taxes classified as parafiscal charges are treated as fiscal claims, creating legal uncertainty and insecurity;
  - parafiscal charges that are not established by law deprive the legislative power of the ability to regulate their establishment;
  - in our opinion, parafiscal charges can only be established exceptionally through legislation; otherwise, they are unconstitutional;
  - parafiscal charges that are not established by law (or by local council decisions, where permitted by law) are unlawful;
  - since parafiscal charges are not administered and used in a strict fiscal-budgetary regime, the collection and use of these taxes are typically handled by the beneficiaries. This makes it challenging to monitor and control their realization and use, and the lack of transparency can lead to weak or non-existent oversight by both the beneficiaries and the state.
  - for the same reason, it is impossible to determine the exact proportion of parafiscal revenues in the overall revenue generated by the state and local communities, as well as in the country's gross domestic product. Additionally, it is unclear how much money are spent for such charges by those who are obliged to pay them.
  - they are bureaucratic, burdensome and time-consuming for their payers;
  - they are numerous and lack uniform rules.

6. Constitutionality and/or unconstitutionality of parafiscal charges

There are authors who claim, without reservations, that parafiscal taxes are constitutional, and among them is professor Mircea Ștefan Minea, former judge of the Constitutional Court. Arguing his opinion, Professor Mircea Minea shows that **the constitutional basis for the establishment and collection of parafiscal charges is found in Article 139(3) of the Constitution**, the text being introduced on the occasion of the revision of the Fundamental Law in 2003, providing that ***„The amounts representing contributions to the establishment of funds are used, as provided by law, only according to their destination”***.

In Professor Minea's opinion, this text ***„came to cover and confer constitutional consecration on an economic-financial reality observed during the economic and social evolution of the country on its way to strengthening the rule of law and the market economy"*** *and meant* ***„completion of the initial text with the aim of including in the constitutional parameters other regulations through which financial levies can be instituted***

and collected for the establishment of funds to finance various actions, services and works, other than those that can be supported from the state budget only"[31].

If this is the case, this means that until the adoption of Law no. 429/2003 revising the Romanian Constitution, there was no constitutional basis for the establishment and collection of parafiscal charges. But we believe that even after the revision of the Constitution, there are constitutional or, as the case may be, legal problems pertaining to some of the parafiscal charges.

The Constitutional Court had to examine the constitutionality of such a tax and decided, in three decisions (no. 495/2017, no. 892/2012 and no. 1494/2011) that the tax subject to control and which was analyzed (literary stamp) was constitutional. In justifying these decisions, the Court noted that *«cultural stamps regulated by Law no. 35/1994* ***are not taxes, but special duties, which the doctrine calls parafiscal charges*** *and which present themselves in a diversity of forms, a fact that also explains their heterogeneous regulation.* ***Parafiscal charges established based on legal rules adopted for this particular purpose refer to the monetary sums collected either by the tax authorities or directly by the entities that benefit from the respective revenues and paid into the accounts of specific public institutions or other collective entities, whether public or private, other than local public collectivities or administrative establishments*** *(...) The specificity of parafiscal charges is that, like taxes,* ***they are mandatory,*** *being established by law, but, unlike taxes and fiscal duties, they are constituted* ***as extra-budgetary income*** *of certain* ***legal entities under public or private law.*** *They have the same origin as taxes, but although they follow a similar legal regime, their purpose is partly different. (...) the normative act establishing the parafiscal charges is, as a rule, the work of the central public authority (law or government ordinance), but it is possible that such charges are also established by the local public administration authority (by decisions of local councils). Also, the parafiscal charges are monitored and collected either through the tax administrations or directly by the legally designated beneficiaries, in whose accounts they are concentrated. The techniques and procedure by which parafiscal charges are collected and paid are very close to those used in fiscal matters.* ***Due to these particularities, parafiscal charges are considered to be genuine „dismemberments" of taxes and fiscal duties. The difference is that, while taxes are collected with the dual aim of enforcing a specific conduct in the socio-economic sphere and of financing the common and general needs of society, parafiscal charges are solely collected from individuals and/or legal entities specifically targeted by the legal rules establishing such charges, solely to provide supplementary revenues to the legal recipients of these funds»***[32].

CCR ruled in an almost identical manner in dec. no. 310/2021 which reviewed (and rejected) the plea of unconstitutionality of the provisions of art. 21(1)(k) and art. 21(2) of GO no. 51/1998 regarding the improvement of the funding system of programs, projects and cultural actions by way of a mandatory contribution similar to the literary stamp, showing that:

- in spite of differences which cannot be challenged and of their different purpose, parafiscal charges have the same origin as taxes, the normative act establishing the parafiscal charges being, as a rule, the work of the central public authority (law or government ordinance), but it is possible that such charges are also established by the local public administration authority (by decisions of local councils);
- the techniques and procedure by which parafiscal charges are collected and paid are very close to those used in fiscal matters and from this perspective, parafiscal charges follow a regime similar to value-added tax, as they are collected by the distributors of taxable products from the acquirers/beneficiaries of such products and paid into the accounts of the beneficiary entities provided by law;
- due to these particularities, parafiscal charges are genuine „dismemberments" of taxes and fiscal duties. The difference is that, while taxes are collected with the dual aim of enforcing a specific conduct in the socio-economic sphere and of financing the common and general needs of society, parafiscal charges are solely collected from individuals and/or legal entities specifically targeted by the legal rules establishing such charges, solely to provide supplementary revenues to the legal recipients of these funds.

We express reservations regarding the opinion of professor M. Șt. Mine and the CCR case law regarding the constitutionality of parafiscal charges as a whole, considering that many of them are unconstitutional, as we will show below.

[31] M.Șt. Minea *Despre constituționalitatea taxelor parafiscale instituite în România [About the constitutionality of parafiscal taxes established in Romania]*, article available on *https://www.ccr.ro/wp-content/uploads/2021/01/minea.pdf*, accessed on 13.11.2022.

[32] CCR dec. no. 495/2017.

Before presenting our reservations and arguments, it is important to acknowledge that parafiscal charges are an established part of legal life that cannot be disregarded. There are a large number (hundreds) of parafiscal charges, each with unique legal regimes, making it difficult to categorize them under a single pattern. Some parafiscal charges provide significant benefits to their beneficiaries, such as the fees charged by OSIM, representing the single source of funding of this institution, or contributions from consumers to support green energy producers. However, in some cases, the benefits are so minimal that the costs incurred exceed the income generated. While parafiscal charges can help institutions to be funded from sources other than the state budget and state aid to be provided indirectly, thus relieving budget pressure, they are often criticized in the business world for being burdensome for citizens and businesses, consuming time and resources, and lacking proper control. The authorities are aware of both the advantages and disadvantages of these taxes, and are striving to decrease their quantity. However, the outcomes in our country thus far have not been particularly encouraging[33].

The following are the reasons for our reservations regarding their constitutionality:

- in accordance with art. 56 of the Romanian Constitution, ***citizens have the obligation to contribute to public expenses through taxes and duties, any other contributions being prohibited, apart from those established by law, in exceptional circumstances***[34]**.**
- art. 137 and 139 of the Romanian Constitution strengthen the principle **of legality of taxation** (art. 137)[35] and **the prohibition to establish taxes, contributions and any other revenues to the state budget other than by law** (art. 139)[36]. For this purpose, the doctrine and the Constitutional Court have repeatedly affirmed that in adhering to the principle of legality in fiscal matters and using the term „only" in art. 139 of the Constitution, **the legislature aimed to prevent the establishment of taxes, duties, and contributions through instruments inferior to the law, such as governmental decisions, and to assert the budgetary revenues' legal nature**[37].
- Last but not least, rather the opposite, **there is Article 56(3) of the Constitution which prohibits any other contributions, apart from those established by law, in exceptional circumstances.** This means that **every time mandatory "other contributions" are instituted** (whatever they are and whoever their beneficiary is), including parafiscal charges, the exceptional circumstances that require their establishment must exist, be shown and argued/substantiated[38] and we also believe that the „exceptional circumstances" justifying the establishment of „other contributions" can only be limited in time, that is, parafiscal charges can only be temporary.

This means that:

- all parafiscal charges **that are not established by law are unlawful**;
- and **by law**, parafiscal charges can **only be established in exceptional circumstances**;
- the exceptional circumstances that allow the establishment of a contribution of this nature is **a matter of appreciation of the legislator**, but in order to be able to establish it, **the legislator must justify that such a circumstance exists**;
- parafiscal charges can only be temporary;
- **the laws by which parafiscal charges were established outside of the exceptional circumstances** referred to in art. 56(3) of the Constitution **are unconstitutional**.

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[33] Law no. 1/2017 repealed a number of 102 such charges.

[34] **Article 56 - Financial contributions**

(1) Citizens have the obligation to contribute to public expenses, through taxes and duties.

(2) The legal taxation system must ensure the fair settlement of fiscal burdens.

[35] **Article 137 - The financial system**

The formation, administration, use and control of the financial resources of the state, of administrative-territorial units and of public institutions are regulated by law.

Any other contributions are prohibited, apart from those established by law, in exceptional circumstances.

[36] **Article 139 - Taxes, duties and other contributions**

Taxes, duties and any other revenues to the state budget and the state social insurance budget are established only by law.

Local taxes and duties are set by local or county councils, within the limits and as provided by law.

The amounts representing contributions to the establishment of funds are used, as provided by law, only according to their destination.

[37] I. Muraru, E.S. Tănăsescu, *Constituția României. Comentarii pe articole [Constitution of Romania. Comments per articles]*, C.H. Beck Publishing House, 2008, p. 560-561.

[38] In France, for example, **when establishing a parafiscal charge** by Decree no. 97-1263, the following substantiation was provided: "With effect from 1 January 1998, a parafiscal charge on advertisements broadcast on sound radio and television [('the charge on advertising companies')] shall be introduced **for a period of five years** to **fund an aid scheme for the benefit of those holding a licence to provide sound radio broadcasting services** in respect of which the commercial revenue deriving from broadcasts of brand or sponsorship advertising is less than 20% of the total turnover. The objective of this charge is to promote radio broadcasting." Quoted from the CJEU Judgment of 22 December 2008, rendered in case C-333/07 available at *https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62007CJ0333*.

However, these are also reasons why we believe that their regulation by law is necessary.

7. Examples of parafiscal charges, collecting entities, beneficiaries and regimes. Conclusions

We are hesitant to accept that parafiscal charges can be established through means other than the law or other acts having the effect of a law. However, we will provide examples of collecting entities and of parafiscal charges. It is important to note that the names given to these charges are not indicative of their classification as parafiscal charges. We are presenting the following examples to illustrate the diversity and complexity of defining parafiscal charges and for educational purposes. These examples are also significant in terms of the revenue they generate.

As mentioned earlier, one of the advantages of parafiscal charges is their contribution to the relieving the burden of certain public entities or institutions on the state budget. Additionally, it should be noted that some public entities collect parafiscal charges, which ultimately become income for the state budget or other entities. Thus:

- **The State Office for Inventions and Trademarks (OSIM)** which is *„a specialized body of the central public administration, with legal personality under the Ministry of Economy (...) single authority on the territory of Romania in ensuring the protection of industrial property",* and *„the operating expenses of the State Office for Inventions and Trademarks are financed from its own revenues*" (art. 1 and 10 of GD no. 573/1998 on the organization and operation of the State Office for Inventions and Trademarks). Its revenues are represented by the fees it collects and the amount of which is established by a normative act with the effect of law (GO no. 41/1998). These represent „additional revenues" that OSIM uses to finance its own activities entirely, and they can also be utilized for funding research and innovation initiatives by universities and/or research institutions (as stipulated in art. 3 of GD no. 573/1998). Thus, it is worth noting that recipients of the parafiscal charges collected by OSIM may include both individuals and legal entities beyond the agency itself. Close to fiscal duties, because they are paid in return for services rendered, they are in reality parafiscal charges.
- **The Romanian Copyright Office (ORDA)** is also a specialized body of the central public administration subordinated to the Government (GD no. 401/2006[39]), is financed from the state budget through the Ministry of Culture, but for the specific activities provided, it collects sums of money (the rates being established by GD no. 1086/2008) which are revenues of the state budget, after collection they are paid by ORDA to the state budget. While parafiscal charges are similar to fiscal duties in that they are charged for services provided by a public institution, they are not established by law and are not administered under fiscal law. Therefore, they can only be classified as parafiscal charges. However, not being established by law, their legality is questionable.
- **The National Office of the Trade Register (ONRC)** is also a public institution fully financed from the state budget (art. 19 of Law no. 265/2022 on the trade register). For the services provided, it collects sums of money in the amount established by Order of the Minister of Justice. But according to art. 5 of GD No. 962/2017, which approves the fees for certain operations carried out by the ONRC, it collects tariffs and fees for certain activities and/or funds with a specific purpose and transfers them to the account of the legal entities designated as beneficiaries by law[40]. Furthermore, the amounts collected appear to be subject to the same regulations as fiscal claims, as stated in art. 4 of GD no. 962/2017[41]. If overpayments were made, they must be refunded to the payers according to the provisions outlined in the Fiscal Procedure Code. They are not established by law, so their legality is questionable.
- **The National Gambling Office (ONJN)** collects fees/tariffs with an even more unclear regime. And we note that here we mainly deal with the contributions they collect for the purpose of financing a social activity of their own (that of preventing gambling addiction). Thus, based on art. 10(5) of GEO no. 77/2009 regarding the organization and operation of games of chance, amended by GEO no. 114/2018 regarding, among other things, fiscal and budgetary measures), in addition to **ONJN*, „an activity was established*** *to* ***promote compliance with the principles and measures regarding socially responsible gambling*** *(...)* ***fully financed from own revenues****, in accordance with the provisions of Law no. 500/2002 on public finance".* This one **activity is fully financed from own resources obtained through the (mandatory) contributions of gambling organizers**. **The nature of these revenues is unclear**, because on the one hand, they **are not taxes, duties or contributions falling under the**

[39] GD no. 1086/10.09.2008 regarding the establishment of tariffs for the operations carried out by the Romanian Copyright Office for a fee and for the approval of the Methodological Norms regarding the level of establishment, distribution and use conditions of the incentive fund for the staff of the Romanian Copyright Office.

[40] Art. 5 (1) The National Trade Register Office and trade register offices attached to the courts collect fees for certain activities and/or funds with a specific purpose and transfer them to the account of the legal entities designated as beneficiaries by law.

[41] Art. 4 Any overpayments will be returned according to the provisions (...) of the Fiscal Procedure Code (...).

category referred to in the Fiscal Code, and on the other hand, by the law that establishes them, **they are fiscal claims,** which means that they cannot be used outside budgetary purposes and according to the destination assigned by law. Moreover, **in the budget laws, they do not appear under this name either in the chapter "fiscal revenues" or in the chapter „non-fiscal revenues".** The „fiscal revenues" chapter of Annex no. 1 to the budget laws only includes *„gambling income taxes"* (budget indicator 030122) and *„gambling taxes"* (budget indicator 160101) and *„taxes and fees for issuing operating licenses and authorizations"* (budget indicator 160103), and if we included them in the category of „social contributions" it would mean adding to the law (which defines them in art. 7(10) of the Fiscal Code), which is not possible. **These *„contributions"* are not even listed in Annex no. 1 to the budget laws** and we do not think it is possible to change the name used by the legislator („contributions") to that of duty, nor to qualify or assimilate them with the duty as defined by the legislator, that of payment for the service provided by a public institution and this, because if the „activity" of prevention could be considered a provision of services, **then the payment of the service should be borne by the beneficiaries, *i.e.,* the players,** and not by the game organizers.

- The activities „established" and for which the source of income is created by art. 10(4)-10(6^1) of GEO no. 77/2009 aims to prevent gambling addiction and include the programs for the protection of young people and players against gambling, the prevention and treatment of gambling addiction, the realization of responsible promotion and advertising, the settlement of disputes between a game organizer and a player, as well as for the provision of personnel expenses related to its own activity in the maximum limit of 30% of the total amounts related to the activity. The own revenues are established on account of the contributions established (imposed) on gambling organizers as follows:
  - for class I licensed remote gambling organizers, the sum of 5,000 euros annually;
  - (ii) for legal entities directly involved in the field of traditional and distance games of chance licensed in class II, the sum of 1,000 euros annually;
  - (iii) for class III state monopoly distance games, the sum of 5,000 euros annually;
  - (iv) for licensed traditional gambling organizers, the sum of 1,000 euros annually.

The deadline for payment of contributions is for the first year of license, 10 days from the date of approval of the licensing documentation, and for subsequent years, until January 25 of each year. In the event of the termination of the validity of the license, for any reason, for the license year in which the factual situation occurs that has the effect of termination of its validity, the annual contribution is due in full. These revenues (which, according to the law, are ONJN's own revenues) **have the nature of budgetary fiscal claims** and **are enforced according to the rules of the Fiscal Procedure Code for fiscal claims based on the ONJN notification which is an enforceable title**.

However, we note that:

- according to art. 1(5) of GEO no. 20/2013 regarding the establishment, organization and operation of the National Gambling Office, „**The Office has its own budget and is financed from the state budget, through the budget of the Ministry of Public Finance**", the ONJN president having the capacity of credit authorizer.
- art. 10(5) of GEO no. 77/2009 regarding the organization and operation of games of chance ordered the „establishment of an activity" for which revenues are created distinct from those of ONJN which is financed from the state budget.
- the law establishing the „contribution" fails to show or justify the „exceptional circumstances" that justified its establishment, as provided by art. 56(3) of the Constitution, so that the constitutional requirement for its enactment has not been met. In other words, art. 10(4)-10(6^1) are, in our opinion, unconstitutional. Until a potential intervention of the Constitutional Court or the legislator, the contribution exists, is mandatory and must be paid by the organizers of games of chance.

A conclusion in relation to such „contributions" is that it is impossible to determine their legal nature.

The evidence presented above shows that tax charges vary greatly, even in cases where they should be similar due to the collecting entities and the types of activities involved, resulting in different legal regimes. This makes it difficult, or even impossible, to determine their legal nature and raises questions regarding their constitutionality or legality.

In our country, the following are considered to belong to the category of parafiscal charges (among others):

- oil, mining and agricultural royalties (noting that they are assimilated to fiscal claims in terms of their administration (art. 2 of the Fiscal Procedure Code);
- monetary contributions (*e.g.*: the contributions of the organizers of the licensed games of chance established for the purpose of financing from their own resources the ONJN activity for compliance with the

principles and measures regarding games of chance

- authorization and licensing fees and tariffs (but the budget laws include them in the category of fiscal revenues – see Annex 1;
- judicial fees;
- cadastral taxes and fees;
- fees for the definitive removal of land from the agricultural circuit;
- fees for participation in public procurement through SEAP;
- taxes and tariffs in the field of environment, forests and hunting funds;
- taxes and tariffs in the field of culture (literary stamp, musical stamp);
- tuition and professional qualification fees and charges;
- fees and charges for forensic services (28);
- fees for services in the field of foreign affairs (consular fees);
- competition fees levied by the Competition Council;
- fees for sanitary and veterinary services;
- fees for services of the Ministry of Administration and Interior (registrations, examinations, issuance of driver's licenses);
- tariffs in the field of electronic communications.

The beneficiaries of parafiscal taxes are determined by the acts that establish them, which can be collective, public, or private entities. These acts are typically laws, including government ordinances, as well as decisions made by local councils that must „comply with the provisions of the Fundamental Law".

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WHAT HAPPENS WITH GOODS RECEIVED FREE OF CHARGE ON THE OCCASION OF PROTOCOL EVENTS IN THE EXERCISE OF THE MANDATE OR PUBLIC OFFICE?

Elena Emilia ȘTEFAN*

Abstract

One of the concerns of the public authorities governing us should, without doubt, be to make sure that, the trust of the population in the state institutions is increased by means of the activity carried out in respect of the country administration. From this perspective, the article proposes for analysis a current topic on the transparency of the activity of public authorities, viewed from the perspective of the citizen who may wonder if a public official or a civil servant who receives a good during his mandate or position can still be objective?

In this respect, we consider that the topic is of interest both to legal specialists and to citizens, future public officials or civil servants, as it provides information on how they should act if they find themselves in such a situation and to avoid conflicts of interests.

The study also presents and summarizes information on French legislation regarding the analyzed topic in order to be able to know, from the point of view of comparative law, some aspects related to the approach of this rather sensitive issue of gifts and invitations that can be offered or requested by a public servant and the legal risks that are entailed. Our analysis will emphasize the importance of respecting both the legality of the activity of public authorities and integrity, seen as a fundamental ethical value.

Keywords: *public authorities, conflict of interests, transparency, integrity, protocol.*

1. Introduction

The persons who temporarily hold a position in the state apparatus, public official or civil servant, shall have, in addition to the obligation to comply with the law, the obligation to be honest. In this way, citizens will perceive public administration as a standard of legality and appropriate behavior, in the light of public officials or civil servants. From this point of view, the Administrative Code regulates the general principles[1] of public administration[2] in the first place and the institutions in the second place.

The conflict of interests shall mean: „the situation whereby a person exercising a public office has a personal patrimonial interest, which could influence the objective fulfillment of the duties incumbent on him/her according to the Constitution and other normative acts[3]". Furthermore, the Administrative Code regulates the obligation to fulfill the legal regime of the conflict of interests[4] and of incompatibilities for public officials and civil servants, as well as the fulfillment of the rules of conduct. From the analysis of this normative act, emerges, among others, the philosophy of a traditional principle of the administrative law, namely the subordination of citizens to public authorities[5].

According to the doctrine, „the Constitution uses the terms of public positions and offices[6]". The scope of this study is to analyze the legal regime of the goods received free of charge on the occasion of protocol events, in the exercise of the mandate or office, in order to know the risks entailed by such situation. We do not want to

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[1] In detail, on the principles of the law, in paperwork E. Anghel, *General principles of law*, in LESIJ.JS XXIII nr. 2/2016, Lex ET Scientia International Journal - Juridical Series, pp. 364-370 and E. Anghel, *The lawfulness principle*, published in the proceedings CKS-eBook 2010, vol. I, Pro Universitaria Publishing House, Bucharest, 2010, ISSN 2068-7796, p. 799.

[2] On the case law of the ECJ regarding public administration, see R.M. Popescu, *ECJ case-law on the concept of "public administration" used in article 45 paragraph (4) TFUE,* in proceeding CKS e-book 2017, pp. 528-532.

[3] Art. 70 of Law no. 161/2003 regarding certain measures to ensure transparency in the exercise of public offices and positions and in the business environment, for preventing and sanctioning corruption, published in the Official Gazette of Romania no. 279/21.04.2003.

[4][„The principles underlying the prevention of the conflict of interest (...) are the following: impartiality, integrity, transparency of decision and supremacy of public interest"] - D. Apostol Tofan, *Drept administrativ Part I,* 2nd ed., C.H. Beck Publishing House, Bucharest, 2008, p. 177.

[5] On public authorities, see M.C. Cliza, *Drept administrativ Part I,* Pro Universitaria Publishing House, Bucharest, 2011, pp. 12-20.

[6] I. Muraru (coord.), A. Muraru, V. Bărbățeanu, D. Big, *Drept constituțional și instituții politice. Caiet de seminar*, C.H. Beck Publishing House, Bucharest, 2020, p. 117.

develop more in this article on the proposed subject, by analyzing the EU legislation[7] on the legal regime of protocol goods or the ECtHR case law or the CJEU case law, this will be done in a future research.

The paperwork has the following structure: on the one hand, analyzes the national legislation and verifies whether public authorities comply with legal obligations and, on the other hand, provides legal information on the analyzed topic.

2. Legal regime of the goods received free of charge on the occasion of protocol events in the exercise of the mandate or office

The legal framework for the measures concerning the goods received free of charge on the occasion of protocol events in the exercise of the mandate or office consists of Law no. 251/2004 on the measures concerning goods received free of charge on the occasion of protocol events in the exercise of the mandate or office[8] and of Government Resolution no. 1126/2004 for the approval of the Regulation for the implementation of Law no. 251/2004[9].

2.1. Who are the persons obliged to declare goods received?

Law no. 251/2004 (...) provides the following *rule*: „the persons holding the capacity of public official and those holding public offices, magistrates and those assimilated to them, persons holding management and control positions, civil servants within public authorities and institutions or of public interest, as well as the other persons who have the obligation to declare their assets, according to the law". Therefore, the law obliges several categories of persons to declare goods they received, by emphasizing the holding by them of a position or a certain capacity.

2.2. What goods should be declared?

The aforementioned persons shall be bound to declare, within 30 days as of the receipt, the goods received free of charge, within certain protocol events in the exercise of the mandate or office, on the contrary, they shall be held liable for[10].

The law also provides an *exception*: „medals, decorations, badges, orders, scarves, collars and the like received in the exercise of a public office, as well as office objects with a value of up to 50 euros" shall not be declared. By way of interpretation[11], we note that the exception takes into account, on the one hand certain goods in such a category, expressly nominated, as well as other similar ones, and on the other hand, the threshold value of 50 euros for office objects.

2.3. What is the content of the declaration?

The declaration together with the good/goods is submitted to a committee especially appointed for this purpose. The declaration shall contain the following mentions: surname, name, workplace and position held by the person in question; the detailed description of the submitted good; description of the circumstances in which the good was received; date and signature.

2.4. What is the procedure for declaring the respective goods?

The law requires that each authority, institution or legal entity sets up a commission to assess and make an inventory of the goods the persons in question received free of charge, within protocol events in the exercise of

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[7] In what concerns the EU legal order, see A. Fuerea, *Manualul Uniunii Europene*, VIth ed., revised and supplemented, Universul Juridic Publishing House, Bucharest, 2016, pp. 228-252 or on the EU policies and competencies, see A.-M. Conea, *Politicile Uniunii Europene. Curs universitar*, Universul Juridic Publishing House, Bucharest, 2020, pp. 10-20.

[8] Law no. 251/2004 on the measures concerning goods received free of charge on the occasion of protocol events in the exercise of the mandate or office, published in the Official Gazette of Romania no. 561/24.06.2004.

[9] Government Resolution no. 1126/2004 for the approval of the Regulation for the implementation of Law no. 251/2004 (...), published in the Official Gazette of Romania no. 680/28.07.2004.

[10] In what concerns the liability of constitutional judges, see Barbu S.-G., A. Muraru A., V. Bărbățeanu V., *Elemente de contencios constituțional*, C.H. Beck Publishing House, Bucharest, 2021, pp. 46-49.

[11] In what concerns the interpretation of the legal regulation, see N. Popa (coord.), E. Anghel, C. Ene-Dinu, L.-C. Spătaru-Negură, *Teoria generală a dreptului. Caiet de seminar*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2017, pp. 197-202.

the mandate or office. The head of the institution shall appoint the respective commission, consisting of 3 specialized persons, the commission's term of office being of 3 years with a single renewal possibility.

All goods in this category shall be registered and the commission shall propose to the head of the institution to resolve the situation of the respective good by the end of the year. The assessment of the good shall be performed by the commission, by taking into account the market price, but experts in the field can also be consulted, who were selected for this operation, according to the law.

There are two possibilities, depending on the value of the good, the threshold established by the law being of 200 euros:

Possibility 1- if the value of the goods established by the commission is higher than the equivalent in RON of the amount of 200 euros, the persons who has received the goods can request to keep them, by paying the difference. If the value of the goods established by the commission is under the equivalent of 200 euros, they shall be kept by the recipient.

Possibility 2- If the person who has received the goods has not requested to keep them, upon the commission's proposal, the goods remain in the assets of the institution or can be transferred free of charge to a relevant public institution or sold at auction, according to the law. By capitalizing such goods, the amounts obtained shall represent income to the state budget, local budget or the budgets of authorities, public institutions or legal entities.

In the recitals[12] of the draft law, the threshold value of goods was proposed to be 300 euros and following the legislative process, it remained at 200 euros.

2.5. What are the obligations of public authorities?

The law requires the authorities, institutions and legal entities to publish the list of the submitted goods and their destination, on the website of the respective legal entity or in the Official Gazette of Romania, Part III, at the end of the year.

3. Case study

3.1. Case study – national plan

In order to be able to note practical applicability of the law, we have conducted a case study by researching the website of several public authorities to see if they display on the institution's website information on the goods received on the occasion of certain protocol events, in the exercise of the mandate. Representative public authorities were selected at central level: The Chamber of Deputies and the Presidential Administration. The time period that we have documented covers 3 years, respectively 2020-2022.

3.1.1. The Chamber of Deputies

The scientific research performed showed that no declaration was filed in what concerns the receipt of any good by the deputies/employees of the services of the Chamber of Deputies in 2020[13].

In 2021[14], 13 gifts were offered to certain deputies, most of them being returned to the recipient and the rest kept in the assets of the institutions:

- (I) *returned:* tea set with floral design, consisting of 6 cups and 6 saucers and a teapot, made of Bohemian porcelain, amounting to 50 euros; decorative object, logo with the insignia of the Ministry of Defense, amounting to 26 euros; decorative office object, amounting to 30 euros; logo of the Commission I of the Chamber of Representatives of Indonesia, amounting to 24 euros; printed textile material, amounting to 24 euros; traditional decorative bowl, amounting to 56 euros (...).
- (II) *kept*: painting with Theodor Pallady stamps, 150 years since his birth, amounting to 108 euro; plaque with the official insignia of the President of the Republic of Poland, amounting to 56 euros; anniversary plaque of Club Sportiv Dinamo; official plaque with the image of the Indonesian Parliament, amounting to 24 euros (...).

[12] Public information, available online: ***https://www.cdep.ro/proiecte/2004/100/10/6/em116.pdf***, accessed on 19.01.2023.
[13] Public information, available online: ***https://www.cdep.ro/pdfs/cadouri/cadouri2020.pdf***, accessed on 18.01.2023.
[14] Public information, available online: ***https://www.cdep.ro/pdfs/cadouri/cadouri2021.pdf***, accessed on 18.01.2023.

Among the goods received by the deputies as gift in 2022[15], we mention the following: artwork painting in mixed technique, amounting to 50.6 euros (kept in the assets of the institution) and decorative porcelain plate, amounting to 152 euros (kept in the assets of the institution – Parliament Museum).

3.1.2. Presidential Administration

A number of 14 goods were received in 2020[16], free of charge, by the President of Romania, on the occasion of certain protocol events and submitted to the Evaluation Commission within the Presidential Administration, the destination of the goods in the Assets of the Presidential Administration.

The total amount of the goods received free of charge in 2020 is of 1,801 euros and includes, for example: metal and marble statuette, height 26 cm., black color, representing a female character next to a lion, amounting to 150 euro; painting representing the image of ruler Alexandru Ioan Cuza[17], amounting to 105 euro; silver ship, amounting to 300 euros; replica after the sword of Voivode Ștefan cel Mare, amounting to 300 euros; distinctive mark representing the flag of Romania, amounting to 50 euros etc.

In 2021[18], 18 goods were received, with a total value of 1,883 euros, goods intended for the Assets of the Presidential Administration: gold emblem/statue, amounting to 150 euros; two silver coins, amounting to 85 euros; black and white engraving with wooden frame, amounting to 40 euros; copy after Byzantine icon in 950% silver, lithograph, representing Jesus Christ, amounting to 200 euros etc.

In 2022[19], 26 goods were received, with a total value of 4,753 euros: pen, amounting to 94 euros; writing set, amounting to 30 euros; Republic flag, amounting to 410 euros; mirror, amounting to 70 euros; philatelic painting, amounting to 25 euros; amber painting, amounting to 1,125 euros; traditional design tie, amounting to 60 euros etc.

3.2. Case study France - how are gifts and invitations managed within public authorities?

One of the laws concerning transparency in public life and known as Law Sapin II is one of the most relevant laws of France on our subject matter. French Anti-Corruption Agency– A. F. A.[20] issued practical Guidelines called: *Public officials - the risks of breach of probity in relation to gifts and invitations*[21], document made available in September 2022 and delivered to all public authorities.

According to art. 1 of the law for the promotion of transparency, combating corruption and the modernization of the economy, French Anti-Corruption Agency is: „a national competence service subordinated to the Ministry of Justice and the Ministry in charge with the budget the mission of which is to help competent authorities and the persons dealing with them prevent and detect corruption, influence peddling, misappropriation of public funds and favoritism[22]”.

In our analysis, we firstly noted the main obligations of public officials and then developed the actual subject of gifts and/or invitations, in order to understand that the philosophy of the practical Guidelines is precisely based on the care of public authorities that officials do not make mistakes in their actions, being bound by legal obligations. Therefore, we find in the General Civil Service Code the obligations of public agents referred to in art. L 121. French legislator imposes as obligations, for example: „the public agent shall exercise his functions

[15] Public information, available online: *https://www.cdep.ro/pdfs/cadouri/cadouri2022.pdf*, accessed on 18.01.2023.

[16] Public information, available online: *https://www.presidency.ro/files/documente/Lista_bunurilor_primite_cu_titlu_gratuit_cu_prilejul_unor_actiuni_de_protocol_in_anul_2020.pdf*, accessed on 18.01.2023.

[17] The painting was received on the 200th anniversary of the birth of ruler Alexandru Ioan Cuza. See in this respect, C. Ene-Dinu, *Istoria statului și a dreptului românesc,* 1st ed., Universul Juridic Publishing House, Bucharest, 2020, p. 223 *et seq*.

[18] Public information, available online: *https://www.presidency.ro/files/documente/Lista_bunurilor_primite_cu_titlu_gratuit_cu_prilejul_unor_actiuni_de_protocol_in_anul_2021.pdf*, accessed on 18.01.2023.

[19] Public information, available online: *https://www.presidency.ro/files/documente/Lista_bunurilor_primite_cu_titlu_gratuit_cu_prilejul_unor_actiuni_de_protocol_in_anul_2022.pdf*, accessed on 18.01.2023.

[20] Public information, available online: *https://www.agence-francaise-anticorruption.gouv.fr/fr*, accessed on 18.01.2023.

[21] Public information, available online: *https://www.fonction-publique.gouv.fr/files/files/publications/hors_collections/GuideCadeauInvitation_AFA.pdf*, accessed on 18.01.2023.

[22] We refer to Loi n°2016-1691 du 9 decembre 2016, relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie economique, available online at *https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000033558528*, accessed on 18.01.2023.

with dignity, impartiality, integrity and probity and shall be bound by the obligation of neutrality" (art. L 121- 1 and L 121-2).

We do not detail the aspects of criminal nature that could intervene in the daily activity of civil servants, the Guide being such a tool that also warns of criminal risks, derived from possible temptations to accept gifts and invitations. Notwithstanding, in addition to the risks of criminal nature, there may also be risks of disciplinary nature or even the risk of contentious administrative litigations associated with gifts and invitations, which may disrupt the activity of the public administration, according to the Guidelines. Examples of such situations are provided: the annulment of a public procurement contract, of a contract or administrative decisions for abuse of power following the acceptance by a public official of a gift, advantage or invitation[23].

The General Civil Service Code[24] defines the conflict of interests in art. L 121-5, as follows: „all situations of interference between a public interest and public or private interests that are likely to influence or appear to influence the independence, impartiality and objectivity of the public official's functions". Another applicable normative act is Law no. 2013 - 907 of 12 October 2013 on transparency in public life. The normative act defines in art. 2[25] thesis 1, the conflict of interest in the same terms as the General Civil Service Code.

The Practical Guidelines are structured in 2 parts and 6 Appendices: Part I - *Understanding the risks related to gifts and invitations* and Part II – *Establishing an appropriate set of rules for gifts and invitations.* According to the Guidelines: „Requesting or accepting gifts or invitations carries the risk of compromising probity. In all cases, in order to avoid criminal risk, disciplinary risk and the risk of affecting the good operation and reputation of the administration, it is advisable to refer, in close and permanent connection with the hierarchical authority, to a series of ethical principles and to take into account the specific circumstances of each gift or invitation: the recipient's functions and missions; the capacity and interest of the giver; characteristics and circumstances in which the gift or invitation was offered."

In France, the law does not set a value threshold for gifts and invitations. In analyzing the condition of accepting a gift or invitation, the Guidelines establish three criteria: the purpose of the gift; frequency and monetary value. French Anti-Corruption Agency provides that no public agent should either request or accept a gift or invitation in the exercise of his/her function and should always inform the direct supervisor[26].

4. Conclusions

In our analysis, we tried, by means of the documentation carried out, to offer more information on the legal regime of the goods received free of charge within protocol events, during mandate or office. On this occasion, we found out that the value threshold regulated by the legislator for the good received is 200 euros, and the applicable normative act is Law no. 251/2004. Furthermore, from the computer research it appears that, during the analyzed period, both the Chamber of Deputies and the Presidential Administration published the list of goods received free of charge on the occasion of some protocol actions and submitted to the Evaluation Commission.

The paperwork also presented the legislation in France in order to be able to know, at a summary level, how gifts or invitations received free of charge by public agents are dealt with in this state. In this way, we noted the important role played by French Anti-Corruption Agency in the prevention of corruption deeds by issuing practical Guidelines called: *Public officials - the risks of breach of probity in relation to gifts and invitations* and delivered to all public authorities.

[23] Public information, available online: *https://www.fonction-publique.gouv.fr/files/files/publications/hors_collections/GuideCadeauInvitation_AFA.pdf, page 23*, accessed on 18.01.2023.

[24] Public information, available online: *https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000044416551/LEGISCTA000044420673/*, accessed on 18.01.2023.

[25] Art. 2 is part of Chapter I- *„Prevention of conflict of interests"*, Section 1- *„Abstain obligations"* of Loi n˚ 2013-907du 11 octobre 2013 relative à la transparence de la vie publique, available online at *https://www.legifrance.gouv.fr/loda/id/JORFTEXT000028056315*, accessed on 18.01.2023.

[26]Public Information available online: *https://www.fonction-publique.gouv.fr/files/files/publications/hors_collections/GuideCadeauInvitation_AFA.pdf*, p. 13, accessed on 18.01.2023.

The final conclusion of the paperwork is that, regardless of the temporary position held by a citizen, public official or civil servant, in addition to the obligation to comply with the law, he/she shall have the obligation to be honest[27].

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[27] From another perspective, see E. Anghel, *The lawfulness principle*, published in proceedings of CKS-eBook 2010, vol. I, Pro Universitaria Publishing House, Bucharest, 2010, ISSN 2068-7796, p. 799 or E.E. Ștefan, *Legalitate și moralitate în activitatea autorităților publice*, in Revista de Drept Public no. 4/2017, pp. 95-105.

VALUES AND TRADITIONS IN THE ADMINISTRATIVE CODE AND OTHER NORMATIVE ACTS

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Abstract

States have always been concerned with regulating in the Constitution or in other domestic normative acts the most important coordinates according to which the good administration of the country is carried out. Depending on specific values and traditions, all states develop in normative acts what they consider most important to express their national identity.

The topic we propose started from the curiosity to know whether references are made to divinity or to Christian values in national law, but also in comparative law, in main normative acts. A potential topic of debate would be that of finding out if there is unitary regulation in the Constitution, but also in other normative acts, in what concerns the inclusion of the religious wording in the content of the oath. From this point of view, we consider that the topic is of interest due to the fact it provides additional information both to law specialists and to persons that could find themselves, at some point, in the situation to fulfill the formality of the oath, when assuming the mandate or public office.

In order to fulfill the proposed research scope, several normative acts shall be analyzed, both from national legislation, but also from comparative law, in the light of the proposed research topic. The final part of the study shall consist of the conclusions and de lege ferenda proposals.

Keywords: *Constitution, Administrative Code, value, religious wording, honor.*

1. Introduction

Given our previous concerns[1] of scientific research of public administration[2], we aimed to develop in this paperwork other aspects which can help to better knowing the legal regulations on public authorities. Furthermore, the relationship between law and morality is analyzed in all classes of general theory of law[3]. Nowadays, we cannot explain[4] a text of a normative act, without knowing the history[5] of the state and the law of a state. This is the only way we believe that an objective image can be drawn from which the philosophy of the respective text emerges, namely the spirit of that people. The issue of the existence of the religious wording in the content of the oath is not a simple one because it can happen that a person specifically invokes freedom of conscience and cannot say the religious wording.

The Constitutional Court noted in its case-law that, according to the provisions of art. 29 of the Fundamental Law: „No one may be forced to adopt an opinion or to join a religious belief, contrary to his convictions” (para. 18)[6]. According to art. 1 para. (3) of the revised Constitution: „Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be

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[1] E.E. Ștefan, *Legalitate și moralitate în activitatea autorităților publice*, in Revista de Drept Public no. 4/2017, pp. 95-105.

[2] For further details, see R.M. Popescu, *ECJ case-law on the concept of „public administration” used in article 45 paragraph (4) TFUE,* in proceedings of CKS e-book 2017, pp. 528-532

[3] For further details, see E. Anghel, *Values and valorization*, LESIJ JS XXII/2015 nr. 2/2015, Lex ET Scientia International Journal - Juridical Series, pp. 103-113 and E. Anghel, *The notions of „given” and „constructed” in the field of the law,* published in proceedings of CKS-eBook 2016, pp. 338-343.

[4] In what concerns the interpretation of the legal regulation, see N. Popa (coord.), E. Anghel, C. Ene-Dinu, L.-C. Spătaru-Negură, *Teoria generală a dreptului. Caiet de seminar*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2017, pp. 197-202; M. Bădescu, *Teoria generală a dreptului*, Sitech Publishing House, Craiova, 2018, pp. 167-187.

[5] For further details, see E. Anghel, *Constant aspects of law,* published in proceedings CKS-eBook 2011, Pro Universitaria Publishing House, Bucharest, 2011 and E. Anghel, *Drept privat roman. Izvoare, procedură civilă, persoane, bunuri*, Universul Juridic Publishing House, Bucharest, 2021, pp. 7-81.

[6] CCR dec. no. 669, published in the Official Gazette of Romania no. 59/23.01.2015.

guaranteed". Therefore, the legislator expressly regulated in the Constitution that there are values and traditions of the Romanian people[7].

We did not find in the doctrine an analysis of the topic as we propose it, although the classes of administrative law[8] or constitutional law[9] make reference to the formality of the oath without developing the topic, in the light of the subject matter of this paperwork. The proposed scope of this study is to provide additional information necessary to know if, on the one hand, there are references to divinity or Christian values in the normative acts and, on the other hand, if there is an unitary conception between the Constitution and other normative acts, in what concerns the oath.

In terms of the structure, the paperwork is divided into two parts. The first part begins with the research of the wording of the oath referred to in the legislation, and the second part analyzes normative acts of comparative law, in order to have a more detailed picture of the subject.

2. The regulation of Christian values and religious wording in national law

In our opinion, the access to knowledge is not a simple one, but it represents the result of conscious efforts to get out of own ignorance and therefore, by means of education and personal work, a person knows to make choices, in full knowledge. In our opinion, family and school[10] play an important role in ensuring access to knowledge. Good, truth and beauty are universal values and we note, in this respect, *Plato's Allegory of the Cave* which begins as follows: „And now allow me to draw a comparison in order to understand the effect of learning or the lack thereof upon our nature. Imagine that there are people living in a cave deep underground (...) The cavern has a mouth that opens to the light above (...)"[11]. We do not go into more details on Plato's work, but we believe that the example is relevant due to the fact it provides a topic for reflection which was also contemplated by the case-law of the Constitutional Court. We refer to the freedom of thought, conscience or religious belief, and the family-school binomial by means of which education is ensured in first years of life.

Therefore, the Constitutional Court provided that: „according to the provisions of art. 29 para.(1), the individual enjoys the unrestricted freedom of thought, conscience and religious belief, a situation that gives consistency to the free development of human personality as supreme value guaranteed by art. 1 para.(3) of the Fundamental Law[12]". In the opinion of the Court, „(…) the state guarantees freedom of conscience, which must be expressed in a spirit of tolerance and mutual respect" (para. 20)[13] and „as part of the constitutional system of values, the freedom of religious conscience is assigned the imperative of tolerance, especially in relation to human dignity guaranteed by (…) the Fundamental Law, which dominates the system of values as a supreme value" (par.21)[14].

2.1. With or without religious wording?

In this section, the analysis included a wide range of information on local officials, public officials, civil servants, or even on magistrates, lawyers or legal advisers, since the latter provide a public service.

2.1.1. Administrative Code

The Administrative Code[15] regulates in art. 1. para.(1): „the general legal framework for the organization and operation of the authorities and institutions of public administration, the status of the personnel thereof

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[7] For another perspective analysis, see E.E. Ștefan, *Reflectarea constituțională a jurământului de credință*, in revista.universuljuridic.ro no. 4/2020, available online at *http://revista.universuljuridic.ro/reflectarea-constitutionala-juramantului-de-credinta/*, accessed on 26.01.2023, and E.E. Ștefan, *Aspecte de drept comparat privind jurământul șefului de stat*, in Revista de Drept Public no. 3-4/2020, pp. 89-101.

[8] M.C. Cliza, *Drept administrativ Partea I,* Pro Universitaria Publishing House, Bucharest, 2011, p. 81; C.S. Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck Publishing House, Bucharest, 2016, p. 581.

[9] I. Muraru (coord.), A. Muraru, V. Bărbățeanu, D. Big, *Drept constituțional și instituții politice. Caiet de seminar*, C.H. Beck Publishing House, Bucharest, 2020, p. 288.

[10] On the institution of family as the basic cell of society, see C. Ene-Dinu*, Istoria statului și dreptului românesc*, 1st ed., Universul Juridic Publishing House, Bucharest, 2020, p. 545 *et seq*.

[11] Platon, *Opere* vol. V., *Republica*, Științifică și Enciclopedică Publishing House, Bucharest, 1986, pp. 312-321.

[12] CCR dec. no. 669, published in the Official Gazette of Romania no. 59/23.01.2015.

[13] *Ibidem.*

[14] *Ibidem.*

[15] GEO no. 57/2019 on the Administrative Code, published in the Official Gazette of Romania no. 555/05.07.2019, latest amendments made by Law no. 19/2023, published in the Official Gazette of Romania no. 28/10.01.2023.

(…)”. Considering this de facto situation, we believe that it is necessary to investigate the point of view of the national legislator on whether Christian values are regulated in the content of this normative act.

There are references in the Administrative Code to the religious wording on the occasion of taking the oath of allegiance by: local and county councillors, mayor, president of the county council, prefect, but also civil servants. The Administrative Code mentions a single time the wording of the oath of allegiance regarding local councillors, in art. 117, while for the president of the county council, county councillors or mayor, the normative act makes reference to the same art. 117 by providing that the person (…) „takes the oath referred to in art. 117” (...).

In what concerns local councillors, art. 117 of the Administrative Code details the procedure and the text of the oath, that also includes the religious wording: „The elected local councillors whose term of office was validated shall take the following oath in Romanian language: *I solemnly swear to abide by the Constitution and laws of the country and to dedicate with good faith all my strength and the best of my ability for the welfare of the people of commune/city/municipality/county…. So help me God!* The closing religious wording shall respect the freedom of religious beliefs, the oath being also accepted without the religious wording (…)”. The legislator expressly allows the taking of the oath without the religious wording, by respecting the freedom of religious beliefs for the person in question.

The Administrative Code also provides the wording of the oath for the prefect. Furthermore, it mentions the possibility of taking it without religious wording. Therefore, art. 251 para. (3) provides the following: „When assuming the office, the prefect shall take the following oath (…), in Romanian language: " *I solemnly swear to abide by the Constitution and laws of the country and to dedicate with good faith all my strength and the best of my ability for the welfare of the people of ... county/Bucharest municipality. So help me God*!" while para. (4) provides the following: ”The closing religious wording shall respect the freedom of religious beliefs, the oath being also accepted without the religious wording”.

The formality of the oath of civil servants is provided by art. 259 of the Administrative Code, para.(4): *„I solemnly swear to abide by the Constitution, the fundamental human rights and freedoms, to apply the laws of the country fairly and impartially, to conscientiously fulfill my duties in the public office to which I was appointed, to preserve professional secrecy and to respect the norms of professional and civic conduct. So help me God!”* „The closing religious wording shall respect the freedom of religious beliefs, the oath being also accepted without the religious wording (…)”.

2.1.2. Revised Constitution of Romania

The revised Constitution of Romania provides the content of the oath which is the same for the President of the country, the Prime Minister, Ministers and the other members of the Government. In this respect, art. 82 provides the following: „The candidate (...) shall take (...) the following oath: *I solemnly swear that I will dedicate all my strength and the best of my ability for the spiritual and material welfare of the Romanian people, to abide by the Constitution and laws of the country, to defend democracy, the fundamental rights and freedoms of the citizens, Romania's sovereignty, independence, unity and territorial integrity. So help me God*!” while art. 104 para. (1) provides the following: „The Prime Minister, the Ministers and other members of the Government shall individually take an oath before the President of Romania, as provided under art. 82”.

Unlike the Administrative Code, the Constitution[16] does not provide another possibility to replace the religious wording in case of the President or of the Ministers, as in the aforementioned cases, the legislator requiring the full wording of the oath.

[16] [„In the debates carried out in the Constituent Assembly, there were different points of view in connection with the religious wording which was to be introduced in the text of the oath”]- D. Apostol Tofan, *Drept administrativ Partea I,* 2nd ed., C.H. Beck Publishing House, Bucharest, 2008, p. 110.

2.1.3. Law no. 8/2002 on the oath of allegiance to the country and the people of the senators and deputies of the Romanian Parliament

The oath of the senators and deputies is referred to in Law no. 8/2002 on the oath of allegiance to the country and the people of the senators and deputies of the Romanian Parliament[17]. Art. 1 para.(1) and (2) holds our attention.

The legislator expressly provides in art. 1 para.(1): „The senators and deputies shall take, in solemn meeting of the Chamber they belong to, the following oath of allegiance to the country and the people: *I solemnly swear that I will bear true faith to my country Romania. I solemnly swear to abide by the Constitution and the laws of the country. I solemnly swear to defend democracy, the fundamental rights and freedoms of the citizens, Romania's sovereignty, independence, unity and territorial integrity. I solemnly swear to fulfill with honor and loyalty the mandate entrusted by the people. So help me God*!

Art. 1 para.(2) provides as follows: „the oath of allegiance can also be taken without religious wording, by being replaced by the following: *I solemnly swear on my honor and conscience*, which precedes the oath".

2.1.4. Law no. 303/2022 on the profession of judge and prosecutor

Art. 80 of Law no. 303/2022 on the profession of judge and prosecutor[18] expressly provides the following in para. (1): „Before starting to exercise their office, judges and prosecutors shall take the following oath: I solemnly swear to abide by the Constitution and the laws of the country, to defend the fundamental rights and freedoms of citizens, to fulfill my duties with honor, conscience and impartiality. So help me God!

The reference to divinity in the oath of the judge shall change according to religious belief of judges and prosecutors and shall be optional."

2.1.5. Normative acts applicable to lawyers and legal advisers

Law no. 51/1995 for the organization and practice of the profession of lawyer[19] provides the oath taken by the lawyers in art. 22. Therefore, para.(1) provides the following: (…), the lawyer shall take (…) the following oath: „*I solemnly swear to abide by and to defend the Constitution, human rights and freedoms and to practice the profession of lawyer with honor and dignity. So help me God*!" and para. (2): „The oath can also be taken without religious wording, in this case the oath shall start with the following wording: *I solemnly swear on my honor and conscience*!"

According to the Law on the profession of legal adviser[20], art. 17, (…) the legal adviser shall take the following oath: „*in the name of the Law, Honor and Truth, I solemnly swear to abide by the Constitution and the laws of the country, to practice my profession with independence, dignity and impartiality and to keep professional secrecy. So help me God*!"

We note a difference between the two normative acts, namely, the law provides the possibility to take the oath without the religious wording, by replacing it with honor and conscience only in case of lawyers, while in case of legal advisers, this possibility does not exist.

3. The regulation of Christian values and religious wording in comparative law -short considerations

Important documents at European level include provisions on values and traditions and we will mention them hereafter, without detailing the European Union policies at this point[21].

[17] Law no. 8/2002 on the oath of allegiance to the country and the people of the senators and deputies of the Romanian Parliament, published in the Official Gazette of Romania no. 101/05.02.2022.

[18] Law no. 303/2022 on the profession of judge and prosecutor, published in the Official Gazette of Romania no. 1102/16.11.2022.

[19] Law no. 51/1995 for the organization and practice of the profession of lawyer, published in OJ no. 116 of 19 June 1995, with latest amendments by Law no. 32/2023 (…), published in the Official Gazette of Romania no. 36/12.01.2023.

[20] The Law on the profession of legal adviser, published in the Official Gazette of Romania no. 684/29.07.2004, with latest amendments by Resolution no. 4/2014, published in the Official Gazette of Romania no. 452/20.06.2014.

[21] A.-M. Conea, *Politicile Uniunii Europene. Curs universitar*, Universul Juridic Publishing House, Bucharest, 2020, pp. 10-20 or A. Fuerea, *Manualul Uniunii Europene*, 6th ed., revised and supplemented, Universul Juridic Publishing House, Bucharest, 2016.

Therefore, the Charter of Fundamental Rights of the European Union[22], includes references to values and traditions in the Preamble, respectively – common values*: „The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values”* (par. 1); indivisible and universal values: „*Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity* (…)”(para. 2); common values/traditions: „*The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States (…)”* (par. 3).

The European Code of Good Administrative Behavior[23] regulates in art. 5 para. 5): „*The official shall in particular avoid any unjustified discrimination between members of the public based on nationality, sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion* (…)”. In this background, we found interesting to research whether in the fundamental law of different states, we find references to Christian values and beliefs and we have proposed in this sense an analysis of three constitutions of the European Union, randomly chosen.

The Constitution of the Republic of Austria[24] speaks of social, religious and moral values (…) and on divinity, we note art. 62 which in para. (1) provides: „(...) The Federal President shall take the following oath (...): *„I solemnly promise that I shall faithfully observe the Constitution and all laws of the Republic and that I shall fulfill my duty to the best of my knowledge and conscience*” and in para. (2): „The addition of a religious affirmation is admissible”. Furthermore, art.72 regulates the oath of Ministers and art. 101 para. (1) the oath of the Land Governor, both articles providing the following mention: „The addition of a religious affirmation is admissible”.

Art. 56 of the Constitution of the Federal Republic of Germany[25] shall read as follows: „(...) The Federal President shall take the following oath (...): *"I swear that I will dedicate my efforts to the well-being of the German people, promote their welfare, protect them from harm, uphold and defend the Fundamental Law and the laws of the Federation, perform my duties conscientiously, and do justice to all. So help me God!* The oath may also be taken without religious affirmation”.

The last constitution analyzed is that of the Polish Republic. The preamble of this Constitution outlines an interesting point of view of the legislator which dedicates the Fundamental Law to all people, referring both to those who believe in divinity and to those who do not share such faith. The text shall read as follows: „We, the Polish Nation – all citizens of the Republic, both those who believe in God as the source of truth, justice, good and beauty, as well as those not sharing such faith but respecting those universal values as arising from other sources[26]”.

In what concerns divinity, art. 104 para.(2) of the same Constitution regulates the content of the deputies' oath: *"I do solemnly swear to perform my duties to the Nation diligently and conscientiously, to safeguard the sovereignty and interests of the State, to do all within my power for the prosperity of the Homeland and the well-being of its citizens, and to observe the Constitution and other laws of the Republic of Poland[27]”.* In case of the President of the Republic: „The oath may also be taken, (…) with the additional sentence: *So help me God*!” (art. 130[28])

4. Conclusions

In this paperwork, information necessary to know whether there are references to divinity or Christian values in the legislation has been documented.

Therefore, in what concerns the Administrative Code, there are references to the religious wording used on the occasion of taking the oath of allegiance by: local and county councillors, mayor, president of the county council, prefect and civil servants. In order to have an overview of the subject, we extended the documentary

[22] Public information, available at *https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:ro:PDF*, accessed on 26.01.2023.

[23] Public information, available at *https://www.ombudsman.europa.eu/ro/publication/ro/3510*, accessed on 26.01.2023.

[24] Șt. Deaconu (coord.), I. Muraru, E.S. Tănăsescu, S.G. Barbu, *Codex constituțional. Constituțiile statelor membre ale Uniunii Europene*, vol. I, “Monitorul Oficial”, Publishing and Printing House, Bucharest, 2015, p. 74.

[25] *Idem* vol. I, p. 700.

[26] *Idem,* vol. II, p. 310.

[27] *Idem,* p. 329.

[28] *Idem,* p. 335.

research to judges, prosecutors, lawyers and legal advisers, because they provide a public service and references to divinity also exist in their specific legislation.

The Administrative Code provides two elements of similarity for all subjects obliged to take the oath: on the one hand, the closing religious wording shall respect the freedom of religious beliefs and, on the other hand, the oath shall also be accepted without the religious wording. In domestic law, the reference to divinity prevails in the content of the oath, but there is also the possibility to take the oath without the religious wording, as in case of magistrates or lawyers.

The reference to divinity in the wording of the oath is optional in the legislation on judges and prosecutors, compared to the Administrative Code. Unlike the judges and prosecutors, in case of senators and deputies, although the law provides that the oath can be taken without the religious wording (as in case of the Administrative Code), in addition, it provides that it can be replaced by „honor and conscience”. The text that is replaced in case of senators and deputies is not surprising, due to the fact the following are included in the wording of the oath taken by judges and prosecutors: „honor, conscience and impartiality”, while the oath of local councillors or prefect includes: ”good faith”.

Unlike the content of the oath of the President and the Ministers in the Constitution, the normative acts that we have analyzed provide more than the Constitution itself and from this point of view there is no unitary conception between the Constitution and the aforementioned acts. De lege ferenda, we propose the revision of the text of the oath and to debate whether it can be supplemented by the possibility of taking it without the religious wording, as in case of other states of the world, by respecting the freedom of conscience.

A final conclusion that emerges from the paperwork is that Christian values are found both in national legislation and in comparative law, such as truth, justice, good, beauty, honor, conscience.

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THE NEUTRAL CHARACTER OF THE SANCTION OF REVOKING AN ADMINISTRATIVE ACT

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Abstract

One of the multiple valences of the law state is translated into the fact that any administrative act issued or adopted by the state authorities must meet a series of characteristics that correspond to legal requirements, to be timely, to be issued for the purpose of achieving a public or private interest , but also to correspond entirely to the legal purpose on the basis of which it emanates.

Therefore, the primary role of state authorities and institutions is to fulfill the requirement of compliance with the law and all legal principles at the time of the adoption of such an act that modifies the internal legal order and to ensure that all legal principles are fulfilled in the case, avoiding in this way the production of a disruption of social relations through the elaboration of the act and to preserve the public interest of preserving the security of legal relations, as well as the private interest of avoiding concrete damage for the particular recipients of the administrative act.

In this sense, revoking the administrative act which presents elements of illegality or inexpedientness, legal or factual, stands out as a „sanitary" measure, being intended to eliminate from the administrative circuit any disruptive or damaging elements.

Given that the main role of the administrative authorities is to respect the law and protect the public interest, but in such a way that the private or moral interests of individuals are not harmed, it is natural to establish an effective and prompt legal remedy to eliminate any deviation from to the general principles of law or from the administrative acts with superior legal force, being thus removed from the legal order any inadequate administrative acts.

From this perspective, the revocation presents the mixed valences of a sanction and a public law remedy, involving the prompt intervention of the issuer or its hierarchically superior structure to abolish the act and to restore legality in administrative law relations.

However, in addition to this primary role of the revocation, we will identify in this article a series of other relevant values of this sanction, which outline its complex role, as a neutral remedy and rebalancing of legal relations, which outlines a significant aspect of general prevention in the operational mode of this remedy.

As we will reveal in the following, the revocation is intended to prevent the propagation of harmful effects in the internal legal order and at the same time to prevent the occurrence of specific legal damages to the recipients of the administrative act or other individuals affected by its issuance.

Thus, the revocation takes shape as an instrument to safeguard the static administrative circuit and as a damage prevention measure being from this perspective a sanction with an obviously neutral character, meaning that the revocation, mainly, does not itself represent the source of distinct damages, but only prevents or removes the already existing ones.

Keywords: *revocation, sanction, remedy, neutral, legal security.*

1. Introduction

The administrative act is characterized by a series of special legal features, which gives it the typology of a disproportionate legal act, being characterized by a reminiscence of state power, meaning that the administrative act carries the entire public authority in the context of which it was issued and imposes with binding force among its recipients, but also of all individuals whose situation is influenced by the act in question, regardless of their typology.

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Considering the legal regime in which it is issued, the administrative act produces a series of energy effects, being also accompanied by a series of attributes that dissociate it from any other legal act specific to Romanian law.

In this sense, in French legal literature it was noted that *„the administrative act has perpetual effects that do not expire due to prolonged non-use (CE 13 May 1949, Couvrat, D. 1950, 77, note M. Waline). They disappear only in case of decay, which can result from a limited life span in time, provided by the text itself or from the disappearance of the situations that an act thus devoid of any application was supposed to govern (EC March 12, 2014, Committee Harkis and Verité and M. X, no. 353066, Lebon T), in case of repeal (CRPA art. L. 243-1 and s.) or revocation (CRPA, art. L. 243-3 and s.) or annulment, following a court decision"*[1].

Thus, the administrative act benefits from a series of legal presumptions, arising from the public authority under whose auspices it was issued. These presumptions refer to the legality, authenticity and truthfulness of the administrative act, the three legal qualities, and a fourth one, inextricably linked to them, namely the ope legis execution of this legal act.

As it was correctly revealed, *„the administration takes over different categories of acts that are subject to a certain legal regime, dominated by the principle of legality. But some of them can have particularly serious consequences for their recipients and are therefore subject to enhanced protection rules"*[2].

Therefore, the administrative act is intended to settle a number of important aspects of the legal order, constituting the main way in which the state authorities discipline certain sectors of activity, establish generic obligations for the members of society, confer a certain social or personal status to certain recipients, individuals, gives rise to contractual obligations, etc.

Therefore, this type of legal act represents an indispensable tool for the relationship between the public administration authorities, regardless of the level on which they are located, therefore both at the central and local level, and the citizens they govern, establishing an elaborate framework and well-defined action from its recipients.

Through this type of act, the public interest for which the state authorities and institutions were established is also achieved, so that, since the general interest can only be one corresponding to the law and public morals, then the administrative act submits to the principle of legality .

Thus, it was noted that *„the regulatory power, like all the powers available to the administration, is completed, meaning that it exists only in the general interest: as much as a prerogative, it therefore constitutes a mission that the administration cannot dispense, and under certain assumptions, a task. It is the case for the adoption of the regulatory texts necessary for the implementation of a law or a decree. The administration is obliged to take them within a reasonable period so that the planned provisions do not remain a dead letter, and its responsibility can be engaged in case of prolonged inaction"*[3].

Therefore, the achievement of a legal effect and the enforcement of effects corresponding to the social order and the public interest, represents a series of inherent desires in the issuance of the administrative act[4].

Only if the act corresponds to the domestic and international normative framework, we can say that the desired discipline of legal relations between its recipients is achieved.

If the act does not correspond to normative acts with superior legal force or if it is issued in violation of the legal powers of the issuing authority, then the act itself constitutes a source of disruption of the legal order, in which case it is necessary to abolish its effects, case that is achieved through different alternative methods.

The control exercised by the courts represents the main way of regularizing the administrative act, a natural thing, since the courts have the primary role of imposing the valences of the principle of the rule of law, expressed through the characteristic of the supremacy of the law.

In this regard, it has been revealed in American doctrine that, as a matter of principle, *„the control of administrative action by law far exceeds the basic rationale for judicial review. For example, the law establishes lawyers to directly improve administration and establishes tribunals with expert members to resolve disputes with public authorities and auditors to improve economic efficiency in administration. (...s.n.) If courts leave behind the limited role this reasoning advocates, they may or may not make better decisions than administrators, but they will not enforce the rule of law. It is a challenge for judges to articulate a form of oversight of the*

[1] A. Maurin, *Droit administratif*, 11th ed., Sirey, Paris, 2018, p. 91.

[2] A. Legrand, C. Wiener, *Le droit public*, La documentation Française, Paris, 2017, p. 107.

[3] *Idem*, p. 108.

[4] L.-C. Spataru-Negură, *Protectia internationala a drepturilor omului. Caiet de seminar*, Hamangiu Publishing House, Bucharest, 2023.

administration that respects the rule of law. Because of the continuing struggle of judges to meet this challenge, judicial review is the best way to study administrative law"[5].

It has also been rightly pointed out that, mainly, *„the concept of public interest litigation can be justified on the grounds that as the power of the bureaucracy expands, it is inevitable that the power of the judiciary will expand accordingly. In this type of litigation, the plaintiff seeks to enforce or prevent a violation of general public law. Public interest litigation is thus of great social relevance for modern society"*[6].

Finally, about this main control of the courts of justice over the legality of the administrative act, the American doctrine highlighted the fact that *„the courts apply a basic notion of legality: the government action that affects citizens must be justified by reference to a certain law authorizing the specific act done, as in Entick v. Carrington (1765)"* [7].

However, resorting to the control exercised by the court is not the only way to regularize an administrative act and to prevent the irradiation in the legal order of some effects that are unequivocally contrary to the legal norms in force.

A much faster and simpler method of blocking the obviously illegal effects of the administrative act is represented by **the sanction of revoking it**.

2. Notion, Effects, Characteristics

Regarding this institution, in the specialized literature it was noted that this sanction specific to administrative law „refers to the abolition of the legal effects of the administrative act, through the manifestation of the will of the issuing body or the hierarchically superior one, as a result of illegality or even the lack of opportunity his. In a narrow sense, revocation refers to the retraction or withdrawal of the administrative act by the issuer"[8].

In another opinion, revocation „is a way of terminating the legal effects or, more concretely, a way of abolishing administrative acts. It is a perspective that derives from the dynamic approach to the administrative act, that is, that approach that follows the unfolding over time of the legal effects produced by that act. (...s.n.) Viewed from another point of view, the revocation can be perceived as a concrete legal operation, as an administrative act through which the Administration expresses its will to abolish another previous administrative act. It is a static perspective on the institution, which has aroused less interest in specialized literature"[9].

Finally, by revocation was designated „the legal operation by which the issuing body orders the withdrawal of its own act, either on its own initiative, or as a result of the provisions of the higher hierarchical body"[10].

In our opinion, the revocation can be viewed from two angles, that of the **legal regime**, from the perspective of which this institution presents itself as an administrative law **sanction**, which irremediably leads, from the perspective of the issuing authority, to the cessation of the effects of the unilateral administrative act with individual or normative character, as well as that of legal features, as well as the form that the act of revocation takes, this representing a genuine **administrative act**, in itself, which must meet all the requirements of legality and opportunity, like any administrative act in internal law.

Regarding the **sanction nature** of the revocation, we reveal the fact that it represents the emanation of a control act from the issuing authority of the administrative act that forms its object, and the functional analysis is structured on two distinct and interdependent levels.

The first is the level of **lawfulness** of the verified administrative act, which assumes the faithful correspondence of this administrative act with the acts having superior legal force, as well as the compliance by the issuer of the competence guidelines in issuing the primary administrative act.

The second verification plan aims at the **opportunity** of issuing/adopting the initial administrative act, by verifying, extrajudicially, the spectrum of legal, material, political and economic considerations in which the administrative act subject to verification is issued, in the sense that it must represents the result of an elaborate

[5] T. Endicott, *Administrative law*, 2nd ed., Oxford University Press, 2011, p. 67.

[6] M. P. Jain, S. N. Jain, *Principles of administrative law*, LexisNexis, New Delhi, 2011, p. 1734.

[7] H. Fenwick, G. Phillipson, *Constitutional & Administrative law*, 6th ed., Routledge-Cavendish, 2010, p. 10.

[8] E. Marin, *Legea contenciosului administrativ nr. 554/2004. Comentariu pe articole*, Hamangiu Publishing House, Bucharest, 2020, p. 13.

[9] I. Brad, *Caracteristicile juridice specifice ale actului administrativ de revocare*, in Iurisprundentia no. 2/2007, p. 1.

[10] P. Manta, *Suspendarea, revocarea şi anularea actelor administrative*, in Analele Universităţii „Constantin Brâncuşi" of Târgu Jiu, Seria Ştiinţe Juridice, no. 1/2011, p. 51.

process of analysis and synthesis of all the fair factors of its issuance, so that the expected effect by issuing the administrative act is achieved in optimal conditions of consumption of the material and human resources for the adoption of the act, as well as the production of the more opportune effects that the said act could produce.

In the event that the cumulative and indispensable meeting of all these congruent elements is not verified in practice, the sanction of revoking the administrative act becomes incident, as a way of removing it from the legal order, in order to prevent the production or perpetuation of the illegal or inappropriate effects of such a legal act.

Seen from the perspective of the **legal feature**, I have shown that the revocation represents a sui generis administrative act, which must not only take on the specific form of such an act, but must meet all its constituent elements, the most important of which is **that of being issued under public authority**.

Therefore, the revocation representing a genuine administrative act must, by way of consequence, comply with all the conditions of legality and opportunity for the issuance of such an act, including the competence to issue it[11], the condition of the written form, the regime of public authority, its sequence , the consultation procedure and adoption of the act, etc.

From the perspective of the issuing authority, as it results from the teleological analysis of the provisions of art. 7 of Law no. 554/2004, the revocation may constitute the exaltation of the issuing authority of the administrative act referred to by this extinguishing cause of legal effects, but also of the authority hierarchically superior to it.

The reason why the competence to issue the administrative act of revocation is conferred on the administrative authorities issuing or hierarchically superior to the first ones, so with the exclusion, at least in this phase, of the control of legality and expediency carried out by the court, is that of preventing the perpetuation of some obviously illegal legal effects and which are likely to prejudice the stability of administrative legal relations or a determined or determinable person, recipient of the document or a simple third party.

Therefore, viewed from this perspective, the revocation is presented as an eminently preventive and exclusive measure of illegal or immoral consequences of the administrative act referred to by it.

The revocation is intended to prevent the transfer of the rights and obligations established by the administrative act issued, in the extremely complex, but also sensitive, legal relations of administrative origin born from the activity of the public authorities of the Romanian state.

Thus, the revocation implies either the retroactive abolition of the harmful effects of the non-compliant administrative act, when the causes of the revocation are contemporaneous with the moment of issuing the act, or the termination for the future of the illegal or inappropriate effects of the administrative act, in the situation where the source of the revocation is concurrent or subsequent the intervention of this sanction.

Considering these requirements, the revocation is presented as a true „sanitary body" of the public administration system in Romania and as an effective remedy for the activity of drafting administrative acts.

Although, obviously, the act of revocation must be legal, in itself, an aspect that can be verified by way of an administrative litigation action, through which the interested personnel can request the competition of the court in the verification and control of the legality of such a legal remedy, however most of the time it is likely to prevent the transgression of the law, as well as the prevention of the unwanted legal effects of the administrative needle whose illegal effect is already definitively established.

By preventing the production of harmful effects and by the exercise by the issuing authority or by the superior one of a „quality" control of the issued primary administrative act, the revocation is presented as a genuine neutral legal act, being likely to restore legality, by regularizing the harmful effects of the verified administrative act.

The neutrality of the revocation is transposed into the restoration of the legal order violated by the administrative act targeted by this sanction, which reveals the beneficial and integrative role of the revocation sanction.

Obviously, if the revocation abandons its neutral role from the perspective of affecting the legal relationships outlined by the revoked act, then the act of revocation itself is susceptible to the sanction of annulment, available to the court, vested by way of administrative litigation.

Thus, it was held in French doctrine that „at the beginning of the 20th century, the Council of State accepted to control the facts whose existence was not contested and which were the basis of the decisions subject to its

[11] A. Maurin, *op. cit.*, 2018, p. 77.

censure (...s.n.) the annulment of a decisions to revoke the mayor of Hendaye from which he was accused of not having ensured the decency of a funeral procession, these facts being inaccurate"[12].

3. Conclusions

The revocation presents a supple, but emergent legal form, which is at the urging of the administrative authorities issuing the administrative act or those superior to them, by which a harmful and disruptive administrative act is removed from the internal legal framework, so that through revocation the illegal or inopportune acts are reformed and the normal legal order is preserved in any democratic state.

The value of the revocation sanction is given by its extrajudicial, useful and easy way of operation, as well as by its synergistic effect of preventing any prejudice to the social values protected by the normative acts in force.

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[12] A. Maurin, *op. cit.*, 2018, p. 247.

CONSIDERATIONS REGARDING THE LEGAL NATURE OF THE DECISIONS AND/OR THE ORDERS OF THE UNIVERSITY ETHICS COMMISSIONS

Iulian BĂICULESCU*

Abstract

One of the most important activities in a society is scientific research. Its essential character is conferred by its role in the perpetuation of social, economic and other human progress, all of which are underpinned by scientific progress. The functioning of the scientific research system is based, on the one hand, on a scale of academic degrees and diplomas designed to ensure and reward, gradually and thematically, an increased level of competence and complexity in the performance of scientific tasks and, on the other hand, the confidence of society as a whole in the quality and honesty of the holders of scientific degrees and diplomas. However, like any other area of economic and social life, scientific research is by its very nature perfectible. Or, to put it another way, it is subject to the permeability to various manifestations of unethical and deontological research activity. And this susceptibility is all the more present in developing societies, which have not yet achieved a sufficient degree of social and institutional resilience to the specific mechanisms of corruption in all its forms. Precisely in order to combat the possible lack of ethics in scientific research, in particular, and in the creation of intellectual creations, in general, the Romanian legislator has designed a tripartite system designed to ensure compliance with the rules of ethics in scientific research and to maintain society's confidence in research professionals, a system that we will analyse below.

Keywords: *ethics, academics, research, university, commissions, decisions, orders.*

1. Introduction

Unethical behavior and acts that are generically referred to as corruption, result in the inefficient use of an institution's/organization's resources, thus negatively affecting the way in which it performs its duties, and for public institutions, generating a negative impact on the quality and quantity of services provided to the population[1].

In the framework of educational reforms, the Romanian legislator has always sought to establish principles that ensure, at any level, the promotion of an education focused on quality, value, creativity, on stimulating cognitive and volitional capacity, while developing the academic needs. To achieve these goals, both the conduct of teachers and students must be subjected to certain codes of conduct that ensure an ethical behavior.

To this end, both the current National Education Law no. 1/2011 (in its art. 3) and the repealed Law no. 84/1995 (in its art. 5) have established a series of ethical principles within the fundamental principles governing the educational system, at all levels of organization and functioning and in all forms of teaching.

Thus, the principle of fairness or non-discrimination, the principle of equal opportunities and the principle of transparency, as ethical principles, stand alongside the principle of quality, the principle of relevance, the principle of efficiency or the principle of decentralization[2].

Although art. 3 letter (f) of the Law no. 1/2011 defines the principle of public accountability as the basis of the legal accountability of educational institutions for their performance, public accountability should not only be transposed to the institutional level, because the education system cannot be designed without the involvement of stakeholders, teaching staff and pupils/students, which is why public accountability is also reflected on their behavior from a teaching perspective in relation to their performance or to the shortcomings in the teaching and learning process.

At the same time, Law no. 206/2004[3], regulates good conduct in scientific research, communication, publication, dissemination and scientific popularization activities and, together with the Code of Doctoral Studies, outlines a research framework that regulates the organization and implementation of doctoral programs in Romania, which was published by GD no. 681/2011.

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[1] G. Gulyas, L. Radu, D.O. Balica, C. Hâruță, *Etica în administrația publică*, „Babes-Bolyai" University, Cluj-Napoca, 2011, p. 10.

[2] Art. 3 the National Education Law no. 1/2011, published in the Official Gazette of Romania no. 18/10.01.2011 (hereinafter referred to as the *National Education Law*).

[3] Published in the Official Gazette of Romania no. 505/04.06.2004.

Since the doctoral research is, on the one hand, both an end and a means of conducting the research activity as a whole, which stands as a veritable cornerstone of the education process (especially the superior cycle of it), given its role in forming the future teachers and, on the other hand, probably the most talked-about subject related to the superior cycle of the Romanian education system, in the following we will show how the legal framework in the matter of the ethics in the doctoral activity stands and works.

2. The multiple-layered legal framework guarding the respect of the ethical norms applicable to the doctoral research activity

The first piece of legislation to be taken into account when considering the issues is Law no. 8/1996 on copyright and related rights. Of course, it could also be said that this place should be given to Law no. 206/2004 on good conduct in scientific research, but as far as we are concerned, given the central place of Law no. 8/1996 in the system of Romanian Intellectual Property Law and the fact that it is the source to which we must refer in order to understand most of the notions used, we choose to start our analysis from the provisions of this act, in which we identify definitions of essential notions such as authors, works, etc.[4].

The next applicable act, which we consider essential for the field under analysis, is the National Education Law no. 1/2011, which regulates issues such as levels of study and the specific organization of each of them[5].

Next, very important for our analysis is also Law no. 206/2004, in which we find the most relevant provisions regulating the actual conduct of the activity of developing research approaches, but it would be appropriate to mention that this act also makes certain references to Law no. 319/2003 on the status of research and development staff[6].

The next act we mention, GD no. 681/2011 on the Code of Doctoral Studies[7], is of lesser legal force but no less relevant, as it contains the most detailed regulations on doctoral studies[8].

Also important for each doctoral candidate and member of the Thesis Committee are the regulations on the organization and conduct of doctoral studies adopted at the level of the institutions organizing doctoral studies where the activity under review is carried out[9].

So, we can see the existence of a legal framework consisting of a number of at least five different acts that the doctoral researchers have to respect, namely: Law no. 8/1996, Law no. 206/2004, Law no. 1/2011, GD no. 681/2011 and the Rules of Procedures adopted by each Doctoral School. In this context, it would not be without interest to present a short history of how this complex and rather opaque and unpredictable system came to be.

3. Brief history of ethics regulation in the Education field

Given the need for a national integrity system and a long-term anti-corruption strategy, with multidimensional ethical infrastructures, to ensure ethical behavior in the public sector through reform measures, including legislative reform[10], it is evident in the public sector in Romania, since 2004, the intensification of efforts to outline and implement codes of ethics and deontology in public sector professions - civil servants, education, health, judiciary. Obviously, these steps have been integrated into Romania's internal and external policy strategy for accession to the European Union.

In the context of building a system of integrity in educational activities, disciplinary legislation should be complemented with rules on the respect of ethics in education and the deontology of the teaching profession, with the establishment of effective monitoring and control bodies and a code of ethics, measures first implemented in university education under Law no. 84/1995 [art. 141 letter s) of the law] at the initiative of the relevant ministry, which adopted Order no. 4492/06.07.2005 on the promotion of professional ethics in universities.

Although the legislation of that time regulated the disciplinary liability of teaching staff both for violation of their duties under the individual employment contract and for violation of rules of conduct that damage the educational goals and prestige of the institution (see art. 115 of Law no. 128/2005), the bodies competent to investigate the actions of teaching staff and to apply sanctions were the disciplinary investigation committees

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[4] For further details, see I. Cuciureanu, D.-A. Bantaș, *The legal regime of the liability for violating deontological norms in the activity of elaborating doctoral theses - between the academic ethics and the logical challenges*, in Diplomacy & Intelligence Magazine no. 14/July 2020, p. 85 *et seq*.

[5] *Ibidem*.

[6] *Ibidem*.

[7] Published in the Official Gazette of Romania no. 551/03.08.2011.

[8] I. Cuciureanu, D.-A. Bantaș, *op. cit*., p. 85 *et seq*.

[9] *Ibidem*.

[10] A. Avram, C. Berlic, B. Murgescu, M.L. Murgescu, M. Popescu, C. Rughinișm, D. Sandu, E. Socaciu, E. Șercan, B. Ștefănescu, S.E. Tănăsescu, S. Voinea, *Deontologie academică. Curriculum cadru, Curs Universitar*, Bucharest, 2017, p. 4.

for disciplinary offences and, since 1 October 2005, the university ethics committees for the investigation of offences against university ethics (before 2005, both types of offences were investigated by the disciplinary investigation committees within the framework of disciplinary liability procedures).

The adoption of the Order of the Minister of Education and Research no. 4492/2005 was preceded by the adoption of the Law no. 206/2004 on good conduct in scientific research, technological development and innovation, a normative act that establishes rules of good conduct in research and development activities, criminalizes fraud in science, falsification and seizure of data in research activities, plagiarism and conflict of interest and a number of seven sanctions applicable by the National Ethics Council to personnel carrying out research and development activities in violation of the rules of good conduct.

Having regard to the research and development component of the teaching staff's duties in higher education under art. 79 and art. 80 para. (1) of Law no. 128/1997, as well as to the duties incumbent on it with regard to the development and implementation of reform strategies in education and training under art. 141(s) of Law no. 84/1995, the Ministry adopted Order no. 4492/2005, on the basis of which university codes of ethics were established at university level and ethics committees were subordinated to the university senate in order to analyse and resolve complaints and referrals concerning breaches of university ethics.

With the entry into force of the National Education Law no. 1/2011, the legislator's vision of ethics in the field of education has changed, on the one hand by regulating ethical issues in the teaching activity of pre-university education staff, the teaching council of the pre-university education unit has the power to establish a code of professional ethics and to monitor compliance with these rules in the educational institution), on the other hand, by speeding up the regulation of good conduct at higher education level by extending liability for breaches of ethical rules to students as well, *i.e.,* by regulating separate academic ethics, both as regards the work of teaching and research staff and as regards compliance with ethical rules by the higher education institution, with institutional academic ethics becoming an important part of the public accountability assumed by the higher education institution.

Also, if legal instruments for public accountability of educational institutions regarding their activities that violate ethical rules and principles have been adapted, we note that Law no. 1/2011 in art. 217 para. (1) has also regulated new monitoring bodies and the competences of the existing ones have been extended.

Thus, in addition to the University Ethics and Management Council (the old University Ethics Council from the Order of the Minister of Education and Research no. 4492/2005, which also received powers to monitor the management activity of higher education institutions, in the sense that it assumes public institutional responsibility), a National Ethics Council for Scientific Research, Technological Development and Innovation was also appointed, with specific powers regarding good conduct in research and development activity according to art. 218 para. (3) in conjunction with art. 323 and art. 325 – art. 326 of Law no. 1/2011.

By virtue of the new provisions of Law no. 1/2011 and in order to legitimize their activity, the competences and working procedures of the Ethics and University Management Council were detailed by the adoption of the Order of the Minister of Education and Scientific Research no. 3879/2012 on the establishment of the Ethics and University Management Council and the approval of the Regulation of its organization and functioning, successively repealed by OMESR no. 3304/2015 and currently by OMESR no. 6085/2016 (the latter act also presenting the nominal composition of the Ethics Council at national level), respectively the competences and working procedures of the National Council for Scientific Research, Technological Development and Innovation through the adoption of OMESR no. 5735/2011 on the approval of the Regulation of organization and functioning of the National Council for Ethics of Scientific Research, Technological Development and Innovation, successively repealed by OMESR no. 4393/2012, OMESR no. 5873/2015, OMESR no. 5712/2016, Order of the Minister of National Education no. 211/2017 and currently Order no. 4655/2020 (the latter administrative act presenting also the nominal composition of the Council at national level including representatives of research and development institutes and state universities).

Given the different system of subordination to the Ministry and of funding of pre-university establishments to higher education institutions, in order to coordinate and monitor the application of the rules of moral and professional conduct in pre-university education activities, OMESR no. 5550/2011 constituted a National Ethics Council of 378 members, 9 members for each county and Bucharest, with professional prestige and moral authority, representing teaching staff, parents and non-governmental organizations that have had a significant activity for at least 3 years in the field of pre-university education.

At the level of each school inspectorate, ethics committees are established for four-year terms based on the results of a vote of the school inspectorate's board of directors, with annual reconfirmation by the board of directors. The Framework Code of Ethics for Teaching Staff in University Education was issued by Order 4831/2018.

At this point, it may not be without interest to see what are those specific breaches of the ethical conduct

in academic matters that such a complex framework defends against. Therefore, in the following section we will identify and analyse those breaches.

4. Specific breaches of the ethical behavior in research and education

Deviations from the rules of good conduct are provided for in art. 2 index 1 of Law no. 206/2004, insofar as they do not constitute offences under criminal law. These deviations read, in the wording of the aforementioned legal disposition, as follows:

- the compilation of results or data and their presentation as experimental data, as data obtained by numerical calculations or computer simulations or as data or results obtained by analytical calculations or deductive reasoning;
- falsifying experimental data, data obtained by calculation or numerical computer simulation or data or results obtained by analytical calculation or deductive reasoning;
- deliberately obstructing, hindering or sabotaging the research and development activities of other persons, including by unreasonably blocking access to research and development facilities, damaging, destroying or tampering with experimental apparatus, equipment, documents, computer programs, data in electronic form, organic or inorganic substances or living matter necessary for other persons to carry out, conduct or complete research and development activities;
- plagiarism and self-plagiarism;
- inclusion in the list of authors of a scientific publication of one or more co-authors who have not contributed significantly to the publication or exclusion of co-authors who have contributed significantly to the publication;
- inclusion in the list of authors of a scientific publication of a person without that person's consent;
- unauthorized publication or dissemination by authors of unpublished scientific results, hypotheses, theories, or methods;
- the inclusion of false information in applications for grants or funding, in applications for habilitation, for university teaching posts or for research and development posts;
- non-disclosure of conflicts of interest in conducting or participating in evaluations;
- failure to respect confidentiality in the evaluation;
- discrimination in evaluations based on age, ethnicity, gender, social origin, political or religious orientation, sexual orientation or other types of discrimination, except for affirmative action provided for by law;
- abuse of authority to obtain authorship or co-authorship of publications of subordinates;
- abuse of authority to obtain salary, remuneration or other material benefits from research and development projects conducted or coordinated by subordinates;
- abuse of authority to obtain authorship or co-authorship of publications of subordinates or to obtain remuneration, compensation or other material benefits for spouses, relatives or family members up to and including the third degree;
- abuse of authority in order to impose their own theories, concepts or results on subordinates without justification;
- obstructing the work of an ethics committee, a review committee or the National Ethics Council in the course of a review of misconduct in the research and development activity of subordinates;
- failure to comply with the legal provisions and procedures intended to comply with the rules of good conduct in the research and development activity provided for in Law no. 206/2004, in Law no. 1/2011, in the Code of Ethics, in the codes of ethics by fields, in the regulations of organization and functioning of the research and development institutions, respectively in the university charters, as the case may be, including the non-implementation of the sanctions established by the ethics committees according to art. 11 para. (6) of this Law or by the National Ethics Council, according to art. 326 of Law no. 1/2011;
- active participation in misconduct by others; knowledge of misconduct by others and failure to notify the Ethics Committee or the National Ethics Council;
- co-authorship of publications containing falsified or fabricated data;
- failure to comply with legal and contractual obligations, including those relating to the contract of mandate or funding contracts, in the exercise of functions of management or coordination of research and development activities.

From those breaches, by far the most frequent and talked about in the public sphere are plagiarism and self-plagiarism. Therefore, we feel the need to talk about these former ones in further detail.

As the specialized literature puts it, „the origin of the term can be found in the Latin *plagium*, which in

Romanian law meant the kidnapping of a slave or a child. The plagiarist (*plagiarius*) was considered a kidnapper, a robber, a concealer of stolen goods, a person who helped persons prosecuted by law to hide"[11].

„The first prominent figure to use the term plagiarism in its current sense was the Latin poet Martial in the 1st century AD, to denote the act of his rival Fidentius of reciting his works in public as if they were his own. The negative meaning of the term indicates that Martial considered Fidentius' act particularly serious and likely to damage his dignity"[12].

„Examples of plagiarism that can be found in the academic environment are copying whole passages from other people's works in one's own assignments (essays, reports, scientific papers), using recordings, images without citing the author, presenting another person's work as the student's creation or publishing online lectures, course materials, etc."[13].

As far as classifications are concerned, these can be multiple. Thus, a first type, which involves the crude and completely unfiltered taking over of a person's work without proper citation, is the so-called copy-paste or clone plagiarism. Another type is partial citation plagiarism – the taking of content from a single source with minimal intervention. In this case, either the source is not indicated, or it is indicated without proper citation. There is also paraphrase plagiarism, where the author retains the meaning of an idea by replacing words with synonyms - basically paraphrase plagiarism is a rephrasing of an idea"[14]. This wording makes us rally to the opinion that „a qualification of this practice as plagiarism should be made after a thorough analysis of the works, extreme approaches being recommended to be avoided, as it can be concluded that any idea taken and reformulated, whose author is identified, but without quotation marks, is plagiarism, which would lead to the qualification of ¾ of published scientific works as plagiarism"[15].

Another form of plagiarism that departs slightly from the traditional physiognomy of plagiarism, but also from originality, and is somewhat of a borderline situation, is plagiarism by mixing, *i.e.,* taking texts by several authors and arranging them into a meaningful sentence. This creates an ideational jigsaw puzzle which, if the author puts his or her own stamp on it, can be classed as plagiarism (some authors have also distinguished „plagiarism by confusion")[16].

Hybrid plagiarism is a form of plagiarism where the liability of the person who „plagiarizes" in this way should be questionable. It is, in fact, that situation where one correctly quotes a source which is itself plagiarized. In this case, holding the „end-user" of the text liable is not justified, because they have (correctly) quoted a plagiarized text[17].

Of course, there is also aggregate plagiarism, where the author compiles texts by other authors, with the correct use of quotation marks, but without a creative contribution. The value of such a work can only be documentary at best, as it is a register of quotations[18].

As far as the Law no. 206/2004 is concerned, its art. 4 defines plagiarism as the *presentation in a written work or an oral communication, including in electronic format, of texts, expressions, **ideas**, demonstrations, data, hypotheses, theories, results or scientific methods extracted from written works, including in electronic format, of other authors, without mentioning this and without reference to the original sources*, and self-plagiarism as the *presentation in a written work or an oral communication, including in electronic form, of texts, expressions, demonstrations, data, hypotheses, theories, results or scientific methods taken from written works, including in electronic form, by the same author or authors, without mentioning this and without reference to the original sources*. Art. 310 of Law no. 1/2011 refers to serious misconduct in scientific research and academic activity such as plagiarizing results or publications of other authors; fabricating results or replacing results with fictitious data.

As regards the application of these rules, there is also a different practice in the adjudication of cases falling within the jurisdiction of the labor courts and the administrative courts (also in relation to the substantive provisions of art. 11(1) and art. 14 of Law no. 206/2004).

At this stage, we would also like to point out the fact that, as the specialized doctrine puts it, „ideas, theories, concepts and discoveries contained in a work (...) cannot benefit from legal protection" and that the „official texts of a political, legislative, administrative or judicial nature and official translations thereof are not

[11] I. Cuciureanu, D.-A. Bantaș, *op. cit*., p. 85 *et seq*.

[12] R. Coravu, *Ce este plagiatul și cum poate fi prevenit*, in Revista Română de Biblioteconomie și Științe ale Informației, february 2013, p. 39, apud I. Cuciureanu, D.-A. Bantaș, *op. cit*., p. 85 *et seq*.

[13] I. Cuciureanu, D.-A. Bantaș, *op. cit*., p. 85 *et seq*.

[14] *Ibidem.*

[15] *Ibidem.*

[16] *Ibidem.*

[17] *Ibidem.*

[18] *Ibidem.*

protected".[19]

Author Marian Florescu comes to similar conclusions, in the sense of the appropriateness of removing the provisions of Law no. 206/2009 on the protection of ideas. Citing case law on the subject, he also points to the fact that, in certain areas of scientific research, including law, certain expressions are standardized, uniformized, such as those contained in legal textiles, which do not enjoy the protection conferred by copyright established by Law no. 8/2006. Furthermore, the same author considers that, in order to be in the presence of plagiarism, there must be a cumulative material element, consisting of the taking of a text and the lack of citation of the taken text, an intentional element, consisting of the intention to present the taken text as the author's own creation, and the condition that the work/works taken are original[20].

In the same vein, we have to point out that, since the legislator's option was to remove certain types of text from the protection granted by the legislation regarding the intellectual property rights, it would be a proof of extensive interpretation to include these creations under the scope of the aforementioned dispositions governing plagiarism and, therefore, such a legal solution must pe repelled from the very beginning.

5. Liability of higher education teaching/research staff for breaches of ethics and professional conduct regulations

Defined either by the legislator (art. 310 of Law no. 1/2011 and art. 4 of Law no. 206/2004), or by the university senates that have adopted the Codes of Ethics and Professional Deontology, now considered integral, part of the university charters [art. 123 para. (3) with reference to art. 128 para. (2) letter b) of Law no. 1/2011], the facts constituting breaches of the regulations on teaching ethics and professional deontology may be referred to the academic ethics committees for examination by any person aware of the fact, *i.e.,* the committees may act on their own initiative to investigate, by virtue of their status as a judicial body recognized by the law in force on national education, the ethics committees at the level of educational institutions [according to article 306 para. (1) and para. (2) of the Law no. 1/2011, ethics committees operate at the level of universities, their composition being approved by the board of directors and approved by the university senate without the existence of any subordination relationship, and according to art. 307 sentence II of the Law no. 1/2011, the legal responsibility for the decisions and activity of the university ethics committee lies with the university].

Following an *ex officio* complaint/investigation, the University Ethics Committee initiates the procedures established by the Code of Ethics and Deontology, namely Law no. 206/2004 regarding the investigation of the facts, the hearing of the parties (the person denounced as the author of the violation of ethical rules, respectively the denouncer), the investigation of the factual and legal situation in which the violation was committed, determining the circumstances in which the act was committed and the individualization of the applicable sanction according to the conduct of the person under investigation in general and in particular in relation to the offence under investigation.

From the point of view of the procedure described above, and even from the perspective of the sanctions that can be applied to teaching and research staff by the university ethics committee for violation of university ethics or deviations from good conduct in scientific research, it would seem that we are in the field of disciplinary liability of teaching staff, liability committed for disciplinary misconduct[21].

However, the legal nature of disciplinary offences and the penalties for committing them are different from breaches of the rules of professional ethics and professional conduct, *i.e.,* the penalty regime differs for bodies carrying out research activities and those applying penalties, as the case may be.

Even the legislator in Chapter II of the National Education Law no. 1/2011 - Status of Higher Education Teaching and Research Staff, regulates separately, although in the continuation of the sections, Academic Ethics - Section 5 and Section 8 - of Disciplinary Sanctions - Section 7. Even in enumerating and defining the sanctions applicable in the two procedures, the legislator uses separate texts [art. 312 para. (2) of the Law no. 1/2011 on Disciplinary Sanctions, and art. 318 of the Law on Disciplinary Sanctions], sanctions for violations of academic ethics and good conduct in research).

Following the analysis carried out by the members of the ethics committee, the applicable sanction(s) (art. 321 and/or art. 324 Law no. 1/2011) is/are determined and individualized, as opposed to disciplinary liability in the case where only one disciplinary sanction is applied in relation to the offence and the consequences of the facts.

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[19] V. Roș, *Plagiatul, plagiomania si deontologia*, *www.juridice.ro*, 03.07.2007, accessed on 25.05.2020, apud I. Cuciureanu, D.-A. Bantaș, *op. cit*., p. 85 *et seq*.

[20] M. Florescu, *Plagiatul. Scurte consideraţii*, in Pandectele săptămânale no. 21/2012, apud I. Cuciureanu, D.-A. Bantaș, *op. cit*., p. 85 *et seq*.

[21] I. Macovei, *Dreptul proprietății intelectuale*, „Alexandru Ioan Cuza" University Publishing House of Iași, Iași, 2002, p. 137.

Within 30 days of imposing the sanctions (from the issuance of the Ethics Committee's decision/order), the rector or dean, as the case may be, shall apply the sanctions established by the committee, according to art. 322 of Law no. 1/2011. Thus, the 30 days constitutes a limitation period, and in relation to this period, the person who enforces (although the legislator does not distinguish, it has to be the rector) orders the enforcement of sanctions for teachers, while the dean enforces sanctions for students.

With regard to the application of sanctions for deviations from good conduct in research and development for staff of higher education institutions, found and proven, the National Council for Ethics in Scientific Research, Technological Development and Innovation determines the application of one or more sanctions either as a court (art. 5 of Law no. 206/2004), or as an appeal court in the case of sanctions applied by university ethics committees [art. 321 of Law no. 1/2011 on art. 11 para. (2) of Law no. 206/2004].

If the National Council for Ethics in Scientific Research, Technological Development and Innovation, a national-level organization, determines the sanction to be applied, the legal responsibility for the work of the Council lies with the relevant Minister. It is the Minister who implements by ministerial order the sanction applied by the National Ethics Council for Scientific Research, Technological Development and Innovation as the court of substance. If the Council resolves appeals against decisions/orders of the university ethics commissions, the decisions of these appeal courts will be communicated to the management of the educational institution for implementation.

6. Personal considerations on the legal nature of the decisions/orders of the University Ethics Committees in the elaboration of PhD Theses

With regard to teaching staff in the university education system, we consider that, although the teacher is in a contractual employment relationship with the educational institution, the sanction for violation of ethical rules is distinct from the disciplinary sanction from the perspective of the procedure carried out by the University Ethics Committee, because we take into account that according to art. 307 of Law no. 1/2011, the legal responsibility for the decisions and activity of the University Ethics Commission lies with the university, so the University Ethics Commission is an administrative-judicial body at the level of the institution, the legal status being different from that of a disciplinary investigation as well as from the perspective of the consequences on the activity of the teaching staff (withdrawal of certain scientific titles - for example, the scientific title of doctor, a university degree of professor or a scientific researcher degree - or the loss of certain qualities associated with the teaching function - loss of the quality of doctoral supervisor - respectively the withdrawal of certain published works from the scientific field or portfolio.

From the point of view of the quality and competence of the University Ethics Commission, it investigates the facts and applies sanctions in case of violations of the provisions of the Code of Ethics and Professional Deontology, according to art. 320 and art. 321 of Law no. 1/2011, so that the decision/order of the University Ethics Commission is the act of the administrative judicial body that produces legal effects – by establishing the applicable sanction.

We consider that the theory of the complex administrative act is fully applicable, provided that for the implementation of the sanctions applied by the University Ethics Commission, the dean or rector issues an act subsequent to the commission's decision. For these reasons, the legality and appropriateness of the decision/order of the University Ethics Commission regarding the facts and sanctions applicable to university staff must be subject to review by the administrative court, in accordance with the procedures established by Law no. 554/2004, the activity of the University Ethics Commission and its acts cannot be assimilated to the activity and acts of a prior disciplinary investigation commission (whose activity is subject to the control of the legality of the labor law courts according to art. 208-211 of Law no. 62/2011) which does not have the prerogative of an administrative-judicial body, but only to ascertain the facts and circumstances in which the disciplinary offences were committed, the decision of sanctioning is the responsibility of the decision-making body of the universities - the faculty council or the university senate according to art. 313 para. (2) of the National Education Law no. 1/2011.

We believe that this solution is feasible in assessing the quality and competence of the University Ethics Commission, whose statute - a body coordinated by the university senate, and not subordinated to it - by an administrative judicial body, confers a character of administrative law on its acts, namely the decision/order establishing the sanctions resulting from the petitions examined regarding violations of professional conduct and ethics.

The decision of the Rector/Dean provided for in art. 322 of the National Education Law no. 1/2011 is an act subsequent to the act establishing the sanction of the Ethics Committee, it is an implementing act, as provided for by the legislator.

From the above considerations, we disagree with the practice of the court, although unqualified, which considers that the sanction established by the University Ethics Commission is a sanction applied within the framework of a contractual employment contract (teaching staff have employment contracts with universities, not being civil servants according to the letter of Law no. 188/1999), thus arguing that the labor dispute resolution courts, within the framework of judicial dispute procedures, are competent to ensure the legality of both the decision of the rector/dean implementing the decision of the University Ethics Commission and the decision of the University Ethics Commission itself, following the principle of disciplinary liability and the specific procedures of the preliminary disciplinary investigation.

The solution of splitting the appeal against the decision of the Ethics Committee from the appeal against the decision of the Rector/Dean in the case of a dispute challenging the procedure before the University Ethics Committee and the sanctions established by it and implemented cannot be accepted because of the break in the unity of the complex administrative act which is the decision of the University Ethics Committee, the same procedural report based on the appeal against the acts of the Ethics Committee is subject to different jurisdictional procedures - the specific labor dispute procedures relating to the decision of the rector/dean and the administrative dispute procedures relating to the acts and activity of the University Ethics Committee.

7. Conclusions

At the level of pre-university education, the application of sanctions for unethical behavior among students and teachers is currently blocked by the lack of a Code of Ethics in Education defining deviations from the rules of professional ethics, although there are regulations establishing the composition and competence of monitoring bodies. Ethics committees have been operating since 2005 at university education level, both at institutional and national level, with serious breaches of ethical conduct being described in university charters within the framework of the codes of ethics and professional deontology, texts which affect the conduct of both teachers and research staff and students.

In the current regulation of the rules of ethics in higher education, from the student's perspective, we note that the effects of sanctions applied in case of violation of the rules of academic ethics by the student are exacerbated, in the sense that the studies carried out within the study program, interrupted due to expulsion, on the grounds of violation of the provisions of the Code of Ethics and University Deontology, cannot be recognized in case of a new enrollment [art. 147 para. (2) of Law no. 1/2011], regardless of the educational institution to which the student would re-enroll.

Basically, this mandatory rule requires the cancellation of all transferable credits earned by a student in a degree program if the student's conduct is unethical at any given time, whether resulting from a conflict with another student or professor or resulting from teaching fraud. However, this is not an absolute nullity because a student expelled as a result of a breach of ethical rules is not fully reinstated prior to enrolment, which is why if the study program interrupted by expulsion established by the Ethics Commission was a funded one, enrolment in a new study program can only be made against payment.

As regards the legal nature of the acts and activities of the University Ethics Commission, we note that the approach of the courts differs depending on the relationship that the person investigated for violation of the rules of ethics and conduct specific to the education system has with the institution where the University Ethics Commission operates, namely whether the person investigated and sanctioned is part of the teaching staff of the university (having an employment contract concluded and signed by the rector as the representative of the employer), then the dispute concerning the appeal against the decision/order of the Ethics Committee is considered by most courts as an employment dispute arising from the employment contract, involving in the form of a disciplinary liability of the employee - the teacher - and litigation in matters of administrative dispute being referred to the administrative dispute courts with the decision of the rector/minister's order to enforce the sanction, when we have an appeal against a decision/order of the Ethics Committee to withdraw a scientific title/research degree (where the person under investigation does not necessarily have to have an employment relationship with the university), the scientific title/research degree being awarded on the basis of a civil education/professional training report.

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CULTURAL HERITAGE AND ITS PROTECTION AS CONTINUATION OF INTELLECTUAL PROPERTY RIGHTS

Cristiana BUDILEANU[*]

Abstract

In the public space there is a heated debate about the extension of the public domain with works which are no longer protected through copyright and there are a lot of advocates for this idea, including for the decrease of the duration of protection of works through copyright. However, there are also the advocates for the protection of material and immaterial goods that are of high value and significance for the community from which they originate, and which are no longer protected through copyright. The first group is arguing that by continuing to protect such goods after the intellectual property has elapsed, irrespective of the system of protection, we harm the public domain on which people rely to create new works. The second group is arguing that not granting a special protection for such goods will harm both spiritually and financially the communities and their members.

Both groups seem to have logic arguments. However, a balance must be found, and we think that above all, we should try to find this balance by giving priority to the protection of goods which are of high value and significance for the community from which they originate.

The purpose of this paper is to present how these goods which are of high value and significance for the community from which they originate are protected and what means for further protection are trying to be found with a focus on Romanian legislation and case-law.

Keywords: *cultural heritage, traditional cultural expressions, World Intellectual Property Organization, United Nations Educational, Scientific and Cultural Organization, copyright, public domain.*

1. Introduction

We can notice that many industries such as entertainment, fashion, agriculture, pharma, sometimes use traditional designs, songs, knowledge and dances that belong either to states, either to small communities (*e.g.,* indigenous people, Aborigines) as their cultural heritage. Such uses are made for the purpose of creating other works which might be protected by intellectual property.

In this sense, we all saw recently that the famous puzzle company Ravensburger has been obliged by Italian courts to pay royalties for the use of the Vitruvian Man in one of its puzzle games[1].

In 2022, legal actions have been commenced against Jean Paul Gaultier by the Uffizi gallery in Florence, Italy for the use, on garments, of the images of the famous painting Birth of Venus by Sandro Botticelli[2].

In 2021, both the Louvre Museum from Paris, France and the Uffizi gallery in Florence, Italy started legal actions against Pornhub for the use of famous classic paintings in its website and mobile application „Show me the Nudes"[3] which ended with the company deleting these images from its website and mobile application.

In 2019, the company Studi d'Arte Cave Michelangelo S.r.l., who used a copy of the sculpture David to create a video in which the sculpture was wearing an outfit of a famous Italian luxury fashion house, was obliged by Italian courts to (a) refrain from using the image of the sculpture for commercial purposes by any means, (b) remove from its websites all images of the sculpture, (c) pay daily penalties per day of delay in complying with the order[4].

What do all these cases have in common? If we look carefully, we notice that in all of them works of art which were created more than a hundred years ago were used: the Vitruvian Man was painted by Leonardo Da

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[1] Le Figaro, *Ravensburger condamné à payer des droits à l'image pour son puzzle de L'Homme de Vitruve*, 2023, *https://amp-lefigaro-fr.cdn.ampproject.org/c/s/amp.lefigaro.fr/culture/ravensburger-condamne-a-payer-des-droits-a-l-image-pour-son-puzzle-de-l-homme-de-vitruve-20230328* (accessed on 01.04.2023).

[2] A. Tremayne-Pengelly, *Florence's Uffizi Museum Sues Jean Paul Gaultier for Using a Botticelli Image in Clothing*, 2022, *https://observer.com/2022/10/florences-uffizi-museum-sues-jean-paul-gaultier-for-using-a-botticelli-image-in-clothing/* (accessed on 01.04.2023).

[3] B. Latza Nadeau, *Louvre calls in lawyers over Pornhub's hardcore re-enactments*, 2021, *https://www.thedailybeast.com/louvre-calls-in-lawyers-over-pornhubs-hardcore-reenactments* (accessed on 01.04.2023).

[4] C. Marchisotti, F. Tognato, *A Copy of a Copy: The Court of Florence on the Unauthorized Reproduction of Cultural Properties*, 2022, *http://blog.galalaw.com/post/102hz4i/a-copy-of-a-copy-the-court-of-florence-on-the-unauthorized-reproduction-of-cultu* (accessed on 09.04.2023).

Vinci around the year 1487, the Birth of Venus by Sandro Botticelli between 1482 and 1485, the other paintings from the Pornhub case date around the same period.

Moreover, there are situations in which people tend to appropriate other cultures' traditions, being „attracted by the novelty and sophistication" of art and design[5] and usually such practices are made for commercial purposes without the communities to whom belong such traditions also having a pecuniary benefit. For instance, an American singer[6] showed up to a concert dressed as a geisha[7] and in a video with cornrows[8].

This paper proposes to present if these practices are correct with a focus on Romanian law, starting from international conventions, national laws, legal literature and ending with the current preoccupations at international level to better protect and safeguard these material or immaterial assets of communities.

2. General aspects about public domain in intellectual property

Regarding the works mentioned earlier, we could say that all these works are no longer protected by copyright laws having in view that art. 7 of the Berne Convention[9] states that the duration of protection is granted for the entire life of the author plus 50 years after his/her death, with the possibility for the member states to establish a higher duration. In general, most of the states grant a protection of 70 years after the death of the author.

Based on this legal provision, after the above-mentioned duration, all these works are falling into something that we conventionally call „public domain".

The notion of „public domain" must not be confused with the identical notion used in administrative law and, from an intellectual property perspective, it does not have a legal definition, and neither Berne Convention offers one. However, multiple legal international and national instruments use this notion.

If we look at art. 18 of the Berne Convention, we will see that para. (2) links „public domain" to the expiry of the protection of works through copyright [para (1)].

Therefore, in intellectual property law, „public domain" means that the works may be freely used by any person without asking permission for use and without paying any remuneration to the author or to the copyright holders[10].

However, it does not mean that the works from public domain are free for the public. For example, we cannot oblige publishing houses to offer free of charge the works written by Victor Hugo motivating that they are part of the public domain. In theory, „the fact that the works have fallen into the public domain means that they may be used by anyone without restriction and without payment of any remuneration for activities such as (a) reproduction, (b) distribution, (c) importation with a view to the domestic marketing of copies of the work, (d) rental, (e) lending, (f) communication to the public, (g) broadcasting, (h) cable retransmission, (i) making derivative works."[11]

Although there is no clear definition of the public domain in any state[12], the public domain can be viewed as follows[13]: (a) in a narrow sense - it refers to works whose protection by an intellectual property right has expired; (b) in a broad sense - encompasses: (i) works whose protection by an intellectual property right has expired; (ii) the common fond, namely information which by its nature has never been protected by an intellectual property right either because it does not meet the originality condition or because it is excluded from

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[5] J. Phillips, *Traditional knowledge and cultural genocide: a letter from Canada's West Coast*, 2015, *https://ipkitten.blogspot.com/2015/07/traditional-knowledge-and-cultural.html* (accessed on 12.04.2023).

[6] A. Trendell, *Katy Perry apologises for 'cultural appropriation'*, 2017, *https://www.nme.com/news/music/katy-perry-apologises-cultural-appropriation-2087931* (accessed on 10.04.2023).

[7] For Japanese culture, geishas represent the beauty and elegance of Japan. They are trained from the age of 14 or 15 into the traditional Japanese culture, the art of performing and of communication. For more details, *https://blog.japanwondertravel.com/the-history-of-geisha-25214#:~:text=The%20word%20geisha%20comes%20from,to%20use%20to%20entertain%20customers* (accessed on 12.04.2023).

[8] The cornrows symbolise symbolize resistance, freedom, love, and power coming to fruition, but also the slaves' resistance, being used as maps to escape from slavery. For more details, *https://www.houseofbraidla.com/history#:~:text=Cornrows%20were%20a%20sign%20of,on%20their%20way%20to%20enslavement* (accessed on 12.04.2023). were a sign of resistance for slaves because they used it as maps to escape from slavery and they would hide rice or seeds into their braids on their way to enslavement.

[9] Berne Convention for the protection of literary and artistic works of 09.09.1886 as subsequently amended and supplemented.

[10] For more details, V. Roș, *Dreptul proprietății intelectuale. vol. I. Dreptul de autor, drepturile conexe și drepturile sui-generis*, C.H. Beck Publishing House, Bucharest, 2016, p. 361-362.

[11] C. Budileanu, *Dreptul de autor în era digitală. O perspectivă asupra licențelor comune („Creative Commons")*, in RRDPI no. 1/2020, p. 72.

[12] S. Dusollier, *Scoping study on copyright and related rights and the public domain*, World Intellectual Property Organization, p. 6, *www.wipo.int/meetings/fr/doc_details.jsp?doc_id=161162* (accessed on 01.04.2023).

[13] M. Dulong de Rosnay, H. Le Crosnier, *Propriété intellectuelle. Géopolitique et Mondialisation*, CNRS Editions, 2013, Les Essentiels d'Hermès, 978-2-271-07622-9, halshs-01078531, p. 20, *https://halshs.archives-ouvertes.fr/halshs-01078531/document* (accessed on 01.04.2023).

protection (*e.g.,* ideas, theories, concepts, scientific discoveries, processes, methods of operation or mathematical concepts, official texts of a political, legislative, administrative or judicial nature and translations thereof, news and press information, etc.); (iii) the consensual public domain or voluntary public domain, namely works protected by copyright which are voluntarily put to free use by authors or copyright holders. They are considered to represent a „breathing space”[14] for our culture and knowledge because they allow free interaction between them and any person.

According to legal doctrine[15], the public domain is the rule, while protection through intellectual property rights is the exception, and almost 13 years ago, it was said that the „public domain” is „an elastic, versatile and relative concept and it is not susceptible to a uniform legal meaning. Its meaning and effect in IP theory are not yet well understood.”[16]

The initiators of the Public Domain Manifesto[17] are arguing that „a healthy and thriving Public Domain is essential to the social and economic well-being of our societies” playing „a capital role in the fields of education, science, cultural heritage and public sector information”. Moreover, they recommend cultural heritage institutions to „ensure that works in the Public Domain are available to all of society, by labelling them, preserving them and making them freely available.”

3. Protection of cultural heritage and international organizations involved

From all of the above, we may conclude that works in the public domain can be used by anyone at any time without further consent being required and without paying any remuneration. And if this is the case with works under public domain, why Italian institutions had such a success when pursuing companies for paying royalties for the use of such works?

Even if the protection through copyright is no longer valid, there are other means to protect works of high value for the cultures from which they originate or works which are in the collection of museums.

These means refer to the protection of cultural heritage[18] which is divided into tangible cultural heritage and intangible cultural heritage and their importance is given by the fact that „protection of the cultural and intellectual property of indigenous people is an indispensable element in any effort to preserve these groups and to protect them from discrimination”[19].

Prior to moving forward with the presentation of first steps for the protection of cultural heritage, we propose to first see what „culture” is and why it is important to individuals and communities.

According to the online Oxford dictionary, „culture” is defined as representing „the customs and beliefs, art, way of life and social organization of a particular country or group”[20]. In simpler words, „culture” represents our identity related to the community to which we belong. Without this identity, we would be lost, we would feel that we do not have our place in the world.

Regarding the use of the terms, it must be specified that intangible cultural heritage is used in multiple legal instruments also with the sense of or as including folklore which is synonymous to traditional cultural expressions. These notions are applicable both to Western communities, but also to indigenous people.

The first preoccupations at international level regarding the protection of cultural heritage started in 21st of May 1971 when the Economic and Social Council of the United Nations adopted the initiative for the protection of indigenous people from discrimination[21].

Also, the World Bank was and still is involved in the preservation and protection of indigenous communities and their culture, until present having worked in 187 out of 629 projects with reference to such communities[22] and in lots of other projects regarding cultural heritage,[23] sustaining activities which support the protection,

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[14] Public domain manifesto, *https://publicdomainmanifesto.org/manifesto/* (accessed on 01.04.2023).

[15] M. Dulong de Rosnay, H. Le Crosnier, *op. cit*. p. 28.

[16] IGC meeting, 17th session, 2010, *Note on the meanings of the term „public domain” in the intellectual property system with special reference to the protection of traditional knowledge and traditional cultural expressions/expressions of folklore*, p. 2, *https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_17/wipo_grtkf_ic_17_inf_8.pdf* (accessed on 01.04.2023).

[17] Public domain manifesto, *https://publicdomainmanifesto.org/manifesto/* (accessed on 01.04.2023).

[18] The cultural heritage includes the traditional knowledge and traditional cultural expressions.

[19] M. Newcity, *Legal Protection of the Traditional Knowledge and Traditional Cultural Expressions of the Indigenous Peoples of the Former Soviet Union*, article published in *The Cambridge Handbook of Intellectual Property in Central and Eastern Europe,* edited by Mira T. Sundara Rajan, 2019, Cambridge University Press, p. 394.

[20] *https://www.oxfordlearnersdictionaries.com/definition/english/culture_1?q=culture* (accessed on 10.04.2023).

[21] UN Economic and Social Council, *The problem of indigenous populations*, 50th sess., 1971, New York, *https://digitallibrary.un.org/record/214989?ln=en* (accessed on 10.04.2023).

[22] *https://projects.worldbank.org/en/projects-operations/projects-summary?themecodev2=000511* (accessed on 10.04.2023).

[23] *https://projects.worldbank.org/en/projects-operations/projects-list?themecodev2=000070&os=0* (accessed on 10.04.2023).

conservation and sustainable development of cultural property and intangible heritage[24].

In 1972, UNESCO adopted the Convention concerning the protection of the World Cultural and Natural Heritage[25] („**UNESCO Cultural heritage Convention**").

In 1975, the Treaty establishing the European Economic Community also referred in its art. 128 to the cultural heritage, stipulating that the Community shall highlight the shared cultural heritage.

In 1983, UNESCO and WIPO drafted and published the „Model provisions for national laws on the protection of expressions of folklore against illicit exploitation and other prejudicial actions"[26] stating in its introductory observations that „Folklore is an important cultural heritage of every national and is still developing – albeit frequently in contemporary forms – even in modern communities all over the world" being commercialized „without due respect for the cultural or economic interests of the communities in which it originates and without conceding any share in the returns from such exploitations". They also underlined that copyright is not sufficient to protect the folklore arguing that „impersonal, continuous and slow process of creative activity exercised in a given community by consecutive imitation" as happens in case of folklore is not specific to copyright. Neighbouring rights for such protection were mentioned, however it was concluded they also not are enough having in view the limited duration of protection just as in case of copyright protection. Therefore, a special (*sui generis*) type of law was suggested which could offer an adequate protection against unauthorized exploitation, the model of such suggested provisions stipulating as a rule that the utilisation of folklore would be subject to authorisation from the competent authorities and payment of fees if it is used for commercial purposes or outside the traditional or customary context with the payment of damages if violated.

In 1989, UNESCO has adopted the Recommendation on the Safeguarding of Traditional Culture and Folklore[27] stating in section B – Identification of folklore – that folklore is „a form of cultural expression" and in section F – Protection of folklore - that folklore „constitutes manifestations of intellectual creativity" and that „it deserves to be protected in a manner inspired by the protection provided for intellectual productions", suggesting states to urgently take separate actions in a range of areas to safeguard folklore.

In 2000, WIPO established its Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore („**IGC**") and IGC started in 2007 to work to create and make adopted an international legal instrument to protect traditional knowledge („**TK**"). The first session of IGC has taken place in 2001. Since 2005 until present, each session of the IGC begun with the presentations by the representatives of indigenous and local communities from different states[28]. The representatives usually present experiences, concerns and aspirations of indigenous and local communities concerning the protection, promotion, and preservation of TK, traditional cultural expressions („**TCE**") and genetic resources.

The current mandate of IGC consists in, among others, continuing the work to finalise „an agreement on an international legal instrument(s) (…) relating to intellectual property, which will ensure the balanced and effective protection of genetic resources, traditional knowledge and traditional cultural expressions."[29]

The next IGC meeting (*i.e.,* the 47th session) will take place from June 5 to June 9, 2023 and it has on the agenda to discuss about the drafts related to the protection of TK and TCE, including about the glossary of terms related to IP, TK and TCE[30]. Among the notions defined in this glossary, we find „codified traditional knowledge", „cultural community", „cultural expressions"[31], „cultural heritage"[32], „disclosed traditional knowledge", „expressions of folklore" for which it is mentioned that they are synonyms with TCEs, „folklore"[33], „indigenous cultural heritage", „intangible cultural heritage"[34], „public domain", TK.

In 2003, UNESCO adopted the Convention for the Safeguarding of the Intangible Cultural Heritage[35]

[24] The World Bank, *Theme Taxonomy and definitions,* 2016, p. 78, *chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://pubdocs.worldbank.org/en/275841490966525495/New-Theme-Taxonomy-and-definitions-revised-July-012016.pdf* (accessed on 10.04.2023).

[25] This Convention was adopted by UNESCO on 16.11.1972 and entered into force on 17.12.1975. 194 States are part to the Convention either through ratification, acceptance, accession, or notification of succession. Romania only accepted the Convention. *https://whc.unesco.org/en/conventiontext/* (accessed on 26.03.2023).

[26] The document is available here *https://unesdoc.unesco.org/ark:/48223/pf0000220160* (accessed on 12.04.2023).

[27] *https://www.unesco.org/en/legal-affairs/recommendation-safeguarding-traditional-culture-and-folklore* (accessed on 10.04.2023).

[28] *https://www.wipo.int/tk/en/igc/panels.html* (accessed on 26.03.2023).

[29] IGS mandate for 2022-2023, *https://www.wipo.int/export/sites/www/tk/en/docs/igc-mandate-2022-2023.pdf* (accessed on 10.04.2023).

[30] *https://www.wipo.int/meetings/en/details.jsp?meeting_id=75419* (accessed on 10.04.2023).

[31] It uses the definition from UNESCO Cultural expressions Convention.

[32] It uses the definition from UNESCO Cultural heritage Convention which we shall detail later.

[33] It uses the definition from UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore.

[34] It uses the definition from UNESCO Intangible Cultural heritage Convention which we shall detail later.

[35] This Convention was adopted by UNESCO on 17.10.2003 and entered into force on 20.04.2006. *https://ich.unesco.org/en/convention* (accessed on 26.03.2003).

(„**UNESCO Intangible Cultural heritage Convention**"), UNESCO recognising in the conventions's recitals that indigenous communities, groups and even individuals may have a significant role in producing, safeguarding, maintaining, re-creating intangible cultural heritage, helping, therefore, „to enrich cultural diversity and human creativity".

In 2005, UNESCO adopted the Convention for the Protection and Promotion of the Diversity of Cultural Expressions („**UNESCO Cultural expressions Convention**")[36]. However, it recognises the priority of the human rights and fundamental freedoms, such as freedom of expression, information, and communication, over the cultural diversity.

In 2007, the United Nations adopted the Declaration on the Rights of Indigenous Peoples[37] which grants protection to cultural heritage, cultural expressions, stating in art. 31 that „Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts", as well as to „maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions".

4. Tangible cultural heritage

4.1. The object of protection both at international level and national level in Romania

Art. 1 of the UNESCO Cultural heritage Convention protects the cultural heritage and it states that in this notion are included: (a) Monuments – architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; (b) Groups of buildings – groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; (c) Sites - works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.

We may notice that in this definition are also included the paintings, inscriptions, cave dwellings, as expressions of the humans. Art. 4 and 5 of the UNESCO Cultural heritage Convention impose to the states party to identify, protect, conserve, present and transmit them to future generations through multiple means, such as: adoption of general policy aiming to include cultural heritage in the life of the community, setting up services for the protection, conservation, and presentation of the cultural heritage, developing scientific and technical studies and research.

Romania has in the present 9 properties inscribed on the World Heritage List (out of which the last two represent natural heritage), as follows: (a) 1993, 2010 - Churches of Moldavia; (b) 1999 - Dacian Fortresses of the Orastie Mountains; (c) 1999 - Historic Centre of Sighişoara; (d) 1993 - Monastery of Horezu; (e) 2021 - Roșia Montană Mining Landscape; (f) 1993, 1999 - Villages with Fortified Churches in Transylvania; (g) 1999 - Wooden Churches of Maramureş; (h) 2007, 2011, 2017, 2021 - Ancient and Primeval Beech Forests of the Carpathians and Other Regions of Europe; (h) 1991 – Danube Delta.

Regarding the cases from Italy presented earlier, we must mention that Italian institutions did not construe their legal actions based on copyright rules, since the length of the protection expired, instead these actions represent cultural heritage disputes, the legislation allowing „to control for-profit reproductions of Italian cultural heritage, irrespective of their copyright status."[38]

The Italian Law related to the Code of cultural heritage and landscape[39] defines the cultural assets as movable and immovable goods presenting artistic, archaeological, entoanthropological, archival interest and belonging to the state, regions, or other territorial public bodies, as well as to any other public body and institution and to legal persons, private non-profit, including ecclesiastical bodies civilly recognized. Moreover, this code offers examples of goods that are considered cultural assets, such as: (a) the collections of museums,

[36] This Convention was adopted by UNESCO on 20.10.2005 and entered into force on 18.12.2006 *https://en.unesco.org/creativity/convention/texts* (accessed on 26.03.2003).

[37] This Declaration was adopted by the UN on 13 September 2007 *https://social.desa.un.org/sites/default/files/migrated/19/2018/11/UNDRIP_E_web.pdf* (accessed on 26.03.2023).

[38] For more details, E. Rosati, *Uffizi museum sues Jean Paul Gaultier over unauthorized reproduction of Botticelli's Venus on fashion garments*, 2022, *https://ipkitten.blogspot.com/2022/10/uffizi-museum-sues-jean-paul-gaultier.html* (accessed on 09.04.2023).

[39] *https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2004-01-22;42&_x_tr_sl=fr&_x_tr_tl=ro&_x_tr_hl=en&_x_tr_pto=wapp* (accessed on 01.04.2023).

art galleries; (b) the archives and individual documents of the state, regions, of the other territorial public bodies; (c) the book collections of the State libraries, of the regions, of other territorial public entities; (d) immovable and movable things of artistic interest, particularly important historical, archaeological or ethno-anthropological; (e) archives and individual documents, belonging to private individuals, which are of particularly important historical interest; (f) exceptional book collections belonging to private individuals; (g) immovable and movable things, belonging to whoever, which are of particularly important interest because of their reference with the history of politics, military, literature, of art, science, technology, industry and culture in general; (h) things, belonging to anyone, which present an artistic, historical, archaeological or ethno-anthropological interest exceptional for the integrity and completeness of the cultural heritage of the nation; (i) collections or series of objects, belonging to anyone, which for tradition, fame, and particular environmental characteristics, or for artistic, historical, archaeological, numismatic relevance or ethno-anthropological, as a whole are of exceptional interest.

The Romanian Constitution[40] stipulates in art. 33 para. (3) that the state must ensure the protection and conservation of cultural heritage.

According to their deontological code[41], the Romanian architects must respect the cultural heritage of the community in which they exercise their profession, contributing to its conservation and enrichment.

Romania has a similar law with the one from Italy, namely Law no. 182/2000 on the protection of national mobile cultural heritage[42] („**Law no. 182/2000**") which mentions that in national cultural heritage are included the goods representing a „testimony to and an expression of evolving values, beliefs, knowledge and traditions", simpler „it comprises all the elements resulting from the interaction, over time, between human and natural factors". Therefore, Romanian notion of „national cultural heritage" aligns with international norms and it included in the cultural heritage, the intangible cultural heritage, the TCEs.

Among the goods forming the national cultural heritage, the Law no. 182/2000 mentions: (a) archaeological and historical documentary heritage; (b) goods of artistic significance being offered the following examples: (i) plastic art works (paintings, sculptures etc.), (ii) decorative art works, (iii) cult objects; (c) goods of ethnographic significance such as tools, household and domestic items, furniture objects, pottery, fabrics, jewellery, etc.; (d) goods of scientific importance; (e) goods of technical importance such us unique technical creations, rarities, regardless of brand.

It is worth mentioning that in order to be considered goods from national cultural heritage and to enjoy the protection granted by Law no. 182/2000, the goods must be classified as such following the procedure described in art. 9-22 of this law.

Moreover, this law mentions the institutions involved in the protection of the national cultural heritage, namely the public administration authorities, specialised institutions (such as museums, public collections, memorial houses, archives and libraries, religious cults) and the non-governmental organizations.

4.2. The protection granted at international level and national level in Romania

Art. 4 of UNESCO Cultural heritage Convention obliges each state party to ensure „the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage" by using to this end its own resources, but also international assistance if it is able to obtain it.

To arrive to such end, art. 5 of the UNESCO Cultural heritage Convention provides for multiple means, such as: (a) adopting general policies aiming to give the cultural heritage a function in the community; (b) setting up services with appropriate staff; (c) developing scientific and technical studies and research; (d) taking appropriate measures to identify, protect, preserve, present the culture heritage; (e) creating regional centres for training in the protection, conservation and presentation of the cultural and natural heritage.

On the basis of these provisions of the UNESCO Cultural heritage Convention, Romanian Law no. 182/2000 states that for making copies, casts, posthumous prints and facsimiles of the goods [art. 27 para. (1) and (2)] and to reproduce them through photo, video, or numerical means [art. 27 para. (3)],the administration institution's or the goods owner's approval must be obtained.

In our opinion, Law no. 182/2000 should have included the copies, casts, posthumous prints, and facsimiles within the reproduction notion and should have given it a broader protection in a way to include the reproduction through any means and under any form, just like Law no. 8/1996 on copyright and related rights[43] defines

[40] Romanian Constitution republished in 2003 in the Official Gazette of Romania no. 767/2003.

[41] Deontological code of the architect profession adopted in 2012 by the Romanian Architects Order, published in the Official Gazette of Romania no. 342/12.05.2012.

[42] Law no. 182/2000 on the protection of national mobile cultural heritage, republished in the Official Gazette of Romania no. 259/2014.

[43] Law no. 8/1996 on copyright and related rights, republished in the Official Gazette of Romania no. 8/1996.

„reproduction".

Moreover, we can notice that art. 75 para. (1) letter l) of Law no. 182/2000 establishes that the reproduction as described above without approval constitutes contravention, while the reproduction under Law no. 8/1996 is considered a crime. The actions of making copies, casts, posthumous prints, and facsimiles are punished as crimes only if executed for commercial purposes, as per art. 80 of the same law, understanding therefore that such actions are allowed for personal purposes.

In a decision[44] having as object the request of the author of a wall mosaic to oblige Suceava City and Suceava County Direction for Culture and Patrimony to pay moral damages for the demolition of a building which had on an outside wall the author's mosaic, the author arguing that his work was classified in the registries of Suceava County Direction for Culture and Patrimony as public forum monument and that he was not informed about the destruction of his work, the Romanian courts have admitted the author's request obliging the defendants to pay 100.000 LEI as moral damages.

In reaching this decision, the Romanian courts held that the work was a wall mosaic, a composition worked in the mosaic technique of fireclayed and glazed bricks, covering an area of 456 square metres and located on the outer wall of a state building. They also held that the work was a public forum monument, Suceava City being guilty of the demolition of the building on whose wall was the mosaic and also of the non-register of the work in its registries, and Suceava County Direction for Culture and Patrimony being guilty of not informing Suceava City about the work of art which was to be destroyed, of not opposing to the demolition authorisation without notifying the author of the work and of not verifying if the work was still protected by copyright law.

In this regard, the Romanian courts showed that the defendants had a passive attitude while they were obliged by law, as state authorities, to take active and concrete measures to preserve the good which was part of the national mobile cultural heritage, including by requesting the suspension / annulment of the demolition authorisation. The Romanian courts mentioned also that the defendants have violated the author's moral right regulated by art. 10 letter d) of Law no. 8/1996, namely the author's right to claim respect for the integrity of the work and to object to any alteration of, or interference with, the work if it is prejudicial to his honour or reputation.

In our opinion, this decision is important because it makes clear that there are multiple legal instruments to protect a work: first the protection by intellectual property rights (in this case, copyright) and second the protection of the work as national cultural heritage if all legal conditions are met. In addition, if the copyright is no longer applicable, the protection of the work as part of the national cultural heritage is still possible, if, of course, it is registered as such in the public registries.

5. Intangible cultural heritage

5.1. The object of protection both at international level and national level in Romania

When we think to TCEs, we associate them mostly with African, Asian, Australian tribes. However, TCEs or folklore as they are also called (are included in the notion of „intangible cultural heritage"), are present all over the world, including in developed states, and also in Europe[45]. In Sweden there is Dala horse[46], Denmark has hygge[47], Norway has rose painting[48], Finland has *Kalevala*[49], Iceland has folk music, Greenland has traditional clothing decorated with bright patterns and designs, but also with abstract shapes and symbols.

The notion of „intangible cultural heritage" is defined by art. 2 point 1 of the UNESCO Intangible Cultural heritage Convention as „the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts, and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity."

According to the same article from UNESCO Intangible Cultural heritage Convention, „intangible cultural

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[44] HCCJ dec. no. 4502/2023, consulted in Lege5 database.

[45] For more details on Scandinavian folk art, see Z. Merchant, *What is Scandinavian folk art, and where can you see it?*, 2023, *https://www.routesnorth.com/scandinavia/what-is-scandinavian-folk-art-and-where-can-you-see-it/* (accessed on 25.03.2023).

[46] *Dalahäst* or Dala horse is a horse made of wood painted in different colours and it is considered a national icon of Sweden.

[47] Hygge describes a feeling of comfort, cosiness and warmth.

[48] Rosemaling (rose painting) is a traditional style of painting that dates back to the 1700s and it consists of brightly coloured floral designs, either painted or carved on wood. For more details, A. Tomlin, *All you need to know about Norwegian Rosemaling*, 2022, *https://www.routesnorth.com/language-and-culture/all-you-need-to-know-about-norwegian-rosemaling/* (accessed on 25.03.2023).

[49] *Kalevala* is a collection of folklore, myths, and legends from Finland.

heritage" may be manifested including, but not limited to the following domains: „(a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship."

It is very interesting to see that language can be protected as intangible cultural heritage. We agree that „Language is at the heart of a nations culture and knowledge retention"[50] and considering that a language together with its community may be lost easily, we think that it was included in the object of protection of the intangible cultural heritage in order to preserve it because the loss of a language will translate into the loss of traditions and identity of a certain community. Besides, we may see that there are organizations concerned about the preservation of „indigenous languages as contributors to the preservation of biodiversity and traditional knowledge"[51].

Art. 4 point 3 of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions[52] defines the „cultural expressions" as „expressions that result from the creativity of individuals, groups and societies, and which have cultural content."

UNESCO has recognised for Romania as intangible cultural heritage the following[53]: (a) in 2022 - Lipizzan horse breeding traditions[54]; the art of the traditional blouse with embroidery on the shoulder (altiţă)[55]; (b) in 2017 - Cultural practices associated to the 1st of March[56]; (c) in 2016 - Traditional wall-carpet craftsmanship; (d) in 2015 – Lad's dances[57]; (e) in 2013 - Men's group Colindat, Christmas-time ritual[58]; (f) in 2012 - Craftsmanship of Horezu ceramics[59]; (g) in 2009 – Doina[60]; (h) in 2008 - Căluş ritual[61].

The Romanian Law no. 26/2008 on the protection of intangible cultural heritage[62] („**Law no. 26/2008**") defines in art. 2 letter a) the notion of „intangible cultural heritage" in the same way as the UNESCO Intangible Cultural heritage Convention.

However, the notion of „traditional cultural expressions" is more detailed in the Romanian law, being defined in art. 2 letter b) of Law no. 26/2008 as „forms of manifestation of human creativity with material, oral expression - forms of word art and traditional verbal expression - forms of musical expression - songs, dances, folk games - forms of syncretic expression - customs, rituals, celebrations, ethnoiatry, children's games and traditional sports games - forms of folk creation in the technical field, as well as traditional crafts or technologies."

This law also establishes in art. 4 the main characteristics of the intangible cultural heritage: „(a) anonymous character of the origin of the creation *(A/N – however, the literature has established that there might be instances when they are created by individuals that the community recognize as having the right, responsibility or permission)*; (b) transmission mainly by informal means *(A/N – by oral or imitation, being capable to evolve during time)*; (c) its preservation especially within the family, group and/or community; (d) demarcation according to the following criteria: territorial, ethnic, religious, age, gender and socio-professional; (e) perception as intrinsically linked to the groups and/or communities in which it was created, preserved and transmitted; (f) the

[50] P. Settee, *Native Languages Supporting Indigenous Knowledge,* Article for United Nations International Expert Group Meeting on Indigenous Languages, New York, 2008, p. 1.

[51] *Indigenous Languages as Contributors to the Preservation of Biodiversity*, 2022, *https://www.culturalsurvival.org/news/indigenous-languages-contributors-preservation-biodiversity* (accessed on 25.03.2023).

[52] This Convention was adopted by UNESCO on 17.10.2005 and entered into force on 18.03.2007, *https://www.unesco.org/en/legal-affairs/convention-protection-and-promotion-diversity-cultural-expressions* (accessed on 26.03.2003).

[53] *https://ich.unesco.org/en/lists?country[]=00182&multinational=3&display1=inscriptionID#tabs* (accessed on 26.03.2023).

[54] For more details *https://ich.unesco.org/en/RL/lipizzan-horse-breeding-traditions-01687#identification* (accessed on 26.03.2023).

[55] It juxtaposes a simple cut with rich and colourful ornamentations that are stitched using complex sewing techniques. The blouses are white and made of natural fibres (flax, cotton, hemp, or floss silk), and the complex stitch combines horizontal, vertical, and diagonal seams that result in a specific pattern and texture. For more details *https://ich.unesco.org/en/RL/the-art-of-the-traditional-blouse-with-embroidery-on-the-shoulder-alti-an-element-of-cultural-identity-in-romania-and-the-republic-of-moldova-01861* (accessed on 26.03.2023).

[56] Traditions transmitted since ancient times to celebrate the beginning of spring. The main practice consists of making, offering, and wearing a red and white thread, which is then untied when the first blossom tree, swallow or stork is seen. For more details *https://ich.unesco.org/en/RL/cultural-practices-associated-to-the-1st-of-march-01287#identification* (accessed on 26.03.2023).

[57] A genre of men's folk dance practised in community life on festive occasions, such as weddings and holidays, as well as during stage performances. For more details *https://ich.unesco.org/en/RL/lads-dances-in-romania-01092* (accessed on 26.03.2023).

[58] A practice that takes place each Christmas Eve. Men go from house to house performing festive songs and the hosts offer them gifts and money. For more details *https://ich.unesco.org/en/RL/mens-group-colindat-christmas-time-ritual-00865#identification* (accessed on 26.03.2023).

[59] A unique traditional craft of ceramics from northern part of Vâlcea county. For more details *https://ich.unesco.org/en/RL/craftsmanship-of-horezu-ceramics-00610#identification* (accessed on 26.03.2023).

[60] A lyrical, solemn chant that is improvised and spontaneous, being performed solo, with or without instrumental accompaniment. For more details *https://ich.unesco.org/en/RL/doina-00192#identification* (accessed on 26.03.2023).

[61] A ritual featuring a series of games, skits, songs, and dances enacted by all-male dancers to the accompaniment of two violins and an accordion. For more details: *https://ich.unesco.org/en/RL/clu-ritual-00090#identification* (accessed on 26.03.2023).

[62] Law no. 26/2008 on the protection of intangible cultural heritage, published in the Official Gazette of Romania no. 168/2008.

realisation, interpretation or creation of elements of intangible cultural heritage within the group and/or the community, respecting traditional forms and techniques."

We might add to the above, the following characteristics of the intangible cultural heritage[63]: (a) it represents intellectual activity and is passed from one generation to another; (b) it reflects the cultural and social identity of a community; (c) usually, it is created for spiritual and religious reasons and not for commercial purposes; (d) usually, it is created from natural resources that exist in a given community.

Also, art. 1 para. (2) expressly states that Law no. 26/2008 „may not be used, in whole or in part, by any natural or legal person to obtain protection of an element of the intangible cultural heritage through legislation governing industrial property or copyright."

5.2. The protection granted at international level and national level in Romania

Art. 2 point 3 of the UNESCO Intangible Cultural heritage Convention states that such intangible cultural heritage is safeguarded through „identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage".

According to art. 9 of Law no. 26/2008, Romania protects the intangible cultural heritage through multiple means, by developing safeguard strategies, establishing criteria for identifying and evaluating them. Also, based on art. 12 of the same law, it was created the National Registry of Intangible cultural heritage.

6. Protection of cultural heritage by copyright

International organizations are working hard to stop the violation of TCEs, mainly for commercial purposes by companies, in order to recognise to the communities their right to grant or not permission of using their TCEs and to cash in a part of the gains.

However, is it possible to protect TCEs through copyright?

Copyright grants protection to a variety of works that are original, irrespective of the mode of creation or the form of expression and independently of their value and destination.

The works protected by copyright are protected as of their creation, even in unfinished form and independently of their presentation to the public. However, these works do not include ideas.

In a case before the Romanian courts[64], the complainant tried to obtain the recognition of copyright for his musical work which was inspired from folklore. The complainant even registered his musical composition with the Romanian Union of music composers and with the Romanian Copyright Office indicating himself as composer and text editor of his musical work. However, this registration is not constitutive of rights over the work.

Analysing the text of the music and the music with the support of specialists, the Romanian courts have concluded that the complainant's work was just a personalised version of a song belonging to the folklore, the complainant not being, therefore, entitled to claim a violation of his copyright, him being only the holder of a related right to copyright, as performing artist.

In its motivation, the Supreme Court of Justice indicated that the folklore comprises impersonal creations of a community, handed down and processed by grinding from generation to generation, the property being exercised collectively and being inalienable having in view that the law expressly states the impossibility to individually appropriate these elements through copyright, both by individuals belonging to the said community and by third parties. The use of such elements within the community, by any of its members, is free, while the third parties may use them only with the community's approval.

The Supreme Court of Justice also indicated that collective creations may never fall in the public domain having in view their transmission from generation to generation, therefore their property being imprescriptible, while the works protected through copyright are falling in the public domain after the expiry of the term of protection.

Moreover, the Supreme Court of Justice said that „if it is not possible to protect elements of traditional cultural expression by means of copyright, a *sui generis* form of protection must be recognised by including them in the intangible cultural heritage". Therefore, the Supreme Court of Justice stated that it is not impossible to recognise the copyright to works created from folklore as long as the derivative work accomplishes the originality condition, meaning that „the derivative work must be sufficiently distant from the original source for the imprint of the author's creative personality to be identifiable". In the absence of the originality condition, the

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[63] Singh & Associates, *Traditional cultural expressions*, India, 2012, *https://www.lexology.com/library/detail.aspx?g=a806fd78-711e-4811-a881-ed269533b635* (accessed on 25.03.2023).

[64] HCCJ dec. no. 597/2013, consulted in Lege5 database.

complainant cannot invoke a copyright over a musical composition inspired from folklore.

We may notice that in this case, someone tried to appropriate a work which is considered „folklore" being part of the intangible cultural heritage. Such persons exist everywhere, not only in Romania, and in order to avoid such cases, at least in the music industry, one author[65] suggests to create within collective management bodies, specialist committees in the field of folklore which shall evaluate from the point of view of scientific and musical evaluation of the pieces proposed for recording.

In another case before the Romanian courts having as object the crosses from Merry Cemetery from Săpânța, Maramureș County[66], the complainant, as successor of the person who firstly made the crosses, requested the recognition of her predecessor as author of 151 crosses and 171 sculptures, pictures and literary works, as well as the recognition of hers patrimonial rights together with pecuniary damages.

The Maramureș court, as first court, rejected all complainant's requests motivating that the person who created the crosses, sculptures, pictures and literary works was a folk creator, not being, therefore, able to enjoy of the protection of copyright for his works because „folklore is represented by the totality of popular, literary, musical, handicraft creations that belong to the popular traditions and customs of a nation or a region". In addition, the court states that folklore does not find protection in Law no. 8/1996, being „perceived as an intellectual creation, however, due to their popular character, popular creations are used freely, not being provided for in Law no. 8/1996, as an object of copyright." According to the court, another aspect which strengthens the popular character of the crosses is that their creator did not sign them, they are anonymous, and their creator taught his apprentices to make them, continuing therefore the tradition.

The Court of Appeal from Cluj, on the other hand, has admitted the appeal formulated by the complainant.

The Court of Appeal from Cluj firstly analysed if the crosses were protected by copyright taking into consideration the conditions established in the above analysed Decision of the Supreme Court of Justice no. 597/2013 and the arguments of the specialists who showed that the creator's crosses have taken over the traditional form from the Maramureş area, but they present specific elements, used for the first time by their creator, their specificity being represented by a stylistic whole: colour, shape, text, of obvious and recognized originality.

In addition, the specialists indicated that the creator „made works of art, discovering a new way of looking at death, which he materialized in an original way", writing „a true artistic monograph of the village with the monument crosses created by him, creating an original work by merging his qualities and talent as a sculptor, painter and poet, combining the old symbol of the wooden cross with the bas-relief, naive painting and folk verse inspired by specific activities of the village".

Moreover, the specialists have argued that the crosses made by the person in discussion in this case, differ from the rest of the crosses in the cemetery by colour, shape, proportions, and other elements which are specific to the creator, being executed in the spirit of an artist who gives free rein to his imagination and hand.

Another own compositional element of the creator was identified as the sacred space, represented on the crosses by a square in which a floral element is configured, located at the junction of the arms of the cross, where the horizontal becomes vertical and the vertical becomes horizontal, thus making the correlation between telluric and celestial. The artist was not focused on details, he thought more about the essence, not being concerned with symmetry, but with the message, being a creative genius.

The specialists also made a comparison between the crosses created by the person in discussion in this case and the crosses created by other persons which are also present in the Merry Cemetery, highlighting a main difference represented by the fact that the successors' crosses are closer to perfection, to the template, revealing the concern for realism, using high-performance tools and a current work technique, there being no compositional connection and only a small amount of the elements used by our creator being reused, specifying also the fact that he was the first to use folklore decorations and verses on crosses, previously the crosses being simple.

Therefore, based on what the specialists indicated, the court of appeal stated that the work of the person who created the crosses is „original, being undoubtedly the identifiable imprint of the author's creative personality, the fact that elements of ethnography and folklore were used in his creation showing no relevance."

After establishing that the creator of the crosses has the capacity of author, his works being protected by copyright, the Court of Appeal analysed if the complainant was entitled to patrimonial rights over reproduction, distribution, and public communication of the works. Based on the definitions of these notions in Law no. 8/1996 which are cvasi-identical with the definitions from the applicable EU directives and on the fact that the defendant

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[65] M. Olariu, *Protecţia operelor muzicale folclorice prin intermediul dreptului de autor*, in RRDPI no. 4/2017, p. 148-150.

[66] Merry Cemetery (in Romanian „Cimitirul Vesel") is famous for its brightly blue coloured crosses with paintings and poems describing the people who are buried there, their live and how they died.

represented by the Parish from Săpânța sells postcards representing photos of crosses and that it charges an entrance fee to the cemetery, the court established that the complainant was entitled to patrimonial rights over reproduction, and public communication of the works.

The defendant attacked the decision of the Court of Appeal, and the Supreme Court of Justice rejected it entirely stating that the craft of crosses may be an object of copyright if the originality condition is accomplished as it is in our case. In addition, the Supreme Court of Justice mentioned that art. 7 of Law no. 8/1996 offer examples of works which may be protected by copyright and that the legal operation of classifying a human creation in the category of works that fall within the scope of protection as copyright belongs to the essence of judicial activity in disputes that have such an object and the application of the law to the factual situation deduced from the judgment.

From the above cases, we may notice that intangible cultural heritage (TCEs) that might be protected by copyright are, for example, songs, stories, paintings, etc.

However, there are also disadvantages of protecting TCEs through copyright and we may refer to the fact that: (a) not all TCEs are original and one of the conditions of copyright protection, as we saw earlier is the originality, which is not defined in any international act. However, it is commonly agreed that original means the work to reflect its author's personality; (b) not each time the author of a TCE can be identified, case in which we can designate an authority to represent the author; (c) not all TCE can be fixed. The fixation requirement is provided in some states, but not all. For example, the Romanian laws recognize the copyright to oral works; (d) the limited term of protection. However, this can be prevented by creating a cultural heritage system, as Italy and Romania did, or by instating a *sui generis* system as the international forums are trying to do, and to oblige users to request the prior approval under the condition of paying a fee.

Having in view all the above-mentioned disadvantages, we would say that one of the advantages to protect TCE through copyright system is represented by the situation in which no other legal protection is recognized to the given TCE.

7. Public domain discussions in case of cultural heritage (TKs and TCEs included)

When referring to cultural heritage (TCE and TK included), it is true that some opinions are oriented as not providing protection to pre-existing TCE and TK arguing that in order to be able to continue to innovate, we must have a big range of knowledge in the public domain on which we can rely on.

Agreed until some point. What means „pre-existing TCE and TK”? TCE and TK created until a certain date? This expression is not defined anywhere. And how could we establish when a TCE or a TK was created? And why not recognising it the protection for an indetermined period as it happens with geographical indications? [67]

In our opinion, if works that represent cultural heritage would be protected for a limited period, in time, they would disappear together with the community that created them.

Therefore, we see that there are two groups. While there are international or national organizations which are fighting to better protect the cultural heritage (*e.g.,* traditional knowledge, traditional cultural expressions) from illegal use in order to recognise to the right people their pecuniary rights, there are also organizations, such as the initiators of Public Domain Manifesto who are recommending also that works that constitute cultural heritage to be made freely available to the society.

Also, people from Creative Commons advocate for the protection and enrichment of the public domain and they have created in 2022 a guide *„*Towards better sharing of cultural heritage. A call to action to policymakers”[68] in which they suggested the actions to be taken to *„*advance open culture and better sharing of cultural heritage”.

In this regard, they suggest the following: (a) to protect the public domain from erosion – meaning to make public domain materials legally used freely by anyone and for any purpose, including for commercial purposes and not be restricted anymore by the application of other laws, such as the cultural heritage laws that exist in Italy, Romania, France etc; (b) to reduce the term of copyright protection – they argue that the length of protection is too high. But if such duration is not granted, what would be the creators' motivation to continue to create works if not the reason that they would get paid for them? In our opinion, less and less people create for the *„*romantic” purpose of having his/her name under the works, instead they create to be remunerated for the

[67] It is said that due to their regional and cultural nature, geographical indications may have more in common with traditional knowledge than other forms of intellectual property. For more details, J. Janewa Osei-Tutu, *What Do Traditional Knowledge and Traditional Cultural Expressions Have to Do with Intellectual Property Rights*, Landslide 9, no. 4, (March/April 2017), p. 24.

[68] *chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://creativecommons.org/wp-content/uploads/2022/12/Towards-better-sharing-of-cultural-heritage-%E2%80%94-A-Creative-Commons-Call-to-Action-to-Policymakers.pdf* (accessed on 09.04.2023).

use of their work and make a living out of it both for them and their heirs[69]; (c) to legally allow necessary activities of cultural heritage institutions, (d) to shield cultural heritage institutions from liability; (e) to ensure respect, equity, diversity, and inclusivity.

Some authors[70] consider that the cultural heritage system is infringing and is incompatible with art. 14 of the EU Digital Single Market Directive[71] which states, as a rule, that if a work of visual art is no longer protected under copyright, any material resulting from the reproduction is not subject to copyright or related rights. The exception consists in the recognition of the copyright if the material resulting from the reproduction is original, meaning that „it is the author's own intellectual creation". We do not agree with these authors mainly because the cultural heritage system is not founded on the copyright one, but it is a sort of continuation, and it applies either if the works are still protected by copyright either if not. The main condition of the cultural heritage system is the works to be included in this category.

The Romanian law has transposed art. 14 of the EU Digital Single Market Directive without any change and even if Romania did not include the exception of the cultural heritage like Italy[72], we consider that this exception is still applicable for the reason mentioned in the earlier paragraph.

Others are of the opinion that „Properly applied, the public domain does not constitute a barrier to the effective protection of traditional knowledge"[73]. And this author suggests a protection in 4 tiers. First tier refers to „secret traditional knowledge" and „sacred traditional knowledge" – this is included in the cultural heritage - (which would receive a protection equivalent to the trade secrets), second tier refers to „closely held traditional knowledge" (which would imply requesting the approval and paying fees for use), third tier refers to „widely diffused traditional knowledge" (which will involve only the right of attribution, meaning paying no fees and no approval for use necessary) and forth tier refers to „generic TK and TCE" (*i.e.,* which are sufficiently widespread as to be incapable of belonging to a single group) [74].

Other authors[75] also consider that „after a specific period of time everyone should be able to use, and build upon, artworks that have fallen into the public domain" and that it is not normal „to turn copyright upside down so as to indirectly be able to monopolise artistic works, which are simply too old to be protected." However, again, it is not about extending the protection through intellectual property, but offering another type of protection and, in fact, control of the most valuable goods of a community.

And would it be proportional? It is one thing to grant such right to natural persons which are using those works for their own personal needs, such as study, research, freedom of expression, promotion of the knowledge of cultural heritage, it is another thing to grant it to natural or legal persons which are using them for commercial purposes, meaning for obtaining profit from their exploitation having in view that the rights that museums grant for the use of goods in their collection represent significant revenues and we all know that states forms their budgets with contributions, taxes and fees collected from natural and legal persons which help them to cover the functioning costs, including also the preservation and restauration of objects of art.

Letting aside the financial reason, in our opinion a use, for commercial purposes, of the goods which are part of the cultural heritage of a community, must be made with the prior approval of that community also to make sure that the respective use is not offensive to that community. Such offense may be given, for example, because of the lack of knowledge of the symbolistic of the goods and its significance for that community. For example, some symbols may have religious significance and their use on kitchen napkins is surely offensive.

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[69] Let us take the example of Ludwig van Beethoven (1770-1827). He was a genius composer recognized even in his time. However, his revenues were not at the level of today's recognized artists and his modest social background always prevented him to marry well-born women.

[70] D. De Angelis, B. Vezina, *The Vitruvian Man: A Puzzling Case for the Public Domain*, 2023, *https://communia-association.org/2023/03/01/the-vitruvian-man-a-puzzling-case-for-the-public-domain/* (accessed on 12.04.2023).

[71] Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ no. 130/2019.

[72] *https://www.brocardi.it/legge-diritto-autore/titolo-i/capo-iii/sezione-iii/art32quater.html?utm_source=internal&utm_medium=link&utm_campaign=articolo&utm_content=nav_art_prec_dispositivo* (accessed on 12.04.2023).

[73] R.L. Okediji, *Traditional Knowledge and the Public Domain*, CIGI Papers no. 176/2018, p. 1.

[74] *Idem*, p. 22.

[75] E. Bonadio, M. Contardi, *How could an Italian gallery sue over use of its public domain art?*, 2021, *https://www.city.ac.uk/news-and-events/news/2021/08/how-could-an-italian-gallery-sue-over-use-of-its-public-domain-art* (accessed on 09.04.2023).

8. Conclusions

Folklore or traditional cultural expressions represent the cultural heritage of peoples.

There is a strong debate between two groups: one supporting a wider public domain and another supporting the protection of valuable goods which fall in the category of cultural heritage.

Also, there is not much legal certainty in the present regarding the protection of folklore and actions at international level are taken. We will see which will be the final draft of the IGC regarding the protection of folklore and other traditions of communities.

Even if works are no longer protected under the copyright laws, we consider that states must be more vigilant, like Italian authorities, and protect works which are part of their cultural heritage, making from such cases „a patrimony issue”[76] because such works deserve a special regime unlike other works which do not have the same cultural importance for their communities.

However, a balance must be found between the interests of the community from which the traditions, cultural heritage originates and the interests of the user in order not to violate the free speech, the exceptions and limitations recognized by copyright if they are still protected by it, but also to encourage the creation of new works which rely on the public domain.

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A FEW PRELIMINARY CONSIDERATIONS ON INFRINGEMENT OF COPYRIGHT BY ARTIFICIAL INTELLIGENCE

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Abstract

The issue of copyright infringement by artificial intelligence (AI) has become more salient, with the worldwide popularity of „Heart on My Sleeve" and with two other class action claims having been filed. The current piece aims to set out the core concepts, to list the possible issues to be addressed by further research and to suggest some perspectives to so address this matter. The most relevant from a copyright infringement perspective seem to be: (1) the distinction between inputs and outputs, i.e., the data the model is trained on and the product of the model; and (2) the existence of different models, each with a different level of human involvement and the existence, within each such model, of component algorithms, each with a different level of human input and relative importance of such. Taking all this into account clarifies the issues that could be incidental to an analysis of possible risks of copyright infringement by artificial intelligence models and also provides some guidance as to the perspectives from which such analysis could be conducted.

Keywords: *artificial intelligence, copyright, infringement, originality, machine learning.*

1. Introduction

Not longer than a few weeks ago there were numerous reports[1] in the media about a song named „Heart on My Sleeve" which had been removed from Spotify, TikTok, Apple Music and YouTube after amassing millions of streams because it was deemed to infringe the rights of artists Drake and The Weeknd, the song having been created with the help of artificial intelligence – or „AI" - (at least) in what concerns the vocal performance (which was wrongly attributed to the two aforementioned artists).

While the possible tensions between ever-more capable computers and copyright law have been espoused in the literature for more than 50 years,[2] most perspectives have been focused on whether works generated by 'creative computers' (or AI) should benefit from copyright protection (and, if so, who the rightsholder should be) and less so on the issues surrounding the infringement of existing copyright in human works and how such should be addressed.

The issue of infringement of copyright by AI has now apparently become more salient, with the worldwide popularity of „Heart on My Sleeve" and with two other class action claims having been filed. The first of these was filed on behalf of owners of copyrights in computer code which they had made available on the platform GitHub and is directed against GitHub, Microsoft (GitHub's owner) and OpenAI, the alleged infringement concerning the code posted by GitHub's users on the platform and its subsequent use by an AI product called Copilot (which is based on an AI called Codex which is used to convert natural language into code.[3] The second was filed by and on behalf of owners of copyright in photographs and is directed against Stability AI (the company offering the image-generation AI Stability Diffusion), Midjourney (who offers the image-generation AI of the same name) and DeviantArt (who offers DreamUp, a product relying on Stable Diffusion to produce images based

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[1] See, *e.g.*, M. Sato, *Drake's AI clone is here — and Drake might not be able to stop him*, in The Verge, 1 May 2023, available at *https://www.theverge.com/2023/5/1/23703087/ai-drake-the-weeknd-music-copyright-legal-battle-right-of-publicity*, last time consulted on 06.05.2023; J. Coscarelli, *An A.I. Hit of Fake 'Drake' and 'The Weeknd' Rattles the Music World*, in The New York Times, 19 April 2023, available at *https://www.nytimes.com/2023/04/19/arts/music/ai-drake-the-weeknd-fake.html*, last time consulted on 06.05.2023.

[2] See, *e.g.*, K. F. Milde, Jr. *Can a Computer Be an „Author" or an „Inventor"?*, in Journal of the Patent Office Society no. 51 (1969), p. 378; T. L. Butler, *Can a Computer Be an Author - Copyright Aspects of Artificial Intelligence*, in Hastings Communication and Entertainment Law Journal no. 4 (1982), p. 707; P. Samuelson, *Allocating Ownership Rights in Computer-Generated Works*, in University of Pittsburgh Law Review no. 47 (1986), p. 1185; E. H. Farr, *Copyrightability of Computer-Created Works*, in Rutgers Computer and Technology Law Journal, no. 15 (1989), p. 63, all referenced in J. Grimmelmann, *There's no Such Thing as a Computer-Authored Work*, in Columbia Journal of the Law & the Arts no. 39 (2016), pp. 403-404, note 3.

[3] *Doe v. GitHub Inc.*, U.S. District Court for the Northern District of California, no. 3:22-cv-06823, referenced in J. Vincent, *The lawsuit that could rewrite the rules of AI copyright* in The Verge, 08.11.2022, available at *https://www.theverge.com/2022/11/8/23446821/microsoft-openai-github-copilot-class-action-lawsuit-ai-copyright-violation-training-data*, last time consulted on 06.05.2023.

on text prompts).[4]

Thus, further analysis of the impact of AI 'generative' activities on the rules governing copyright infringement has become necessary. The current piece therefore aims to set out the core concepts, to list the possible issues to be addressed by further research and to suggest some perspectives to so address this matter.

We do not aim for a comprehensive analysis nor do we hope to arrive at definitive solutions. The field of AI is in a state of fervent development, with little transparency as to how the algorithms are developed and trained. The ever-increasing impact and the enlarging scope of the so-called AI 'generative' products make this analysis more salient by the day. Therefore this paper will hopefully have some use in the guiding of further research and in the grounding of such in some fundamental principles which should help focus future research so as to provide more consistency of approach.

2. The core concepts

Obviously, the most important concept relevant for our discussion is that of „artificial intelligence". The origins of the concept of AI are unclear, with Encyclopedia Britannica referring back to a 1947 Alan Turing conference in London where he had mentioned a „machine that can learn from experience" which would be made possible by the same machine being allowed to change its own instructions.[5]

John McCarthy is credited with coining the term „artificial intelligence" in 1956 when he invited researchers to a summer workshop on „artificial intelligence,"[6] him being convinced that any feature of human learning or intelligence can be described so precisely that a machine could be programmed to simulate it.[7]

The term is normally taken to refer to computer systems, or machines, which perform tasks associated with intelligent beings or which require human intelligence, the machine therefore imitating such human intelligent behavior.[8]

In its „Conversations on Intellectual Property and Artificial Intelligence",[9] WIPO has not indicated a need for a definition in its „Draft Issues Paper on Intellectual Property Policy and Artificial Intelligence"[10] but has done so in the „Revised Issues Paper on Intellectual Property Policy and Artificial Intelligence"[11] even in the face of a lack of consensus as to how such definition should be constructed lest what it should be, as the summary of the meeting shows.[12] WIPO finally opted for a definition that states that „„Artificial intelligence (AI)" is a discipline of computer science that is aimed at developing machines and systems that can carry out tasks considered to require human intelligence, with limited or no human intervention."[13] WIPO then proceeds to clarify that, for the purposes of its meetings, AI was referring to „narrow AI", meaning „techniques and applications programmed to perform individual tasks," with machine learning and deep learning as two subsets of AI.[14]

The European Commission, in its „Proposal for a Regulation Laying Down Harmonised Rules on Artificial

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[4] *Andersen v. Stability AI Ltd*, U.S. District Court for the Northern District of California, no. 3:23-cv-00201, referenced in B. Brittain, *Lawsuits accuse AI content creators of misusing copyrighted work* in Reuters, 17.01.2023, available at *https://www.reuters.com/legal/transactional/lawsuits-accuse-ai-content-creators-misusing-copyrighted-work-2023-01-17/*, last time consulted on 06.05.2023.

[5] B.J. Copeland *artificial intelligence* in Encyclopedia Britannica, 20.03.2023, available at *https://www.britannica.com/technology/artificial-intelligence*, last time consulted on 06.05.2023.

[6] B. Marr, *The Key Definitions of Artificial Intelligence (AI) That Explain Its Importance* in Forbes, 14.02.2018, available at *https://www.forbes.com/sites/bernardmarr/2018/02/14/the-key-definitions-of-artificial-intelligence-ai-that-explain-its-importance/*, last time consulted on 06.05.2023.

[7] *Ibidem*.

[8] *Ibidem*, see also, *e.g.*, B.J. Copeland, *Artificial intelligence*, in Encyclopedia Britannica, 20.03.2023, available at *https://www.britannica.com/technology/artificial-intelligence*, last time consulted on 06.05.2023; *artificial intelligence* in Oxford Learner's Dictionaries available at *https://www.oxfordlearnersdictionaries.com/definition/english/artificial-intelligence?q=artificial+intelligence*, last time consulted on 06.05.2023; *artificial intelligence* in Merriam-Webster Dictionary, available at *https://www.merriam-webster.com/dictionary/artificial%20intelligence*, last time consulted on 06.05.2023.

[9] These have been a series of meetings organized by WIPO in its efforts to engage with its member states on questions regarding the interface between IP and AI, with the first meeting held on 27.09.2019 and another 4 sessions July and November of 2020 and a fourth one (named sixth) in September 2022.

[10] WIPO, *Draft Issues Paper on Intellectual Property Policy and Artificial Intelligence*, 13.12.2019, available at *https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ip_ai_2_ge_20/wipo_ip_ai_2_ge_20_1.pdf*, last time consulted on 06.05.2023.

[11] WIPO, *Revised Issues Paper on Intellectual Property Policy and Artificial Intelligence*, 21.05.2020, available at *https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ip_ai_2_ge_20/wipo_ip_ai_2_ge_20_1_rev.pdf*, last time consulted on 06.05.2023.

[12] WIPO, *Summary of Second and Third Sessions*, 04.11.2020, available at *https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ip_ai_3_ge_20/wipo_ip_ai_3_ge_20_inf_5.pdf*, last time consulted on 06.05.2023, pp. 4-5.

[13] WIPO, *Revised Issues Paper on Intellectual Property Policy and Artificial Intelligence*, 21.05.2020, available at *https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ip_ai_2_ge_20/wipo_ip_ai_2_ge_20_1_rev.pdf*, last time consulted on 06.05.2023, p. 3.

[14] *Ibidem*.

Intelligence (Artificial Intelligence Act)"[15] has first indicated that whatever the definition, the notion „should be clearly defined to ensure legal certainty, while providing the flexibility to accommodate future technological developments," moreover, it „should be based on the key functional characteristics of the software in particular the ability, for a given set of human-defined objectives, to generate outputs such as content, predictions, recommendations, or decisions which influence the environment with which the system interacts, be it in a physical or digital dimension."[16] Moreover, the Commission noted that „[t]he definition of AI system should be complemented by a list of specific techniques and approaches used for its development, which should be kept up-to–date in the light of market and technological developments through the adoption of delegated acts by the Commission to amend that list."[17]

The definition thus proposed, at art. 3 para. (1) is the following: „artificial intelligence system' (AI system) means software that is developed with one or more of the techniques and approaches listed in Annex I and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with." Annex I, as proposed, lists the following techniques and approaches: „(a) Machine learning approaches, including supervised, unsupervised and reinforcement learning, using a wide variety of methods including deep learning; (b) Logic- and knowledge-based approaches, including knowledge representation, inductive (logic) programming, knowledge bases, inference and deductive engines, (symbolic) reasoning and expert systems; (c) Statistical approaches, Bayesian estimation, search and optimization methods."[18]

Out of the above, the AI models that were likely involved in the creation of „Heart on My Sleeve" (although the exact AI used in not known) and the ones behind Copilot/Codex and Stability Diffusion and MidJourney are all developed using machine learning. Therefore, we need to make a few remarks regarding what machine learning is and how it works.

Man-Cho So defines machine learning as „a sub-field of AI that is concerned with the automated detection of meaningful patterns in data and using the detected patterns for certain tasks"[19] which essentially involves an algorithm taking training data as input for outputting information to be used by other algorithms for prediction or decision-making.[20]

This also helps explain why the acceleration of development in the field of AI is only a more recent affair, even though research in the field has been undertaken for over 60 years. Machine learning output of a significant quality requires two cumulative factors: immense computing power (which has constantly grown up to some years back, even though in the last years no longer at the same rate[21]) and a huge pool of training data (which has required that an immense amount of data be fed into social media, e-commerce sites and the like). It is only recently that the second of the two conditions was also fulfilled to the degree to allow the compilation of training data of a sufficient quantity to allow the processed outputs to have a realistic quality so as to be significant.

However, as Man-Cho So indicates, the quality and quantity of the training data is only one of the factors that determine the success of a machine learning model. The type and formulation of the learning task and the design of the algorithm also weigh heavily on the quality of the output.[22]

The selection of the training data and the formulation of the training task are closely linked. Thus, the level of human intervention and the type of training data used depend, to a certain degree, on the type of learning that the model is envisaged for. Man-Cho So describes three such types of machine learning: supervised learning, unsupervised learning and reinforced learning.

Supervised learning briefly means that:

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[15] European Commission, Proposal for a Regulation Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts COM (2021) 206, 21.04.2021, available at *https://ec.europa.eu/newsroom/dae/redirection/document/75788.pdf*, last time consulted on 06.05.2023.

[16] *Ibidem*, at preamble 6.

[17] *Ibidem*.

[18] European Commission, Annex I Artificial Intelligence Techniques and Approaches to the Proposal for a Regulation Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts COM (2021) 206, 21.04.2021, available at *https://ec.europa.eu/newsroom/dae/redirection/document/75789.pdf*, last time consulted on 06.05.2023.

[19] S. Shalev-Shwartz, S. Ben-David, *Understanding Machine Learning: From Theory to Algorithms*, Cambridge University Press, 2014, referenced in A. Man-Cho So, *Technical Elements of Machine Learning for Intellectual Property Law*, p. 1, note 1, available at *https://ssrn.com/abstract=3635942*, last time consulted on 06.05.2023.

[20] A. Man-Cho So, *Technical Elements of Machine Learning for Intellectual Property Law*, pp. 1-2, available at *https://ssrn.com/abstract=3635942*, last time consulted on 06.05.2023.

[21] Moore's Law, a prediction made by Gordon Moore in 1965 that the number of transistors on a microchip would double every year while the costs are halved is generally regarded in the IT industry as a reliable indicator of the growth of computing power. The prediction has held true for a long time but the pace of progress has slowed down in recent years. The number of transistors on a microchip has been doubling every two years instead of every year since 2016.

[22] A. Man-Cho So, *Technical Elements of Machine Learning for Intellectual Property Law*, pp. 16-17, available at *https://ssrn.com/abstract=3635942*, last time consulted on 06.05.2023.

- the data on which the model is trained is labeled and the AI is trying to learn to predict the missing information in the test data based on what it was trained on;
- this, in turn, requires that all the data on which the AI is trained on be identified, selected and prepared in advance under human supervision, thus resulting in a process that becomes more and more expensive the more the quantity of training data increases (while the reliability of the model also only increases with the increase in quantity of training data, and, consequently, with cost);
- the formulation of the learning task be sufficiently precise so as to avoid over-fitting but also to allow for a discrimination in the data to be made. This also falls to the human developer of the model.

Unsupervised learning presupposes that:

- the data on which the model is trained is not labeled, but rather gathered 'as-is' from different sources, with different algorithms used for the classification of data, such as clustering;
- unsupervised learning means that the human input is, in general, limited to the selection of the type and pool of data to be gathered, thereby severely limiting costs to the process and also greatly increasing the potential amount of data to be gathered.

Reinforced learning groups together different methods of training an AI model by reference to a set of actions (defined as a policy) together with rewards and penalties for achieving a desired outcome. The model then explores variances of policies and tests them while taking stock of the outcome (reward/penalty) thereby gradually improving its course of action.

From the above, the takeaways most relevant from a copyright infringement perspective seem to be: (1) the distinction between inputs and outputs, *i.e.,* the data the model is trained on and the product of the model; and (2) the existence of different models, each with a different level of human involvement and the existence, within each such model of component algorithms, each with a different level of human input and relative importance of such. We will now proceed to consider the core issues on copyright infringement having the above takeaways in mind.

3. Issues arising in respect of copyright infringement

As indicated by WIPO, most of the issues currently identified with regards to infringement of copyright by AI refer to the inputs used for the training of the model. Thus, in the „Revised Issues Paper on Intellectual Property Policy and Artificial Intelligence," seven out of the eight issues identified by WIPO as pertaining to „Issue 8: Infringement and Exceptions" under the heading „Copyright and Related Rights" refer to possible infringement of copyright by „the use of the data subsisting in copyright works without authorization for machine learning."[23]

Moreover, both the GitHub and Stability AI claims indicated also state an infringement by unauthorized use of copyrighted works in the training of the respective AI models (in addition to infringement by means of the output).[24]

The questions on infringement of copyright, as raised by WIPO,[25] could be summarized as follows:

- is use of the data in copyrighted works, without authorization from the right holders, for the purpose of machine learning, an infringement of the copyright in those works? If yes, should there be some balance in view of „the development of AI and the free flow of data to improve innovation in AI"?
- if the answer to the first question is in the affirmative, should there be „an explicit exception" allowing the use of such data for the training of AI applications? Should such exception be made at least for „certain acts for limited purposes, such as the use in non-commercial user-generated works or the use for research"?
- if the answer to the first question is in the affirmative, should there be a licensing scheme provided for? Should such be facilitated by means of collective management? Should remedies be limited to equitable remuneration?
- if the answer to the first question is in the affirmative, how could this infringement be detected and enforced, given the large quantity of inputs and outputs?[26] Should there be a regulatory requirement to log training data used?

As we can see from the above, the first and most important question is whether if the data used for the training of the model is contained also in works under copyright, whether such use of the data would amount to

[23] WIPO, *Revised Issues Paper on Intellectual Property Policy and Artificial Intelligence*, 21.05.2020, pp. 8-9, available at *https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ip_ai_2_ge_20/wipo_ip_ai_2_ge_20_1_rev.pdf*, last time consulted on 06.05.2023.

[24] See *Doe v. GitHub Inc.*, US District Court for the Northern District of California, no. 3:22-cv-06823, para. 144-145; *Andersen v. Stability AI Ltd*, US District Court for the Northern District of California, no. 3:23-cv-00201, para. 155-157.

[25] WIPO, *Revised Issues Paper on Intellectual Property Policy and Artificial Intelligence*, 21.05.2020, pp. 8-9, available at *https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ip_ai_2_ge_20/wipo_ip_ai_2_ge_20_1_rev.pdf*, last time consulted on 06.05.2023.

[26] The WIPO paper only refers to outputs but we believe that the large quantity of inputs is also just as relevant.

infringement of copyright in the underlying works.

To determine whether this would be the case, we would first have to discriminate between situations where (1) the works themselves are copyrighted or not; and (2) the data from the works is itself copyrighted or not. As Guadamuz[27] rightly points out, there are numerous types of creations which are not protected by copyright (either because they do not qualify for protection – *e.g.,* ideas, concepts, simple facts and information, etc. - or because they are in the public domain due to the expiration of the term of protection). It is evident that, where there is no copyright in the underlying works, there can be no infringement.

Therefore, where the creators of the AI limit the training data set to data from creations which are not protected by copyright, there would be no infringement by means of the inputs. However, as indicated above, there are limits and variations to the degree of human involvement in the selection of the training data set. This is most evidently the case with unsupervised learning where the models are trained on very large sets of very diverse data taken 'as such', mostly from the internet. But even with labeled sets of data used for supervised learning there is no guarantee that in such large data sets all data (however well curated) is certain to be of the non-protected kind.

In the odd case that some isn't, the fact that the user relied on the guarantee of the data set provider does not shield him from injunctive relief (or, substantially, damages to the right holder) but only, if at all assumed by the provider of the data set, provides him with a claim to be reimbursed by the latter for damage suffered as a result of the right holder's claim. Injunctive relief can be especially damaging in these cases because the model would have incorporated the 'tainted' information into its functioning thereby, should the injunction hold, the only way to respect it would be to stop the model's functioning altogether (which could also, depending on the amount of infringement, seem disproportionate).

This is made even more complicated by the fact that, once the model is accessible to the public at large, there is even less control on the inputs provided by members of the public, who could 'feed' the model with copyright protected works, which the model would then incorporate (in the specifically processed form) in its 'reference' data.

Another issue, also noted by Guadamuz,[28] is the risk that even non-protected material be accessed by means of a database thereby potentially infringing the rights in the database (either copyright or sui-generis rights).

Therefore, it would seem that relying solely on the non-protected character of the dataset used for the training of the model would not, by itself, eliminate all risk of infringement but would rather require a case-by-case analysis which would, in turn, depend on the issues of quantity of the dataset and, consequently, move the resolution of the question into the scope of the last issue mentioned above.

We thus turn to the issue of whether the use itself would fall under the scope of infringement of copyright, under the assumption that (at least some of) the material consists of works protected by copyright.

The nature of the use of the works is also fact-dependent, variations due to the type of model used being possible. As Guadamuz points out,[29] in order for the data to be analysed, a copy of the data would need to be available. Thus, the most likely right to be infringed is the right to control the reproduction of the work. This right covers not only the reproduction in whole, but also the reproduction in part, meaning – as per the CJEU's decision in Infopaq,[30] also the reproduction of just an „extract [that] contains an element of the work which, as such, expresses the author's own intellectual creation."[31] Therefore, an infringement of the right of reproduction can occur whenever protected expression is copied, without the right holder's authorization, either directly or indirectly, irrespective of the permanent or temporary nature of the copy, of the mode or form of copying, including the permanent or temporary storage of a digital copy of such.[32]

However, it would seem to us that for an infringement to be enforced against, there must be an infringer to be held accountable. Who would then be the infringer, normally identified as the one who made the copy? This will also be a fact-dependent inquiry touching upon the degree of human intervention and control in the creation of the dataset on which the model is trained. Where copies are made by a human and supplied as such for analysis to the AI, the respective human will normally be held to be the infringer. But what happens in cases where the model searches for information on the internet and builds the dataset itself? What about the

[27] A. Guadamuz, *A Scanner Darkly: Copyright Infringement in Artificial Intelligence Inputs and Outputs*, pp. 11-12, available at Electronic copy available at: *https://ssrn.com/abstract=4371204*, last time consulted on 06.05.2023.

[28] *Idem*, p. 11.

[29] *Idem*, p. 13.

[30] CJEU, Judgment of 16.07.2009, *Infopaq International A/S v. Danske Dagblades Forening* (C-5/08) in ECR-I (2009), p. 6569, ECLI:EU:C:2009:465.

[31] *Idem*, para. 48.

[32] Art. 14 of Law no. 8/1996 concerning author's right and related rights, republished in the Official Gazette of Romania no. 489/14.06.2018.

additional information the model searches for and integrates based on future prompts made by the users? Would it make a sensible difference if the human programmer had instructed the model not to copy protected works? How would the AI identify such, after all, lawyers involved in due-diligence exercises over the same works normally face significant effort hurdles to in the end achieve a rather non-unequivocal answer.

Moreover, if we were to recognize some determinative capability in the human(s) behind the AI, we would also need to take more seriously the claim for such humans to also derive copyright protection for themselves in the output of the AI.

Clearly, admitting that there could be an infringement of copyright whenever there is any reproduction of a copyrighted work in the dataset on which the AI is being trained would now have a very chilling effect on the research and development efforts surrounding AI now.

On the one hand, efforts to minimize the risk of protected expression being copied in the training of the model would force makers of such models to use only data sets which have the least possibility of containing copyrighted works. This, in turn, would severely diminish the quality of the training, and, consequently, of the model because of the (1) scarcity of information; and (2) high costs – well curated data sets will increase in price where they become the only possible source of training data and, therefore, lead to an arbitrage over the prices or, *e.g.*, over their conditions for franchising. On the other hand, increased transparency into the inner workings of the model – *e.g.,* in order to prove the limits of human control over the training of the model – makes the model much more vulnerable to attacks and, consequently, increases the use risk for everyone.

Avoiding that there is an infringement of the right of reproduction would then turn on whether a copy, as required under the law, is made. Given the wide scope of the reproduction right, as provided by law, the question would then be if the copies thus made could fit into one of the expressly provided for limitations to such a right. Guadamuz refers[33] to the 'transient copy' provisions which, in Romanian law, provide that „provisional acts of reproduction which are transient or incidental and constitute an integral and essential part of a technical process and the sole purpose of which is to enable the transmission, within a network between third parties, by an intermediary, or the lawful use of a work or other subject-matter and which are not economically significant in themselves" are outside the scope of the reproduction right (subject to the work having been made public and the use being in accordance with good practices, not affect the normal use of the work and not damage the author or right holders).[34]

Should the data set be built in such transient manner, with the data being copied solely in view of its processing and then automatically deleted, without any protected expression kept, one could deem that the copies thus made had no economic significance by themselves and therefore the exception would apply.

Moreover, art. 36^2 in the Romanian copyright law provides for a TDM exception, expressly allowing the reproduction of and extractions from protected works which are legally accessible, for the purpose of text and data mining, such reproductions and extractions being allowed to subsist for as long as necessary for the mining of the text and data. However, this exception only applies where the right holders did not expressly reserve the use of their works by appropriate means such as CMIs.

The interplay between the two provisions is not clear at this point but mention should be made that neither provides for an exception to infringement of the sui-generis right in databases, which we have mentioned above. Also, none of the exceptions deals with the use of the data for machine learning however, we believe that while the TDM exception would not shield the data mining itself from scrutiny (once the mining of text and data is complete), the inexistence of a copy where the conditions for the 'transient copy' would be deemed met, would provide a more solid defense to possible arguments of infringement by means of the information so obtained.

By reference to the issue as raised in the WIPO Conversation, we mention also that there is a wider exception expressly provided by the Romanian copyright law for the benefit of research organizations where such act for the purpose of scientific research.[35] In this case, specific indication is made that the exception also applies with regards to the sui-generis rights in databases and the copies can be retained for longer if this is justified for scientific research purposes and if adequate security measures are taken.

Thus, Romanian copyright law appears to be in a relatively good position to tackle the issues derived from the interplay between copyright and AI, as WIPO has perceived them. Future practice and case-law will however need to further clarify the scope of the provisions and provide guidance on different sets of facts.

In this context, licensing appears to be a less desirable solution, given the bottlenecks that could impede the rapid reactions needed to advance in such a dynamic field. Collective management would also be faced with

[33] A. Guadamuz, *A Scanner Darkly: Copyright Infringement in Artificial Intelligence Inputs and Outputs*, pp. 14-16, available at Electronic copy available at: *https://ssrn.com/abstract=4371204*, last time consulted on 06.05.2023.

[34] Art. 35 para. (3) of Law no. 8/1996 concerning author's right and related rights, republished, in the Official Gazette of Romania no. 489/14.06.2018.

[35] Art. 36^1 of Law no. 8/1996 concerning author's right and related rights, republished.

the high costs and risks of increased transparency in the data used for the training of the AI models and the very large quantity of data these process, thereby the cost of licensing, lest that of collective management, could vastly outweigh the benefits and, in turn, halt any development in the area.

Given the high importance the WIPO paper has given to the issue of infringement by means of the inputs, it is not surprising that, in the one issue tackling infringement by means of the outputs, the paper starts from the assumption that such infringement would require that the expression were contained in the data set with which the model was trained. Assuming the protected expression exists (and it presumably survived beyond the moment where it was needed for the purpose of the data mining operation), there will already be an infringement of the right of reproduction. A new act of reproduction could bring into play the right to make derivative works which the protected expression modified by the AI would be.

But in such a case, who is the author of the derivative work? And who is the infringer? After all, it appears that the question of authorship of AI generated works is closely related to that of infringement of copyright by AI. If we deem that someone (either the user, the programmer or the AI itself) could be liable for infringing the rights of a third party by making a derivative work based on unauthorized reproduction of protected expression, it would be natural to ask ourselves whether the derivative work so created should, in turn, be refused protection under copyright.

4. Conclusions

The paper has sought to clarify some key aspects related to possible infringement of copyright by AI and, in so doing, to raise the more salient points which could drive the analysis forward.

We have therefore tried to clarify, and give some context to, the core concept of AI and then to see how this would better delineate the perspectives from which the infringement of copyright could be further analysed. We have thus identified the variables (including the control of a human in the development and training of the model) and the two dimensions that are, in principle, relevant for the analysis of the infringement: the inputs and the outputs.

We have then proceeded to raise the issues as summarized by WIPO and to put them into a more simple framework showing how both these and the wider discussion on protectability under copyright of AI-generated works, can pan out in light of the provisions of the Romanian copyright law.

Further research is necessary to explore these paths and provide a more comprehensive assessment of the viability of arguments which exist now and to subsequently weigh in terms of both copyright policy, security policy and cultural policy the advantages and disadvantages of further molding copyright law in a way that will allow us to capture the most advantage from this very new and exciting technology.

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THE LEGAL REGIME OF NAMES EXCLUDED FROM PROTECTION BY INDICATIVE SIGNS

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Abstract

This study aims to analyse the legal regime of names that cannot be registered for protection by indicative sign, either because they do not meet the conditions provided for by Regulation (EU) no.1151/2012, whether they can mislead the consumer regarding the geographical origin of the product that designates it and at the same time analyse the various situations that may arise in the event of a conflict between the indicative signs and these names through the lens of the CJEU jurisprudence.

In a mercantile society based on the circulation of goods, an important factor in choosing a quality product originating in a certain regions is the sign or name that appears on the label and that gives the product „added value", the consumer being thus aware of his choice and at the same time protected against deceptive practices.

But not all names can be registered and protected by indicative signs, Regulation (EU) no. 1151/2012 stipulating by art. 6 the exceptions from registration, the most common situation being that of generic names, names of products which, although related of the place or country where the product was originally produced or marketed, became the common name of a product in the Union.

In its jurisprudence, CJEU has shown that in order to determine whether or not a name has become generic, the purpose for which a geographical indication or a designation of origin is registered under Regulation (EU) no. 1151/2012, namely that of avoiding abuse of a name by those who aim to benefit from the acquisition of a product protected by an indicative sign and for this the situation in the Member State of origin of the name and of consumption, the situation in other member states and the national or Community legislation must be taken into account.

Likewise, a name proposed for registration as a designation of origin or geographical indication cannot be protected which, given the reputation and renown of a mark, as well as the duration of its use, is likely to induce in the consumer the true identity of the product.

Although less common in practice as well as in the jurisprudence of the Court of the European Union, Regulation (EU) no. 1151/2012 also provides that there are also some other names that cannot be protected as a geographical indication or designation of origin, such as the name that coincides with the name of a plant variety or an animal breed and that may mislead the consumer as to the true origin of the product, such as and the homonymous or non-homonymous name which is likely to mislead the consumer regarding the true identity of the product.

Keywords: *geographical indications, designations of origin, traditionally guaranteed specialties, generic names, marks, deceptive practices.*

1. Introduction

The idea of protecting the origin of a product is increasingly common throughout the world, justified by technological innovations and market evolution on the one hand, as well as by the constantly evolving expectations of consumers on the other, in order to guarantee the appearance that the product has special qualities due to its origin or is the result of manufacturing methods that have their origin in the traditional practices existing in the past in a certain community.

In the context of the existence on the market of a multitude of signs, names and symbols, the development of trade offering many alternatives to the consumer, indicative signs prove to be a determining factor in the choice, hence the importance of their protection at international, European and national level.

In recent years, there has been a trend of consumers around the world to appreciate agricultural products whose origin is determined, increasingly consumers are looking for products that come from precisely determined and delimited areas or that are based on traditional production techniques, context in which the manufacturer, in turn, is willing to ensure the protection of his products against abusive or deceptive practices.

It has been shown that the geographical origin of a product can be carried by several signs, different from a legal point of view, between which there is a certain competition at the international level.[1]

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[1] D. Rochard, *International protection of geographical indications*, PUF 2002, p. 18.

Starting from the definition given to geographical indications by art. 5 para. 2 of Regulation (EU) no. 1151/2012[2], it can be established that in order to be eligible to benefit from the protection conferred by the geographical indication, a product must meet cumulatively three criteria: the product must originate in a certain place, region, locality or country; at least one of the stages of production should take place in this geographical area, and the quality, reputation or other characteristic of the product can be mainly attributed to this geographical origin. As such, it must be demonstrated that the geographical origin is an essential factor for the quality, reputation or other characteristic of the product.

The Regulation also defined the designation of origin[3] as the name, which can be used traditionally, and which identifies a product originating in a certain place, region or, in exceptional cases, country, whose quality or whose characteristics are due in mainly or exclusively to a certain geographical environment with its own natural and human factors and whose production stages all take place in the delimited geographical area.

According to art. 18 para. 1 of Regulation (EU) no. 1151/2012, a name is eligible to be registered as a guaranteed traditional specialty when it describes a specific product or a food that: results from a production process, processing or a composition that corresponds to traditional practice for that product or food or is produced from raw materials or ingredients traditionally used.

As such, in order to be registered, the guaranteed traditional specialty name must: have been traditionally used to designate the specific product or indicate the traditional character or specific character of the product.

Geographical indications, designations of origin and names of traditional specialties guaranteed allow consumers to trust and distinguish quality products, also helping producers in their marketing, in the case of the former, the connection between the specific geographical region and the name of the product being highlighted, in the case of in which a certain quality, reputation or other characteristic can be attributed essentially or exclusively to its geographical origin, in the case of traditional specialties guaranteed, the link referring to the production method used over time in the determined geographical region with the quality and characteristics of the product protected by indicative sign.

In this context, the protection must be approached as the right to use an indicative sign as well as the right to prevent their illegal use, the main purpose being that of protecting the consumer against products that may mislead him about its true geographical origin or the method of processing, as well as protecting producers against unfair competition.

2. The legal regime of names excluded from protection by indicative signs

It can be said that an indicative sign represents a commitment to consumers regarding the quality of a product, and for producers it is a guarantee of fair competition conditions.

The name to be protected as a geographical indication or designation of origin can be a geographical name of the place of production of a specific product or a name used in commercial exchanges or in common language to describe the specific product in the delimited geographical area.

The reputation of designations of origin depends on the image they enjoy among consumers, an image that depends in particular-on-particular characteristics and, in general, on the quality of the product.[4]

As such, with regard to geographical indications and designations of origin, all the technical information necessary to describe a product and the production area, and in the case of guaranteed traditional specialties, the production methods, must be provided by the producers at the time of submitting the application for registration of indicative sign. And this aspect is important because the product specifications are a determining factor in the registration procedure and guarantee the stability of the product quality, without imposing a certain level of quality.

At the same time, it is obvious that when the consumer notices the PDO, IGP or STG sign on the product label, he trusts that the product is of quality and that it cannot be counterfeited, imitated and cannot be misled about the true geographical origin of the product or the traditional method of production.

Therefore, the label of the products protected by an indicative sign may include graphic representations of the geographical area of origin and which must have a counterpart in the specifications, a text, graphic representations or symbols that refer to the member states or the region in which they are located the geographical area of origin of the protected product.

The facts that the food product originates from the delimited geographical area is proven by existence of a traceability system implemented from the entry of the raw material into the factory until the finished product

[2] Regulation (EU) no. 1151/2012 of the European Parliament and of the Council of 21.11.2012 regarding systems in the field of quality of agricultural and food products, published in OJ L 343 of 14.12.2012.

[3] See art. 5 para. 1 of Regulation (EU) no. 1151/2012.

[4] CJUE, Judgment of 16.05.2000, *Kingdom of Belgium v. Kingdom of Spain*, case C-388/95, ECLI:EU:C:2000:244, point 56.

(the traceability tracking sheet, the equipment sheet, the raw material concentration monitoring sheet are drawn up), as well as by the agreement between the amount of products sold under the protected name and the amount of raw material transformed.

It is unanimously accepted that the added value conferred by the indicative signs is based on the trust of consumers and only an effective protection system can guarantee them that a certain quality, characteristic or reputation of the products protected by an indicative sign are maintained for the entire duration of the protection period.

The right to indicative signs in the agricultural and food field is acquired and protected by their registration under the conditions provided by the legislation in force at the level of each state, in the case of national protection, as well as by their registration under Regulation (EU) no. 1151/2012, in the case of protection at community level.

Although apparently any name can be registered as a geographical indication or designation of origin, if it meets the criteria provided by art. 5 para. 1 and 2 of Regulation (EU) no.1151/2012, however, there are some names that cannot be protected by an indicative sign, either because they are generic or because they can mislead the consumer regarding the true origin of the product.

Thus, according to art. 6 of Regulation (EU) no. 1151/2012, generic terms are not registered as protected designations of origin or as protected geographical indications, and a name cannot also be registered when it coincides with the name of a plant variety or a breed of animals and may mislead the consumer as to the true origin of the product.

A name proposed for registration that is homonymous or partially homonymous with a name already registered may not be registered as a designation of origin or geographical indication, unless there is, in practice, sufficient distinction between the conditions of local and traditional use and presentation of the registered homonymous name subsequently, on the one hand, and the name already registered, on the other hand, taking into account the need to ensure a fair treatment of the producers in question and not to mislead consumers. A homonymous name that gives consumers the wrong impression that the products originate in another territory shall not be registered, even if it is accurate in terms of the territory region or locality in which the said products originate.

At the same time, a name proposed for registration as a designation of origin or geographical indication is not registered in the situation where, given the reputation and reputation of a mark, as well as the duration of its use, the registration of the proposed name as a designation of origin or geographical indication is likely to misleads the consumers to the true identity of the product.

First of all, referring to the names/generic terms, Regulation (EU) no. 1151/2012 expressly stipulates through art. 6 para. 1 that they cannot be registered as protected designations of origin or as protected geographical indications, also providing a definition of them as representing product names which, although are related to the place, origin or country where the product was initially produced or marketed, have become the common name of a product in the Union.

The reservation of certain generic names cannot be allowed as it would give an undue advantage to certain producers over their competitors, therefore it has been appreciated that they are part of the public domain, without imperative laws being able to regulate their use, no right or reservation can be exercised over them, thus being able to be used freely, provided, however, that the use does not mislead the consumer regarding the true geographical origin of the product.[5]

The problem of generic names/mentions has been addressed, over time, differently through international agreements and treaties.

Thus, the Madrid Agreement on indications of origin[6] deals with this issue in a limited framework, leaving it to the discretion of the courts of the state's party to this agreement to decide which names, due to their generic nature, do not fall within the scope of this arrangement, while „regional names of origin of wine products" are expressly excluded from this rule according to the provisions of art. 4 of the Agreement.

The Lisbon Agreement[7] provides for the prohibition of the illegal use of a designation of origin that is the subject of an international registration in all states party to the agreement, to the extent that the competent authority of a contracting party has not declared that it could not ensure the protection of such a designation of origin.

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[5] C. Le Goffic, *The protection of geographical indications*, LexisNexis Litec, Paris, 2010, p. 409.

[6] The Arrangement regarding penalties for false or misleading indications of the origin of products was concluded at Madrid on April 14, 1891, and entered into force on July 15, 1892. The arrangement was revised at Washington on June 2, 1911, at Hague on November 6, 1925, at London on June 2, 1934, in Lisbon on October 31, 1958 and in Stockholm on June 14, 1967.

[7] The Arrangement for the Protection of Appellations of Origin and their International Registration was signed in Lisbon on October 31, 1958 and was revised in Stockholm on June 14, 1967 and is administered by WIPO.

According to art. 3 of the Lisbon Agreement, protection is granted against any attribution or imitation even in cases where the true origin of the product is indicated or in cases where the indication is used in translation or is accompanied by expressions such as „of the type", „of the model", „imitation".

The agreement also provides that a designation of origin admitted for protection in one of the countries parties to the agreement, in accordance with the procedure set out in art. 5, cannot be considered generic there, as long as it is protected as a designation of origin in the country of origin.

Regulation (EEC) no. 2081/1992[8] provided a clearer definition of generic names, stipulating that „name that has become generic" means the name of an agricultural or food product which, even if it refers to the place or region where this agricultural or food product was originally produced or marketed, has become the common name of an agricultural or food product.

The TRIPS Agreement[9] defined by art. 24.6 the generic terms as the usual terms used in the current vocabulary as a common name of those products or services on the territory of a member state.

A geographical sign must be to fix the meaning of „geography", in relation to physical, natural or human phenomena located on the globe. These phenomena are generally identified by precise terms, but these are not necessarily available to provide an indication of origin, either because it is possible that some terms have lost their geographical quality in current language and become generic or semi-generic, or because there are homonyms and the same term can describe different places.[10]

Geographical indications or designations of origin which are no longer understood by the population of a Member State as indicating the particular origin of a product, but which indicate a certain type or category of products, may cease to operate as indicative signs.

The generic character of a name can be due either to the name itself, because it has always been generic, or because it has become generic over time through its use. In other words, it is the case of those names that have either never had the function of indicating the origin, or have lost this function so that they can no longer establish the link with the area of origin, in the case of these terms the geographical link between the product and the area of origin disappears, although indirectly, they suggest the origin of the product from which certain of its qualities or characteristics derive.

One of the most important conditions required, before registering a name as a geographical indication or designation of origin is that the name is not already widely used as a generic name for a similar product. The transformation of a geographical indication or a designation of origin into a generic term can take place in different countries and at different times. This may lead to situations where a particular indication is considered to constitute a very specific term for a well-known local specialty in a country (most often in the country origin), may constitute a generic term or a generic trademark for that type of product, in other words, the problem arises when products are marketed under a certain indication that is understood differently in different countries. For example, Parmigiano cheese from Italy is known generically as Parmesan cheese in Australia and the United States.

As such, in this context, a balance must be found between the interests of consumers and producers in countries where the geographical indication is considered to indicate the geographical origin and particular qualities of a product, on the one hand, and those of producers and consumers in countries where this geographical indication has become the symbol of a kind of products and can be used freely by anyone.

It has been shown[11] that the degeneration of a geographical sign can be explained by various factors, the first is its very reputation, a kind of redemption for the glory that also affects certain trademarks whose last stage of notoriety would have turned into a common name and therefore the disappearance as a sign indicating the geographical origin, other justifications reside in the fact that the connection between a certain place and the qualities of the product is not absolute and this explains why in most cases generic names are found for manufactured products or even cheeses.

Also, linguistic transformations are a sign of detachment from territorial roots and certain geographical indications are generic because they have autonomous development in relation to a specific place and at the

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[8] Regulation (EEC) no. 2081/1992 on the quality systems of other agri-food products, published in the Official Journal of the European Union L 208 of 24.07.1992, p. 1, repealed by Regulation (EC) no. 510/2006 of the Council of March 20, 2006 regarding the protection of geographical indications and designations of origin of agricultural products and food, this is turn repealed by Regulation (EU) no. 1151/2012 of the European Parliament and of the Council of 21.11.2012 regarding systems in the field of quality of agricultural and food products.

[9] The agreement on aspects of intellectual property rights related to trade, also called the TRIPS Agreement (Trade Related Aspects of Intellectual Property), represents Annex IA of the Marrakech Agreement of April 15, 1994 and was ratified by Romania through Law no. 133/1994, published in the Official Gazette of Romania no. 360/27.12.1994. It is considered to be the most important international convention in the field of intellectual property protection. The TRIPS Agreement introduced intellectual property law into the multilateral trading system for the first time and remains the most comprehensive multilateral agreement on intellectual property to date.

[10] N. Olszak, *Law of designations of origin and indications of source*, Tec&Doc Lavoisier, Paris, 2001, p. 16.

[11] *Idem*, p. 16.

same time, the role of producers in the distribution of their products can explain this dilution of the identity of the signs that indicate origin because for those who sell products wholesale, grouping by types is easier to manage. In this context, an example was given of the multitude of wines on supermarket shelves, without being placed according to quality criteria, which makes it difficult for the consumer to choose a wine with a geographical indication at the expense of another product of lower quality and dilutes the consumer's perception of a product that offers qualities and characteristics due to its geographical origin or the production method used in its production.

It was also stated that the degeneration is based on a material escape, physically characterized by a constant and repeated use of the term to designate products manufactured in various places foreign to the original place and that in this sense the decisions that recognize the generic character of a name it is often based on the observation that products bearing this name are mostly manufactured outside the place of origin.[12]

In another opinion, the degeneration of indicative signs was attributed to the negligence of the interested parties, who failed to defend the geographical name in question[13], noting that this reasoning was applied in French and Community law, in the matter of degeneration of trademarks[14]; it is about penalizing the holder of a trademark that has become common only if this evolution has occurred due to this owner, who did not show sufficient diligence to maintain the distinctive character of his marks.[15]

At the same time, the question arose whether the uses of generic terms are not made in bad faith, invoking an „aggregation of defects" on the part of a few unscrupulous manufacturers, the degeneration resulting from a generalized original abuse, several competitors committing the same fraud at the origin.[16]

In order to determine whether or not a name has become generic, the provisions of art. 41 para. 2 of Regulation (EU) no. 1151/2012 are relevant, which stipulate that all relevant factors will be taken into account in this approach, in particular by: the existing situation in the member state where the name originates and in the areas of consumption; the existing situation in other member states; relevant national or community legislation.

In this context, the purpose for which a geographical indication or a designation of origin is registered under Regulation (EU) no. 1151/2012 should be highlighted, namely to avoid the abusive use of a name by those who aim to benefit from the reputation acquired by these names and implicitly to avoid their disappearance due to general use outside its geographical area or outside the specific quality, notoriety or other characteristic that can be attributed to that origin and which justifies the registration of that name.

Thus, art. 41 para. 1 of Regulation (EU) no. 1151/2012 stipulates that without prejudice to art. 13, the use of terms that are generic in the Union is not affected, even if the generic term is part of a name that is protected under a quality system.

It is possible for a name to induce expressions that originally had a territorial meaning but that lost it over time as a result of its widespread use away from characterizing products of a determined geographical origin.

Generic terms such as „beaujolais" which is a common name to describe a slightly fruity red wine or „chablis" used to describe a dry white wine are product names which, although linked to place, region or country in which the product was originally produced or marketed, have become the common name of a product in the Union.

Obviously, the question was asked what is the legal regime of generic names in this sense, the provisions of art. 6 and art. 7 para. 1 of the Lisbon Agreement regarding the protection of appellations of origin and their international registration are which provide that the appellation of origin registered under the Agreement cannot be considered generic as long as it is protected as an appellation of origin in the country of origin.

It takes into account the aspect that generic names cannot be registered, as otherwise protected names cannot become generic, and the generic elements of a registered name cannot be protected.

It is undisputed that a geographical name could, to the extent that it is used, become a generic name, in the sense that it could be regarded by consumers as an indication of a certain type of product rather than as an indication of the geographical origin of the product, examples in this sense being the names „Camembert" and „Brie".

The problem of names/generic mentions was and is the subject of many disputes and debates and was also addressed in the CJEU jurisprudence.

Thus, in the assessment of the generic character of a name, it was established that the places where the

[12] C. Le Goffic, *op. cit.*, p. 410.

[13] G. Bonet, *The mark constituted by a geographical name in French law*, JCP E, 1990.

[14] C. Le Goffic, *op. cit.*, p.412.

[15] F. Luxembourg, *The forfeiture of rights, Contribution to the study of civil sanctions,* Editions Pantheon Assas, Theses, Paris, 2007, pp. 153-157.

[16] L. Lorvellec, *The international protection of quality signs,* in Writings on rural and agri-food law, Dalloz, 2002, p. 385.

respective product was produced both inside and outside the member state that obtained the registration of the name in question must be taken into account, the consumption of this product and of the way in which this name is perceived by consumers inside and outside the respective member state, by the existence of a special national legislation regarding the mentioned product, as well as by the way in which this name was used according to community law.[17]

The Court was called upon to rule on this aspect in Bavaria I[18] case, ruling that a name becomes generic only if the direct link between, on the one hand, the geographical area of the product and, on the ither hand, a specific quality disappears of this product, its notoriety or another characteristic that can be attributed to that origin, and the name does nothing more than describe a genre or type of products.

At the same time, it was shown that generic names are part of the general cultural and gastronomic heritage and that, in principle, can be used by any producer and include names that are not related to production in a specific place and therefore to the geographical origin of the product, but only with the properties of the product, which are based on the use of similar production processes.[19]

As far as a protected geographical indication is concerned, a name becomes generic only if the direct connection between, on the one hand, the geographical origin of the product and, on the other hand, a specific quality of that product, the reputation of this or another characteristic of this product, attributable to that origin, has disappeared and that the name only describes a genus or type of products.[20]

At the same time, it was considered that regarding the presence on the market of some marks and labels of some commercial companies that contain the word „Bayerisches” or its translations, as synonyms of the old Bavarian method with reduced fermentation, that circumstance does not allow to deduce the fact that the name in question had become generic at the time of filing the application for registration.

It was thus concluded that the protected geographical indication did not become generic and that, consequently, the direct link existing between the reputation of Bavarian beer and the geographical area did not disappear, such a finding could not be considered to be manifestly inappropriate only because of the presence on the market of marks and labels of commercial companies that contain a word component of the protected geographical indication or its translations as synonyms of the old Bavarian method with reduced fermentation.[21]

The Court considered, on the other hand, that to the extent that geographical indication is not generic and that there is a significant link between the designated product and the origin, a link that can reside only in the local reputation, the protection of the indication of origin can benefit from the exception provided for in art. 30 TEU which makes it possible to circumvent the principle of free movement of goods, the Court establishing the conditions that a product must meet in order to benefit from an indication of origin.[22]

The prohibition to protect generic names is justified by the aspect that they no longer fulfil the essential function of indicating the geographical origin of the product, in other words, they have lost touch with the area of origin.

It should be noted that in the case of a geographical indication or a designation of origin consisting of a compound name that contains a term considered generic, the use of this term does not constitute a direct or indirect commercial use or an abusive use, imitation or evocation within the meaning of art. 13 para. 1 letters a and b of Regulation (EU) no. 1151/2012.

The protection that must be granted to the various components of a name, and in particular that of determining whether it is a generic name or a component protected against direct or indirect commercial use or abusive use, imitation or evocation, are the subject of an assessment based on a detailed analyses of the factual situation existing in each individual case.[23]

Such an analysis requires the verification of a certain number of conditions, which requires, to a large extent, in-depth knowledge both regarding the specific elements of the concerned member state[24] and regarding the existing situation in other member states.[25]

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[17] CJEU, Judgment of July 2, 2009, *Bavaria NV, Bavaria Italia Srl v. Bayerischer Brauerbund eV*, case C-343/07, ECLI:EU:C:2009:415, point 101; CJEU, Judgment of February 26, 2008, Commission/Germany, case C-132/05, ECLI:EU:C:2008:117, point 53, CJEU, Judgement of October 25, 2005, *Germany and Denmark v. Commission*, case C-465/02, C-466/02, ECLI:EU:C:2005:636, point 76-99.

[18] CJEU, Bavaria NV, *Bavaria Italia Srl v. Bayerischer Brauerbund eV*, case C-343/07, previously cited, point 107.

[19] See the conclusions of Advocate General Saggio in the case *Public Ministry v. Guimont*, C-448/98, point 11.

[20] CJEU, Bavaria NV, *Bavaria Italia Srl v. Bayerischer Brauerbund eV*, case C-343/07, previously cited, point 107.

[21] *Idem*, point 108.

[22] CJEU, Judgement of November 10, 1992, *Exportur SA v. LOR SA and Confiserie du Tech*, case C-3/91, ECLI:EU:C:1992:420.

[23] CJEU, Judgement of June 9, 1998, *Yvon Chiciak and Fromagerie Chiciak and Jean-Pierre Fol*, case C-129/97 and C-130/97, ECLI:EU:C:1998:274, point 38.

[24] CJEU, Judgement of December 6, 2001, *Carl Kuhne GmbH& Co.KG and others v. Jutro Konservenfabrik GmbH&Co.KG*, C-269/99, ECLI:EU:C:2001:659, point 53.

[25] CJEU, Judgement of March 16, 1999, *Denmark and others/Commission*, C-289/96, case C-293/96, C-299/96, ECLI:EU:C:1999:141, point 96.

The detailed analysis of all the factors that could determine the generic character concerns the legal, economic, technical, historical, cultural and social indicators an refers to the relevant national and community legislation, including their evolution over time, the perception that the average consumer has of of allegedly generic names, including the fact that the notoriety of the name remains linked to the traditional product manufactured in a certain area as a consequence of the fact that it is not commonly used in other regions of the Member State or of the European Union, the fact that a product has been legally marketed with the respective name in certain member states, the fact that a product was legally manufactured with the respective name in the country from which the name originates, even without respecting traditional production methods, the fact that such operations have endured over time, the quantity of products having the respective name and being manufactured outside the method their traditional by referring to the amount of products manufactured according to the respective methods, the fact that the products manufactured outside of the traditional methods are presented in such a way as to refer to the places of production of the products manufactured according to the respective methods, the protection of the respective name through international agreements and the number of member states which possibly invokes the alleged generic character of the respective name.[26]

The Court also ruled that when a name is considered generic in the common market, a member state does not have the right to limit its use to national products that have certain characteristics and, apart from the generic nature of the name, a state cannot, by applying its own rules regarding the designation of food products, to prohibit the entry into its territory of a product that is labelled with the same name used in accordance with the relevant rules applicable in the country of origin.[27]

Secondly, a name proposed for registration as a designation of origin or geographical indication is not registered in the situation where, given the reputation and reputation of a mark, as well as the duration of its use, the registration of the proposed name as a designation of origin or geographical indication is likely to mislead the consumer as to the true identity of the product.

Thus, the relationship between the names registered in Regulation (EU) no. 1151/2012 and trademarks is regulated, establishing according to the different rules of conflict with scope, with effects and with different recipients.

This second situation concerns the conflict between a protected name or protected geographical indication and an earlier trademark, in the event that the registration of the name in question would be likely to mislead the consumer as to the real identity of the product in view of the reputation, notoriety, duration of use of the trademark.

The existence of the trademark can thus be threatened when the protection of a geographical indication or a designation of origin is subsequently considered, consisting of a sign identical to the one constituting the trademark or having characteristics close to it. Such a conflict is similar, in this case the risk of confusion increases for consumers.

But the conflict can also arise from the coexistence of a trademark and a similar geographical indication that designates different or similar products, the only hypotheses that are excluded being, on the one hand, that in which the previous trademark is a collective trademark that protects a geographical indication, since in this case there is no legitimate reason to subsequently protect a similar indication, and on the other hand, the one in which the geographical indication is included in a complex mark designating products that have the right to be protected by the geographical indication.[28]

The complexity of conflicts between geographical indications and earlier trademarks is due to the tension between two principles, on the one hand the respect of rights acquired, more precisely the property right of the owners of the trademarks, and on the other hand, the general interest that can lead to the geographical indication, prevailing over the previous trademark. In the context of this conflict, three situations can arise, either the previous trademark prevents the validity of the geographical indication, or due to the special legal nature recognized for it, the geographical indication, more precisely the designation of origin, invalidates the previous trademark, or finally, the two signs are authorized to coexist.[29]

In the hypothesis of such a conflict, the effect is the refusal to register the names, but it has been shown[30] that the refusal must be based on an analysis prior to the registration of the protected designation of origin and

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[26] CJEU, Denmark and others/Commission, C-289/96, case C-293/96, C-299/96, previously cited, points 95, 96, 99 and 101, CJEU, Judgement of June 25, 2002, *Dante Bigi v. Consorzio del Formaggio Parmigiano Reggiano*, C-66/00, ECLI:EU:C:2002:397, point 20, CJEU, *Germany and Denmark v. Commission*, C-465/02, C-466/02, previously cited, points 75, 77, 78, 80, 83, 86, 87, 93 and 94, CJEU, Judgement of September 12, 2007, *Consorzio per la tutela del formaggio Grana Padano*, T-291/03, ECLI:EU:T:2007:255, point 65.

[27] CJEU, Judgement of July 11, 1974, *Procureur du Roi v. Benoit and Gustave Dassonville*, case C-8/74, ECLI:EU:C:1974:82.

[28] C. Le Goffic, *op. cit.*, p. 343.

[29] *Idem*, p. 344.

[30] CJEU, Bavaria NV, *Bavaria Italia Srl v. Bayerischer Brauerbund eV*, case C-343/07, previously cited, point 120.

the protected geographical indication and which must be limited to the possibility of a possible consumer error regarding the actual identity of the product due to the registration of the name in question, based on an examination of the name to be registered and the earlier mark, taking into account the fame, notoriety and duration of use of the latter.

The absence of a risk of confusion in the perception of the consumer between the name in question and the earlier mark does not exclude the possibility that the use of the latter may be the subject of direct or indirect commercial use, abusive uses, imitations, evocations or a false or misleading indication of provenance, origin, the nature or qualities of the product or even if there are good reasons for cancelling or revoking the respective mark. At the same time, the mentioned absence of the risk of confusion does not relieve the obligation to check whether the trademark in question was registered in good faith before the date of submission of the application for registration of the protected designation of origin or the protected geographical indication.

Likewise, a name that coincides with the name of a plant variety or an animal breed and that may mislead the consumer as to the true origin of the product cannot be protected as a designation of origin or geographical indication.

However, Regulation (EU) no. 1151/2012[31] also provides exemptions, namely that the introduction to the market of products whose labels contain a protected or reserved name or mention under a quality system that contains or includes the name cannot be prevented a plant variety or an animal breed, when the following conditions are met: the product in question contains or is derived from the mentioned variety or breed; consumers should not be misled; the use shall not exploit the reputation of the protected designation; in the case of designations of origin and geographical indications, the product and marketing of the product has exceeded its area of origin before the date of the application for registration of the geographical indication.

It is obvious that the product whose label contains or includes the name of a plant variety or an animal breed must have the ability not to mislead consumers as to the true origin of the product and also not to exploit the reputation of the protected name by indicative sign.

Regulation (EU) no. 1151/2012 also stipulates that a name proposed for registration that is homonymous or partially homonymous with a name already registered in the Register of Appellations of Origin and Protected Geographical Indications cannot be registered, unless it exists, in practice, a sufficient distinction between the conditions of local and traditional use and the presentation of the subsequently registered homonymous name, on the one hand, and the name already entered in the register, on the other hand, taking into account the need to ensure fair treatment of the producers concerned and not to mislead consumers.

Homonymous geographical indications are those that are written or pronounced the same, but which identify products originating from different regions or countries.

A geographical indication for which an application for registration has been submitted after a homonymous or partially homonymous name has been the subject of an application for a geographical indication or has been protected as a geographical indication in the European Union shall not be registered, unless there is sufficient distinction in practice between the conditions of local and traditional use and the presentation of the two homonymous names, taking into account the need to ensure a fair treatment of the producers of such products and to avoid misleading of consumers regarding the identity or geographical area of the products.

At the same time, a homonymous or partially homonymous name that leaves consumers with the erroneous impression that the products originate from another territory cannot be the object of protection, although the homonymous name is accurate in terms of the territory, region or locality from which the respective products originate.[32]

The TRIPs agreement stipulates in art. 23.3 that in the case of geographical indications for wines, protection can be granted to each indication subject to the provisions of art. 24.4, namely that the protection will be applicable against a geographical indication which, even if it is literally accurate in terms of the territory, region or locality from which the products originate, makes it wrongly understood by the public that the products originate from another territory.

For this purpose, each member state will establish the practical conditions in which the respective homonymous indications would be differentiated from each other, taking into account the need to ensure a fair treatment of the respective producers and it will be done in such a way that consumers are not misled.

It has been shown that a final form of homonym inconvenient for geographical indication can be represented by surnames identical to geographical names, as in the case of noble families, because of the feudal connection between the title and a land and since it is mandatory to identify in professional activity and legitimate to use the name to designate its production, there may be an accidental collision with an indication of

[31] See art. 42 para. 1 of Regulation (EU) no. 1151/2012.

[32] See art. 6 para. 3 of Regulation (EU) no. 1151/2012.

provenance or a temptation to deliberately engage in activities where this name is profitable because of notoriety.[33]

In the case of guaranteed traditional specialities, starting from the definition given to them as a name describing a specific product or a food resulting from a production process, processing or a composition that corresponds to the traditional practice for that product or food or is produced from raw materials or ingredients traditionally used[34], to be registered, it must have been traditionally used to designate the specific product or indicate the traditional character or specific character of the product.[35]

A guaranteed traditional specialty name cannot be registered if it refers only to claims of a general nature used for a set of products or to claims provided for by specific Union legislation, in other words, it is necessary that the name refers to a process of production determined, to a certain way of processing or of a precisely defined composition, these must correspond to the traditional practice for the respective product or food or in the case of raw materials or ingredients traditionally used, they must be clearly and unequivocally listed in specifications.

It should be noted that in the case of guaranteed traditional specialties names, unlike geographical indications and designations of origin, in the situation where the name is also used in another member state or in a third country to distinguish comparable products or products that have an identical or similar name, the decision on registration may stipulate that the name of the guaranteed traditional specialty is accompanied by the mention „made according to traditions" immediately followed by the name of the respective country or region.[36]

3. Conclusions

It is obvious that the sign symbolizing the geographical origin or the production method has a considerable impact on the purchase of a product, so it is necessary to protect it by establishing a quality system with strict rules in terms of registration, marketing and protection of products that offer own qualities and characteristics due to the geographical environment from which it originates or to local traditions related to the manufacturing method.

That is why it is important that the suppliers of the products for which protection by an indicative sign is requested provide all the technical information necessary to describe the product and the production area, in the case of geographical indications and designations of origin, as well as the production methods, in the case of traditional specialties guaranteed.

But not every name can be registered as a geographical indication or designation of origin, either because they are generic or because they can mislead the consumer as to the true origin of the product, it is the case of generic terms, of names that coincide with the name of a plant variety or an animal breed, of the name proposed for registration that is homonymous or partially homonymous with an already registered name and finally of the name proposed for registration that, given the reputation and reputation of a mark, as well as the duration of its use, it is likely to mislead the consumer as to the true identity of the product.

In the case of generic terms, the transformation of a geographical indication or a designation of origin into a generic term can take place in different countries and at different times, as such, situations may arise where when products are marketed under a certain indication, this should be considered a specific term in the country of origin and respectively a generic term in another country for that type of product.

In its jurisprudence, CJEU ruled that in assessing the generic character of a name, the places where the respective product was produced both inside and outside the member state that obtained the registration of the name must be taken into account in question, the consumption of this product and the way in which this name is perceived by consumers inside and outside the respective Member State, the existence of a special national legislation regarding the said product, as well as the way in which this name has been used according to community law.

It was also shown that a name proposed for registration as a designation of origin or geographical indication cannot be registered in the situation where, given the reputation and reputation of a mark, as well as the duration of its use, the registration of the proposed name as a designation of origin or geographical indication is likely to mislead the consumer as to the true identity of the product.

As such, the existence of the trade mark may thus be threatened when the protection of a geographical indication or a designation of origin is subsequently considered, consisting of a sign identical to that which

[33] N. Olszak, *op. cit.*, p. 16.
[34] See art. 18 para. 1 of Regulation (EU) no. 1151/2012.
[35] *Idem*, art. 18 para. 2.
[36] *Idem*, art. 18 para. 3.

constitutes the trade mark or having characteristics close to it, the risk of confusion for consumers being higher in the situation where the products designated by the two conflicting signs are similar.

Less common in practice as well as in the CJEU jurisprudence, the name that coincides with the name of a variety of plants or a breed of animals as well as the homonymous or partially homonymous name, both likely to mislead the consumer regarding the true identity of the product cannot be protected as a geographical indication or designation of origin.

It was also shown that a guaranteed traditional specialty name cannot be registered if it refers to statements of a general nature used for a set of products or to the statements provided for by a specific Union legislation, in its case, it is necessary that the name refers to a specific production process, to a specific processing method or to a precisely defined composition, these having to correspond to the traditional practice for the respective product or food or in the case of raw materials or ingredients traditionally used, these must be clearly listed and unequivocal in the specifications.

It can thus be concluded that the added value conferred by the indicative signs is based on the trust of consumers and only an effective protection system can guarantee them that a certain quality, characteristic or reputation of the products protected by the indicative sign are maintained for the entire duration of the protection period and that in this context the name proposed for registration does not increase the risk of confusion regarding the true origin of the product, the qualities or characteristics due to its origin or the production methods used.

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ARTIFICIAL INTELLIGENCE AND TRADEMARK PROTECTION

George-Mihai IRIMESCU*

Abstract

Although Artificial Intelligence does not represent a new concept, it seems that only in the recent years it started to have a massive impact on people's lives, including their economic behavior. As a consequence, Artificial Intelligence has taken by storm the world of Intellectual Property. While its advantages and disadvantages are still not clearly defined or its benefits and threats are still being debated, the presence and influence of Artificial Intelligence can no longer be disregarded. In this context, its intersection with intellectual property rights, including with aspects concerning trademark protection, is inevitable. Artificial Intelligence became a very useful tool for intellectual property offices, being used to create an interface with users, to assist applicants in online filings and also in connection to examination proceedings. Thus, although it usually came more to the aid of applicants, Artificial Intelligence became more and more helpful to examiners as well. More importantly, Artificial Intelligence changed the consumers' buying habits, and this aspect puts the classical trademark role and functions into a new perspective. This being said, the present paper aims to find which are the evolutions in connection to trademark protection and practice brought by the presence of Artificial Intelligence tools, both from the perspective of the national offices and from the point of view of consumers.

Keywords: *Artificial Intelligence, intellectual property rights, trademark protection, average consumer, likelihood of confusion.*

1. Introduction

What is Artificial Intelligence (AI)? Encyclopedia Britannica offers the following definition: „the ability of a digital computer or computer-controlled robot to perform tasks commonly associated with intelligent beings."[1]

That being said, which are those tasks commonly associated with human beings? The cited author explains: „Psychologists generally do not characterize human intelligence by just one trait but by the combination of many diverse abilities. Research in AI has focused chiefly on the following components of intelligence: learning, reasoning, problem solving, perception, and using language."[2]

From all the above, the human trait that Artificial Intelligence is trying to replicate, which I find the most relevant to trademark protection, is „perception". In psychology, „perception" is defined as a psychological mechanism for deep processing of information. More specifically, while the „sensation" is a subjective reproduction of simple traits of goods and phenomena, „perception" is much more complex than that: it allows individuals to complete the information gathered from simple sensations, it helps people place the same sensations in categories based on common features, it helps individuals compare each stimulus with others from its own environment, allows individuals to focus on the most important aspects of the stimulus and to ignore the less important ones. More importantly, „perception" is based on prior knowledge, to the extent that similar prior experience influences the later act of perception. [3]

Needless to say, consumers' perception is a key element in both the analysis of trademark conflicts and even in trademark examination proceedings. To this end, in a recent article, author Lotte Anemaet debates whether likelihood of confusion should be assessed only factually (based on an empirical approach focusing on consumer perception), or this assessment should also focus on how consumers ought to behave in the marketplace (following a normative approach), concluding that the best option would be a balanced combination between the two approaches.[4] With this in mind, would AI be seen as an appropriate tool to assess trademark conflicts including a likelihood of confusion claim? In other words, would it be able to have a normative approach, or rather an empirical approach? I will try to find an answer in this article.

Another trait of AI identified by the doctrine is of a more complex nature, namely that it is able to make its

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[1] B.J. Copeland, *Artificial Intelligence*, Encyclopedia Britannica, 16.02.2023, *https://www.britannica.com/technology/artificial-intelligence*, consulted on February 19, 2023.

[2] *Ibidem*.

[3] M. Zlate, *Psihologia mecanismelor cognitive*, Polirom, 2nd ed., 2006, Bucharest, p. 85.

[4] L. Anemaet, *The Many Faces of the Average Consumer: Is It Really So Difficult to Assess Whether Two Stripes Are Similar to Three?*, in the International Review of Intellectual Property and Competition Law, 51, 2020, pp. 187-213.

own decisions and appreciations, that are not necessarily the same as those of the owner of the software, or of the one making a certain inquiry: „It is clear that a work created through such software or system belongs to whoever utilised that software or system lawfully. (...). However, in the case of AI, it refers to itself during the creation process and acts more as an independent source of intelligence than as a simple tool. Most importantly, the process of creation does not require the management or even the involvement of human intelligence. Thus, the developer of AI may not be deemed owner of the work created by the AI on its own." [5] Although this question may be found more provocative from a copyright protection perspective, it also raises an important issue from a trademark protection standpoint. If AI was to assess a potential trademark conflict, will it use its own built experience? How is this experience built? Would it be able to provide sound solutions or decisions? The same questions could be asked from the perspective of the interaction between AI and consumers: which are the factors that influence the decision-making process of AI tools, and how do they affect the trademark functions, as we traditionally know them. These are a few questions that will be addressed in the following.

2. Today's use of Artificial Intelligence in connection to trademark examination procedures

According to the website of the *World Intellectual Property Organization* (WIPO), one of the most acclaimed AI tools developed by the Office is the *Global Brand Database*, a tool that allows users to identify visually similar trademarks by means of an image-search function. The *Global Brand Database* was launched in 2014 and its functions are described as follows: *„The new, easy-to-use image-search technology supplements the database's other querying criteria, including Vienna Classification codes, brand-holder names, country of origin and others. With this new addition, for example, a user can simply upload a proposed logo and quickly return records – sifting through more than 4 million images from 15 national and international collections - of other protected images that may bear a resemblance. The database contains nearly 13 million records, with 15 national and international collections. The database contains more than 4 million searchable images.*"[6]

One of the most important features of this database is the *Artificial Intelligence-Based Image Search Tool for Brands*. According to WIPO, this tool determines similarity by identifying shapes and colours, and also uses deep machine learning to identify combinations of concepts.[7] The advantage of this type of search would be that it enables those interested in searching the availability of a certain figurative element to do so without the need to conduct a search using the *Vienna Classification*, which may not be known to a lot of trademark owners and may also generate a lot of results that are not relevant because they are visually sufficiently different to the searched trademark. That being said, using WIPO's tool may prove to be efficient from the visual perspective of an availability trademark search. For a conceptual similarity, however, the *Vienna Classification* may still remain the most relevant criteria in searching figurative trademarks. Nevertheless, the upgrade of the *Global Brand Database* comes with the promise to enhance the capabilities of this tool to conduct conceptually-based searches though learning mechanisms.

Also useful in connection to conducting searches for figurative trademarks, and to overcome the potential lack of knowledge of applicants, WIPO released the *Vienna Classification Assistant* in 2020, an *„(AI)-based tool to help users classify trademark images according to the Vienna Classification more easily*".[8] For the above reasons, this tool may complement the use of the *Global Brand Database* with the comment that, as the doctrine points out, the *Vienna Classification* system was adopted only by 34 contracting parties, so searches by using this criteria has territorial limitations and, furthermore, establishing Vienna classes for a certain trademark has rarely been consistent because of the *„subjective variations between examiners*".[9]

This being said, I have conducted a test-search, in order to assess the availability of a sign consisting of the picture of a Labrador Retriever on a green field with a background of trees, in connection to goods in Nice class 31, which also consists of food for animals. I have chosen the *„conceptual*" similarity option, the one that was enhanced through AI. I asked the machine to sort the results by relevance, which to me meant that the system

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[5] Gönenç Gürkaynak, Ilay Yılmaz, Türker Doygun, Ekin Ince, *Questions of Intellectual Property in the Artificial Intelligence Realm*, article published in February 2, 2018 in the Robotics Law Journal, available at the following link: *https://roboticslawjournal.com/analysis/questions-of-intellectual-property-in-the-artificial-intelligence-realm-91908569*, consulted on February 25, 2023, at 11:45.

[6] *WIPO Launches Unique Image-Based Search for Trademarks, Other Brand Information,* press release from May 12, 2014, available on the website of the World Intellectual Property Organization, at the following link: *https://www.wipo.int/pressroom/en/articles/2014/article_0007.html*, consulted on February 19, 2023, at 18:16.

[7] *WIPO Launches State-of-the-Art Artificial Intelligence-Based Image Search Tool for Brands*, a press release issued on April 01, 2019 and available on the website of the World Intellectual Property Organization, at the following link: *https://www.wipo.int/pressroom/en/articles/2019/article_0005.html*, consulted on February 19, 2023, at 19:00.

[8] *Release of the Vienna Classification Assistant*, a press release published on the website of the WIPO on August 05, 2020, available at the following link: *https://www.wipo.int/reference/en/branddb/news/2020/news_0006.html*, accessed on April 23, 2023 at 21:57.

[9] D.S. Gangjee, *A quotidian revolution: artificial intelligence and trade mark law*, published in Ryan Abbott, *Research handbook on intellectual property and artificial intelligence*, Edward Elgar Publishing Limited, Cheltenham, 2022, p. 335.

would make a certain similarity assessment in order to determine which result comes closest to the searched sign. None of the first results (first page of 244) contained an image of any kind of dog. It therefore seems, from a simple experiment, that the *Vienna Classification* is still remains important for identifying conceptually similar figurative trademarks, while the *Global Brand Database* may still be improved.

The European Union Intellectual Property Office (EUIPO) also uses AI tools. A Webinar provided by the Office, published on February 16, 2022, is very informative with respect to what AI tools are used at the moment, and which are the ones still under development. From the existing tools, this material reminds of the possibility to conduct a semantic search of goods and services when filing trademark applications, a chatbot that offers assistance to applicants, an AI-based goods and services comparison and the implementation of conducting a figurative search for Designs on the *eSearch Plus* platform. I will focus on the comparison of goods and services tool, which is for the Office's internal use and it is targeting examiners. For the comparison it compiles two sources, namely prior first instance decisions and the information in the *Similarity* database, which is publicly available. The AI involvement consists not only in tracing down the same comparison under assessment in other decisions, but also to identify comparisons between semantically similar goods or services that could be used by analogy.[10]

Personally, I find using AI tools in assessing the similarity between goods and services to also have disadvantages, not only advantages. Of course, using such tools may offer consistency and a certain type of predictability. However, it may also apply some prior findings mechanically, without taking into consideration, for example, the interdependence of factors in assessing the similarities between goods and services, which requires, in my opinion, more attention to the particularities of each case than simply applying those found in prior decisions. Not to mention that first instance decisions, with which the AI learning mechanism is fed, may be overturned, and that practice may change in time together with market realities. Needless to say, relying too much on older decisions may shift the attention from changes in a potential market. In any case, it appears that the EUIPO is one of the few Offices at the moment that uses AI for examination purposes and, more specifically, for the examination of objections on relative grounds.

To sum up, it seems that the most common use of AI by trademark offices is limited to trademark availability searches or classification issues. Furthermore, the doctrine has already identified current limits of AI when it comes to tools used by intellectual property offices. It is stated that *„The most obvious limitation is that the AI technologies used by different offices currently only search prior registered signs; there is no tool yet that 'surfs the Internet' or has access to relevant databases in order to identify which signs are in use but not registered. Another limitation relates to non-traditional marks, which cannot be searched for at this point*."[11] However, a paper issued by the International Trademark Association (INTA) in October 2019 makes a brief analysis of the implementation of AI among several IP Offices. In terms of trademark searches, it appears that the most offices focus on AI solutions to find trademarks that are conceptually similar in connection to figurative or word elements, or to assist in mark segmentation and find trademarks that are similar to certain elements of a trademark. With respect to the actual examination of trademarks, the AI tools are rather limited, and their purpose is to try to provide consistent decisions. For example, in 2019, the Singapore Intellectual Property Office was implementing a so-called *„Distinctiveness Checker*", which is aimed to make a first assessment of distinctiveness and provide materials to justify the decision. For the same purpose, the Australian Intellectual Property Office developed a tool called *„Smart Assessment Toolkit*" to anticipate possible objections. It also *„uses a combination of natural language processors and internally developed software trained by a dataset of historic adverse reports from 2008 to 2016 to detect similar existing trademarks*".[12]

Other authors, however, propose using AI tools for more complex examination issues, such as assessing the distinctiveness of a sign or, more specifically, in assessing if a certain trademark has become generic. Cameron Shackell and Lance De Vine explain that, typically, when assessing if a certain trademark became generic, surveys among consumers represent the most compelling evidence. However, acknowledging the importance of the Internet as a communication tool, the authors believe that this type of evidence can be complemented by AI tools that can assess the way a certain mark is actually used online. To this end, the AI could record instances where a certain trademark was written without capitalization (for example, as verbs) or in

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[10] *New EUIPO AI tools empowering customer services*, Webinar held by the EUIPO on February 16, 2022, available at the following link: *https://euipo.europa.eu/knowledge/course/view.php?id=4531*, consulted on April 23, 2023, at 14:00.

[11] A. Moerland, C. Freitas, *Artificial Intelligence and Trademark Assessment*, published in yh-An Lee, Reto M Hilty, and Kung-Chung Liu, *Artificial Intelligence and Intellectual Property*, Oxford University Press, Oxford, 2021, pp. 266-291.

[12] Al. Butterman, M. Fernandez Marques, J. Mackie, M. Marcet, S. Wright, S. Zemanick, C. Lerman, *Use of Artifical Intelligence by IP Registries*, article issued by the Emerging Issues Committee of the International Trademark Association and published on October 2019 on the INTA website and available at the following link: *https://www.inta.org/wp-content/uploads/public-files/advocacy/committee-reports/AI-Use-by-IP-Registries-Report_-10.18.2019.pdf*, consulted on April 23, 2023, at 19:20.

different forms (for example, with a plural form), which are indications that the mark has become generic, or, in general, assess the context where the certain trademark is used and, based on mathematical formulas, to determine if the mark became generic or not.[13]

Authors Sonia K. Katyal and Aniket Kesari analyse the importance of AI tools used for trademark procedures in the broader context of trademark doctrines and economics of Intellectual Property, in general. The authors argue that, since we are now facing registries crowded with a significant number of trademarks, manual availability searches inevitably involve significant costs. In this context, however, the efficiency of AI tools is of great importance, since faulty searches could generate even more costs in case of conflicts. As opposed to the traditional manual searches that were mostly text based, the authors draw the attention to the new features of AI search tools, that also take into consideration phonetical similarities, even conceptual similarities or visual similarities of images, and this type of in-depth searches may have the effect of reducing the role of paralegals or junior attorneys, if they do not reduce the role of legal advisers as a whole. Nevertheless, the authors argue that the AI solutions offered by the private sector are generally more complex than those already used by IP offices, and generally advocates for the cost benefits of using AI tools in trademark management in general, for example, for making risk assessments with respect to the revealed search results.[14]

However, I tend to agree with Dev S. Gangjee who pointed out that at this moment AI tools are meant to assist professionals, and not to replace them. It is indeed a danger that professionals would rely on the findings of AI tools, which sometimes also assess the risks posed by a revealed trademark in percentage, without acknowledging limits of the used algorithms, also to shelter themselves in terms of liability for the opinions they provide. Nevertheless, it should be kept in mind that trademark law and practice also require attention to the particularities of each case. To this end, Gangjee exemplifies that an AI tool that was fed with information deriving from English-speaking jurisdictions may provide results based on assumptions on the knowledge of the relevant consumers that are not correct in others (for example, that the meaning of Chinese characters is not understood). Another example to this end is the capacity of professionals to assess if a certain similarity feature identified by the AI is distinctive enough in the context of a particular conflict and, consequently, to weigh its importance in the overall appreciation of the trademarks' similarity. Most importantly, although the similarity of the conflicting trademarks and the similarity of the conflicting goods and/or services are the pillars of assessing a likelihood of confusion claim, it is, in fact, the assessment of the intersection between these two factors that actually matters and the impact of this synergy on the *„real-world consumer*", an aspect that may be left behind by the *„algorithmic assessment of similarity*".[15]

3. How does Artificial Intelligence influence buying habits?

A recent article published on the website of WIPO makes a comprehensive description of the way buying habits have changed in time. It explains that, during Victorian times, shop assistants were the *„filter*" between consumers and sold goods, which were largely unbranded. Further in time, supermarkets allowed consumers to make decisions without the help of shop assistants, but relying on the information delivered by trademarks. Since then, Internet produced major changes in consuming habits, but, to some extent, reinvented the shop assistants: *„The structure of the purchasing process is changing again, arguably, with the introduction of AI applications such as Amazon Alexa, Google Home, consumer chatbots, AI personal shopping assistants, such as Mona, Amazon Dash and AI robot assistants, such as Pepper. In many ways, the introduction of AI applications has meant that the purchasing process has reverted back to the old Victorian model, with some important differences*."[16]

Rob Batty has identified three ways in which AI could help customers find the desired goods. One of them is by making recommendations based on previous purchases, searches or ratings of the consumer. The second is by using voice-activating searches and orders, by giving direct instructions such as „add coffee to my shopping list". Another option, offered, for example, by a luxury store, is to provide the seller with a picture of a good, for the system to provide similar items from their offer.[17] It seems that choosing the goods based on the trademark they bear has little to do with these manners of making commercial choices. In fact, as Kalyan Revalla stated, the

[13] A more detailed explanation in C. Shackell, L. De Vine, *Quantifying the genericness of trademarks using natural language processing: an introduction with suggested metrics*, Artificial Intelligence and Law, vol. 30, no. 2, 2022, pp. 199-220.

[14] S.K. Katyal, A. Kesari, *Trademark search and AI*, article published in the Berkeley Technology Law Journal, no. 2, vol. 35, 2020, pp. 501-588.

[15] D.S. Gangjee, *op. cit.*, p. 337-340.

[16] L. Curtis, R. Platts, *Trademark Law Playing Catch-up with Artificial Intelligence?*, article published in the WIPO Magazine, available at the following link: *https://www.wipo.int/wipo_magazine_digital/en/2020/article_0001.html*, consulted on February 25, 2023, at 14:41.

[17] R. Batty, *Trade Mark Infringement and Artificial Intelligence*, New Zealand Business Law Quarterly (Forthcoming), August 16, 2021, available at SSRN: *https://ssrn.com/abstract=3978248 or http://dx.doi.org/10.2139/ssrn.3978248*, pp. 7-9, consulted on April 22, 2023, 18:30.

„emotional bond" that consumers develop with trademarks may be replaced by an *„artificial bond*", while *„average consumers*" are replaced by *„artificial consumers*".[18]

In my opinion, however, this assessment may be nuanced. It is true that the bond with trademarks may become less emotional. Not entirely, however. Moreover, consumers cannot become artificial. What is, maybe, artificial, is the shopping environment, the market, the commercial channel, and these are indeed changes that should be taken into consideration in a potential trademark conflict. For example, such developments may also bring new nuances in assessing trademark conflicts in the sense that voice ordering may bring the assessment of trademark phonetical similarity to have a greater importance.[19] Or, I might add, the assessment of how particular goods are placed on the shelves of brick-and-mortar stores, in order to determine their similarities in the sense of the trademark law and practice, may be replaced with the assessment of the way certain goods are presented by online retailers.

This being said, which are the novelties brought by AI to commerce? First of all, AI acts like a filter between the consumer and the market, providing consumers with offers tailored on their past buying experience. In this context, although AI is not making a direct buying decision for the consumer, it has, at least, a significant influence upon it, with the effect that consumers are not aware of the full range of goods available on a certain market when searching specific products, but only of those recommended by AI. Therefore, AI basically reduces information available to consumers and, to some extent, participates to the purchasing decision made by the consumer. This being said, a legitimate question arises: in the context of modern legislation, who is to be considered the average consumer, and how could it be defined.[20]

Trademark practice still usually goes by the definition of the average consumer offered by the European case-law, namely: *„The answer to be given to the questions referred must therefore be that, in order to determine whether a statement or description designed to promote sales of eggs is liable to mislead the purchaser, in breach of art. 10(2)(e) of Regulation no. 1907/90, the national court must take into account the presumed expectations which it evokes in an average consumer who is reasonably well-informed and reasonably observant and circumspect. However, Community law does not preclude the possibility that, where the national court has particular difficulty in assessing the misleading nature of the statement or description in question, it may have recourse, under the conditions laid down by its own national law, to a consumer research poll or an expert's report as guidance for its judgment."*[21]

Under modern circumstances, could a consumer stand by the same qualities? Is it reasonably well-informed, in the context where AI makes an initial selection of goods or brands in its place, and this precludes it from actually being aware of most of the trademark available on the market? Can it be reasonably observant, when most of its purchase decisions are made at long distance? Furthermore, can it be circumspect while it is assisted in making a commercial decision?

From this perspective, in a position paper issued by the Emerging Issues Committee the authors go so far as to state that AI is, actually, taking the place of the *„average consumer*", as defined in traditional trademark practice. The scenario envisaged by the authors is the following: a consumer makes an oral order using smart devices with AI tools. The AI responds by proposing goods bearing other trademarks, either less expensive or that it considers more compatible with the buyer. Usually, in case of conflict, a trademark similarity conflict is assessed based on a visual, aural and conceptual comparison of the trademark at hand. However, as the consumer is less involved in purchasing decisions, as they usually make oral commands and receive oral feedback, the aural comparison between two potentially conflicting trademarks should gain more weight. Furthermore, concepts like *„likelihood of confusion*" or *„imperfect recollection*" would become obsolete, in consideration of the fact that AI is not susceptible of confusion and its recollection is close to perfect. Furthermore, various degrees of attention of the average consumer, depending on the price variations of the goods, would also become irrelevant. Under the circumstances, the authors conclude that *„brand owners and trademark practitioners may need to reevaluate the strength of infringement theories that rely principally on initial interest and point of sale confusion and instead explore theories of infringement that place greater emphasis on the harm caused by post purchase confusion*".[22] Once again, I would actually argue that the average consumer did not

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[18] K. Revalla, *Intelligent Trademarks: Is Artificial Intelligence Colliding with Trademark Law?*, IUP Law Review, vol. 8, no. 4, 2018, pp. 13-20.

[19] L. Curtis, R. Platts, *Alexa, What's the Impact of AI on Trademark Law*, Managing Intellectual Property, 281, 2019, p. 44.

[20] L. Curtis, R. Platts, *Trademark Law Playing Catch-up with Artificial Intelligence?, op. cit*.

[21] Judgement of the Court (5th Chamber) of 16 July 1998 in *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung* (case C-210/96).

[22] R. Keen, S. Rollo, M. Stratton, V. Caddy, C. Lerman, *Artificial Intelligence (AI) and the Future of Brands: How will AI Impact Product Selection and the Role of Trademarks for Consumers?*, article published on the website of the International Trademark Association in October 2019, available at the following link: *https://www.inta.org/wp-content/uploads/public-files/advocacy/committee-reports/AI-and-the-Future-of-Brands-Report-2019-010-18.pdf*, consulted on February 25, 2023, at 19:00.

disappear. Its senses, however, may have gotten a little sharpened or, to the contrary, weakened. It remains for the case-law to decide how the average consumer changed. For example, if AI remembers its prior purchases, is this considered as an aid to its imperfect recollection or, to the contrary, it makes it even weaker, since now consumers rely on a tool to remember trademarks for them?

In fact, this lower level of involvement of consumers in making commercial choices is very well described by the doctrine in the following phrase: *„Probably the most important feature of AI technologies in online shopping is that they can predict what consumers want or like before consumers know it themselves*”.[23] The authors explain that, for AI to be able to provide consumers with results it should compile a series of pre-existing data consisting of other purchases, available offers on the market, browsing history of the buyer, general trends and feedback offered by other consumers, amount of views, cross-selling data etc. They also draw the attention to the risk that some of the data AI is fed with is the result of human subjectivism, and replicating such information could lead to limitations of the tools. Nevertheless, if the amount of data fed to the AI Machine Learning is higher, *„incidental bias*” becomes less of a threat. Another potential foreseen threat is that AI does not have the ability to know why a certain input was given and, in the end, why it is making a certain recommendation.[24] This is put in other words by Michael Grynberg: *„Even though the AI knows your desires better than you do, you will not understand why. Maybe the suggestion to eat at the new creperie owes its origin to a political donation, a song on your playlist, your hometown, or some combination of these or other details. Who knows why? The AI sees a pattern, and it works.”*[25] I would add that, in the same sense, not even AI knows precisely why a recommendation is being made, since it only follows clues that may lead or not to the actual *„taste*” of the consumer. However, even if it succeeds or not, the consumer may very well get used to being told what it likes. Or, to the contrary, it may get used to being critical with respect to the choices AI is making for him.

4. How does Artificial Intelligence influence the role of trademarks?

The same Michael Grynberg explains that the main importance of trademarks is – or better said, used to be – to provide consumers with limited and simple information, allowing customers to save time from doing their own research that, ultimately, might lead to different results. The author states that trademarks usually simply information, by removing *„context*”. On the other hand, AI has the ability to browse through the so called commercial *„context*”, being able to offer consumers better results. This may lead to a potential decrease of importance of trademarks as we know them today.[26] Additionally, the doctrine also points out that, in this new context, consumers would rely more on the trademark of online selling platforms, as carriers of information, than on the information provided by the trademark on different goods and services, in consideration of the fact that they rely more on the platform’s algorithms and how they provide them a certain selection of goods.[27]

This is, indeed, consistent with the results of tops measuring which are the most valuable brands. In 2022, according to *Interbrand*, the first three most valuable brands were – in this order – *Apple*, *Microsoft* and *Amazon*.[28] All three brands are famous in the technology field, while the third one is actually a very famous online marketplace and one of the most efficient developers of Artificial Intelligence. Or, in my opinion, this could only prove right those stated by Daryl Lim. Consumers are now, indeed, placing their trust in technology more than they do in goods designating common goods.

To the contrary, other authors do not exclude the possibility that trademark owners may take advantage of the possibilities given by AI to create an even stronger connection with their consumers: *„Savvy brands now realize that AI curation provides a way to compete and entrench themselves in the buying habits of consumers. (…) Although only the brave would predict what will happen in this changing environment, certain AI tools may favor brands with greater prominence and broad reach, which could amplify the importance of an identifiable trademark and brand recognition.”*[29] This is, however, a double-edged conclusion. I read this statement in the sense that trademark owners would continue to maintain their importance to the extent that they will learn the

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[23] A. Moerland, C. Kafrouni, *Online shopping with artificial intelligence: what role to play for trade marks?*, published in Ryan Abbott, *Research handbook on intellectual property and artificial intelligence*, Edward Elgar Publishing Limited, Cheltenham, 2022, p. 291.

[24] *Ibidem*, pp. 292-293.

[25] M. Grynberg, *AI and the "Death of Trademark"*, article published in the Kentucky Law Journal, no. 2, vol. 108, 2019-2020, p. 203.

[26] *Ibidem*, pp. 229-230.

[27] D. Lim, *Computational trademark infringement and adjudication*, published in Ryan Abbott, *Research handbook on intellectual property and artificial intelligence*, Edward Elgar Publishing Limited, Cheltenham, 2022, p. 264.

[28] *Best Global Brands 2022*, top published on the website Interbrand, available at the following link: *https://interbrand.com/best-brands/*, consulted on April 25, 2023, at 18:16.

[29] C. Strutt, F. Ward, A. Berger, *Artificial Intelligence Threatens Trademark’s Gatekeeper Role*, article published on February 09, 2022 on the website of the International Trademark Association, available at the following link: *https://www.inta.org/perspectives/features/artificial-intelligence-threatens-trademarks-gatekeeper-role/*, consulted on April 24, 2023, at 21:55.

mechanism of Artificial Intelligence. This, however, would not leave much room at the consumers' end, which in this case would be guided towards those brands that have learned to play by the new rules.

Reviewing all the above, one could argue that the information carried by trademarks may be absorbed in the AI's processed data. In this case, the trademarks' importance of information carriers may be considered obsolete? I believe the answer is no. Because in such a scenario, by analysing the customer's behavior, the AI is actually analysing its attachment to certain brands and the way it responds to the information transmitted through trademarks.

From this perspective, I tend to agree with authors Anke Moerland and Christie Kafrouni, arguing that, even if trademarks may lose some of their importance at the moment of making a certain commercial choice, they will still remain important sources of information at the moment when certain goods are actually consumed or when certain services are rendered. Furthermore, even when it comes to the advertising functions of a trademark, I agree that, even if AI may arguably be a substitute of advertising itself, to the extent that it could make choices in the place of consumers using different criteria than those communicated through advertising, the positive connection that a person may have with a certain brand cannot be replaced. Thus, even the advertising functions of trademark may still remain of relevance in the presence of AI.[30]

In the same sense, Hiroko Onishi argues that, even where a consumer is not involved in choosing a certain brand, confusion is still possible in the *„post-sale*" stage of the commercial act.[31]

Vilté Kristina Steponénaité makes a compelling argument to this end. The author argues that trademarks interact with consumers at a psychological level, and for this reason concepts such as *„average consumer*", *„likelihood of confusion*" or *„imperfect recollection*" were developed by trademark law and practice in connection to trademark protection, notions that are built based on human attention or human perception, the latter serving as a *„measuring tool*". For this reason, *„the functions of a trademark (origin, quality, investment, communication, advertising) include a great emphasis on cognitive processes as well*". This may not apply to AI, which cannot be assumed to have the perception of an average consumer or an imperfect recollection. However, the author points out that *„the functioning of AI is not challenging the relevance of (the current understanding of) the notions and the functions in a broad sense since a decision by an AI application is not functioning in isolation and a human agent is still interacting with a trademark after receiving an item (i.e., the trademark is functioning not only at the moment of purchase). Besides, the traditional notions and the functions remain relevant in their traditional sense when an AI application chooses a particular item and places an order under human supervision or where it is merely recommending some alternatives*".[32]

On this basis, it can be argued that, while trademark functions seem to be affected by the interference of AI in the commercial process, the bases of trademark law are still safe, for the time being. Consumers are not entirely replaced and their contact with trademarks is not entirely suppressed.

5. Conclusions

Artificial Intelligence started to be more and more present in people's lives, even if they are aware of this or not. No doubt, Intellectual Property Law and the Trademarks Law could only adapt to the novelties brought by this new equally useful and controversial tool.

First of all, intellectual property offices have relied on AI to deal with the increasing number of trademarks and conflicts they are dealing with. To this end, some of them implemented AI tools to assist applicants when filing new trademarks, or to assist both consumers and examiners to conduct more efficient searches in local, regional or global databases. Most importantly, some offices took a further step, and decided to rely on AI tools to help them in examination proceedings. Of course, this raised the question of whether AI could take the role of examiner and replace the human input. Or, at least for the moment, the dominant opinion is that AI is only a tool in the hands of examiners, just a helper, who should continue to make decisions based on their own assessment. Otherwise, the risk is that decision making would become influenced according to the information previously fed to an AI, information which could not be relevant to a certain jurisdiction or to a certain type of conflict.

Furthermore, AI influenced the way consumers make their choices. Actually, it is more and more debated that AI is the one making commercial choices for consumers or that, judging by the way AI is being used by the

[30] A. Moerland, C. Kafrouni, *Online shopping with artificial intelligence: what role to play for trade marks?, op. cit.*, p. 298-301.

[31] H. Onishi, *"We will still be confused!" : online shopping and trade mark law in the AI era*. *European Intellectual Property Review*, 43(6), 2021, pp. 397-401.

[32] Vilté Kristina Steponénaité, *Alexa, are you confused? Unravelling the interplay between AI and (European) trademark law*, article published on the website of Katholieke Universiteit Leuven on December 17, 2019, available the following link: *https://www.law.kuleuven.be/citip/blog/alexa-are-you-confused-unravelling-the-interplay-between-ai-and-european-trademark-law/*, consulted on April 24, 2023, at 22:40.

latter, their contact with trademarks is smaller and smaller. This raised the question of whether the traditional qualities of the average consumer – namely those related to its level of attention, its imperfect recollection or its „ability” to be confused – are still present. From this perspective, it is more and more accepted that the ways in which consumers interact with trademarks influence the way trademark conflicts should be assessed. Nevertheless, it cannot be concluded, at least at this point, that the average consumer has been replaced. For the time being, it is adjusting to the new commerce environments. And so are trademark owners.

Last but not least, it has been discussed if trademark roles and functions remained the same. If they still are indicators of origin and bearers of information for consumers, or this role has shifted to AI. From this perspective, I agree with the doctrine that even if confusion is more likely to appear post-sale than pre-sale, it remains a threat and the trademark's role to protect consumers against it is not obsolete. Furthermore, even if the consumers' trust starts to be placed in the brand of the retail service provider more than in the trademark of the purchased goods, this is, in my opinion, only a matter of balance that consumers will find in time, by accumulating experience – because not only AI is able to do that, humans are too.

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ARTISTIC CREATIONS. ORIGINALITY, INSPIRATION, IMITATION AND ARTIFICIAL INTELLIGENCE

Carmen-Oana MIHĂILĂ*

Abstract

Despite an evolution in the harmonization of intellectual property laws, the current EU framework has not created yet a unitary concept of work, originality or authorship.

As far as the originality concept is concerned, an artistic creation always has the mark of its author, and originality is „rarely denied to (...) an artistic creation" as the fathers of French intellectual property stated. The author must avoid any external source of inspiration in order to create an original work of genius, because originality, born spontaneously, from the „vital root of genius" means that the imitator must share his crown with the object of his imitation. But the concept has been refined over time, and today originality has been redefined, taking into account the classic imprint of the author's personality as well as his intellectual contribution.

In these last few years, with the exponential development of artificial intelligence, Pandora's box of copyright issues has been opened. From a simple tool that helped the artist, it has led to original works created without human involvement. There are plenty of such spectacular examples. But can artistic works, created with AI, benefit from copyright protection? Can they be considered related rights? Do they qualify as co-authored works? It hasn't been very long since „non-traditional" art creations raised similar questions. Cubism, abstract art, Dadaism, conceptual art or digital art, have triggered similar reactions to those produced today by AI art creations. Even if at this moment we cannot offer concrete solutions to protect creations made only by artificial intelligence, without the human factor taking any credit in the creative stages, we will see what the not too distant future will offer.

Keywords: *originality of the works, artistic creations, imitation, plagiarism, Artificial Intelligence.*

1. Introduction. The originality of the works and the need to harmonise the concept

„A primary idea, transformed into a first phase in the composition, after which the expression is reached, that is the final form. In terms of art, there are difficulties in distinguishing between the first two phases, idea and composition"[1]. From the artist's idea to the form, we find his creative effort, thus, a work of art bears the imprint of the author, of the artist.

Starting from the words of Petre Țuțea, *„only God is original",* we try to outline, however, using the writings of renowned authors in the field, both from domestic and international law, some criteria for defining the concept of originality.

A work is original only if it is the creation of the claimed author, and not a mere copy of an earlier work. [2]

The originality of a work involves both novelty and intellectual creative activity. [3]

Originality is rarely denied to an (...) artistic creation[4].

Originality is essential in the field of copyright because it provides creators with exclusive rights to their original works, protecting their economic interests and stimulating them to create new works. Although it is an essential criterion, the originality of the work can be difficult to establish in practice.

It is desirable to adopt a standard in the interpretation of the originality of a work, especially since this is, as we stated previously, a condition in determining the protection of the work and the infringement of the copyright. A key concept in the field of copyright, equally controversial and widely debated, the criterion of originality separates the continental system from the common-law system at first glance.[5] Throughout history,

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[1] H. Desbois, *Le Droit d'auteur en France*, Dalloz, Paris, 1987, apud E.G. Olteanu, *Creația intelectuală protejată prin drepturi de autor*, in Revista de Științe Juridice no. 4 (Universitaria, 2006): 16.

[2] O. Spineanu-Matei, *Proprietate intelectuală (2). Practică judiciară 2006-2007*, Hamangiu Publishing House, Bucharest, 2007, pp. 245-250, HCCJ, civil and intellectual property section, dec. no. 6428 of June 30, 2006.

[3] A. Circa, *Reflecţii privind originalitatea operei intelectuale*, in Dreptul no. 1/2003, pp. 131-140.

[4] C. Colombet, *Propriété littéraire et artistique et droits voisins*, 7e éd., Dalloz, Paris, 1994, p. 32.

[5] T.-E. Synodinou, *The Foundations of the Concept of Work in European Copyright Law*, in Codification of European Copyright, Challenges and perspectives, Synodinou, Kluwer Law International, 201, pp. 93-113.

originality has been viewed from a **subjective or objective approach**.[6]

Often mistaken for novelty, originality represents the deep connection between the author and the work, yet, lacking a uniform regulation of the criterion, opinions are sometimes even divergent and, in the same way, jurisprudential solutions are not unified. Some specialists[7] appreciate that *„novelty is a subjective component of originality,"* others emphasize the opposition between the subjective notion of originality and the objective notion of novelty, specific to industrial property. Although it has been stated[8] that the originality of a work involves both novelty and the activity of intellectual creation, or that there is no fortuitous similarity, the original intellectual creation being obligatorily new[9], the Romanian courts[10] established, referring to a case settled in the U.S.A., that *"originality does not mean novelty, thus a work can be original even if it closely resembles other works, as long as the similarity is fortuitous and not the result of copying."*

In the 18th century, it was stated that originality is born spontaneously, from the vital root of genius, the imitation being made from pre-existing materials that do not belong to those people[11]. The imitator must share his crown, if he has one, with the object of his imitation. Therefore, the author must avoid any source of external inspiration in order to create an original work of genius[12].

Originality is thus, in the **subjective conception** (specific to French law and the continental system, in general), *"a manifestation of the author's personality"*[13], because it reflects his emotions, his experiences - the manifestation of idealistic aesthetics. The work must be the result of a conscious artistic effort, there being no copyright over a pre-existing thing, in the absence of a creative act on the part of the person claiming authorship[14]. From the doctrinal architecture in our country emerges the majority conception of the notion of originality, which can be defined as *"the subjective approach of the author of a work to make personal choices."*[15]

In a plastic expression, it is stated that the creative act is not only toil, but above all the expression of the personality, of the begetting identity, this being the key to originality[16].

In **France**, the Intellectual Property Code does not expressly establish originality as a criterion that must be met for the protection of the work, yet the condition imposed by the doctrine is essential[17]. The work of the spirit, characterized by its originality, is the expression of the author's personality, a necessary and sufficient condition for the legal protection of copyright[18]. For example, the French Court of Cassation ruled in one case that the journalist *"transcribed the interviews in literary form [...] with transitions, to give the oral expression an elaborate written form, the result of an intellectual investment."* [19] The Court of Appeal of Versailles accepted the protection of an advertising slogan, provided that it contained *"an idea which, by its originality, bears the mark of a work of the spirit".* It is actually about originality in expression (juxtaposition of words, arrangement of phrases), not about the idea itself[20]. In French jurisprudence, *"le choix - the choice"* was expressly confirmed as a criterion of originality. The choice is part of the creation process of the work thus it does not matter whether there are pre-existing elements or not. The combination of these elements reveals the creative activity of the

[6] A.-M. Drăgan, *Originalitatea, condiție fundamentală pentru protecția dreptului de autor*, in RRDPI no. 3/2019, p. 20.

[7] N.R. Dominte, *Originalitatea într-o dimensiune juridică şi non-juridică*, in Analele științifice ale Universității „Alexandru Ioan Cuza" din Iaşi tom LXVI/I, Ştiinţe juridice, Iași, 2020, p. 57.

[8] Circa, *op. cit., loc. cit.*, p. 131-140.

[9] A. Speriusi-Vlad, *Protecția creațiilor intelectuale. Mecanisme de drept privat*, C.H. Beck Publishing House, Bucharest, 2015, p. 220.

[10] HCCJ, Case Law Bulletin. Collection of decisions for 2015, p. 382.

[11] E. Young, *Conjectures on Original Composition, 1759*, *https://rpo.library.utoronto.ca/content/conjectures-original-composition-1759*, accessed on 29.08.2022.

[12] N.R. Dominte, *Originalitatea(…) op. cit.*, p. 52.

[13] V. Roș, *Dreptul proprietății intelectuale. vol. 1. Dreptul de autor, drepturile conexe și drepturile sui generis*, C.H. Beck Publishing House, Bucharest, 2016, p. 207.

[14] The archaeologists who discovered the prehistoric paintings in the Chauvet cave requested to benefit from the legal provisions in the field of copyright regarding posthumous works, the court (C.A. Nimes) rejected this request. See C. Le Henaff, *Memoire - Les criteres juridiques de l'œuvre à l'epreuve de l'art conceptuel*, Université de Poitiers, Faculté de droit, 9, *http://www.legalbiznext.com/droit/IMG/pdf/Memoire_les_criteres_juridiques_de_l_oeuvre_a_l_epreuve_de_l_art_conceptuel.pdf*, accessed on 06.09.2022.

[15] Gh. Gheorghiu, *Examinarea originalității operelor litigioase*, in RRDPI no. 1/2019, p. 13.

[16] S.C. Avarvarei, *Metamorfozele originalității în arhitectura constructului auctorial*, in *Provocările dreptului de autor la 160 de ani de la prima lor reglementare legală în România*, coord. V. Roș, C.R. Romițan, Hamangiu, Publishing House, Bucharest, 2022, p. 324.

[17] However, there is a reference to this effect in art. L112-4 of the French ICC which provides that „the title of a work of the mind, as soon as it has an original character, is protected as the work itself".

[18] Cour de Cassation, Chambre civile 1, 11.02.1997, 95-13.176, publié au bulletin, available online at *https://www.legifrance.gouv.fr/juri/id/JURITEXT000007037807/*, accessed on 06.09.2022.

[19] Cour de cassation, civile, Chambre civile 2, 30.01.2014, 12-24.145, Publié au bulletin, available online at *https://www.legifrance.gouv.fr/juri/id/JURITEXT000028547600/*, accessed on 14.02.2023.

[20] C.A. Versailles, 12ème et 13ème ch. réunies, 17.05.1994, apud P.-Y. Ardoy, *La notion de création intellectuelle* (thèse pour l'obtention du grade de docteur en droit, Université de Pau et des Pays de l'Adour, 2006), p. 137, *https://hal-univ-pau.archives-ouvertes.fr/tel-03189135/document*, accessed on 07.09.2022.

artist, therefore the originality of his work.

In **Germany**, Goethe recognized that *genius* and *creativity* have little to do with originality and stated: *"People always talk about originality, but what do they mean? As soon as we are born, the world begins to work on us and continues until the end. What can we call ours but energy, strength and will? If I could give an account of all that I owe to great predecessors and contemporaries, it would be but a small balance in my favor"*[21]. Answering the criticism of Faust, the same great writer pointed out that *„Walter Scott used a scene from my Egmont, and had a right to do so; and because he did it well, he deserves praise. He also copied the character of Mignon in one of his novels; but whether he did it with the same judgment is another question." «My Mephistopheles sings a song from Shakespeare, and why should he not? Why bother to invent one of my own when this one said exactly what was wanted. If, too, the prologue to my „Faust" is anything like the beginning of Job, it is again quite correct, and I should rather be praised than censured»*[22], said the great Goethe. Thus, inspiration is not reprehensible if the author's personality is what creates originality in the new work. The German legislation is thus based on the principle of creativity, finding in the work a minimum creative effort of the author[23]. Immanuel Kant is another German philosopher who stated that the author has rights over his work due to the intangible connection between the work and his personality.

In this way, the concept is born according to which it does not matter if the work is based on a previous creation, as long as we find the author's imprint, his sensitivity, his intelligence, his style. For example, in order to grant protection to an animal painter's drawings, the court noted that the author did not simply make a copy of nature, even though he tried to reproduce the animals as accurately as possible, but on the contrary, he made *„arbitrary choices that it reveals its personality"* by selecting the attitude of the animals, their colors, their morphological representation.

The traditional definition of originality has lost its echo over time, this being interpreted many times in jurisprudence as the result of a creative effort or even an intellectual *effort*, only if it can constitute a somewhat innovative contribution[24].

An original idea is rare, as a result the new forms of artistic manifestation make us direct our attention to an **objective approach to the concept of originality**, characteristic especially of the copyright system. A work will be protected if it has not been copied from another, being the creation of its author, important this time are the choice, the selection, the arrangements, not the personality of the author.

The absence of copying is found in the **United Kingdom**, where *„skill and labor"* or „sweat of the brow", the effort and investment of money or time, lead to protection[25]. The requirement of creativity becomes unnecessary, the work of the author being essential. This doctrine was first adopted in the United Kingdom in 1900 in the case of *Walter v. Lane*[26], in which oral speeches were reproduced in a newspaper, the Court holding that the work was protected by copyright. In the United Kingdom the condition of originality is expressly stipulated by the rules as a prerequisite for the protection of the work[27].

In a landmark decision[28], *University of London Press v. University Tutorial Press* in 1916, the Court found that originality in copyright law does not refer to originality of idea or thought, but to the expression of such an idea or thoughts. The law does not require that the expression be in an original form, but that this expression is not copied from another work - the essential thing is that it comes from the author. *„What is worth copying is prima facie worth protecting,"* said Judge J. Peterson. Thus, objective originality is comparable to novelty.

Originality becomes the direct link between the idea and the resulting work. The author creates property and obtains protection by directly recognizing and protecting the property he has created[29]. After the 2009 CJEU

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[21] J.W. Von Goethe, J.P. Eckermann, *Conversations of Goethe with Johann Peter Eckermann*, Da Capo Press, 1998, p. 115.

[22] *Ibidem*, p. 82-83.

[23] A. Speriusi-Vlad, *Despre originalitate, noutate, prioritate și despre plagiat*, in RRDPI no. 3/2014, p. 36.

[24] C. Le Henaff, *op. cit.*, p. 73.

[25] It is shown that *common law* countries, England for example, have moved away from the spirit of the Berne Convention because works which required time, labor or money to produce but which are not truly artistic or literary intellectual creations, benefit from copyright protection: S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986,* London, Centre for Commercial Law Studies, Queen Mary College/Kluwer, 1987, p. 901.

[26] *Walter v. Lane* [1900] AC 539, judgment of the House of Lords on the question of authorship under the Copyright Act 1842. The effort, skill and time which The Times reporters put into transcribing speeches to which they added corrections and punctuation, were enough to make them original.

[27] P. Buta, *O perspectivă istorică asupra condițiilor de protecție a unei opere prin dreptul de autor,* in *Provocările dreptului de autor la 160 de ani de la prima lor reglementare legală în România*, coord. V. Roș and C.R. Romițan, Hamangiu Publishing House, Bucharest, 2022, p. 355.

[28] *University of London Press v. University Tutorial Press*, 1916, [1916] 2 Ch 601, *https://www.cipil.law.cam.ac.uk/virtual-museum/university-london-press-v-university-tutorial-1916-2-ch-601*, accessed on 20.02.2022.

[29] A. Rahmatian, *Copyright and creativity. The making of property rights in creative works*, Cheltenham: Edward Elgar, 2011, p. 16, apud A. Rahmatian*, Originality in UK Copyright Law: The Old „Skill and Labour" Doctrine Under Pressure*, IIC International Review of

decision in the *Infopaq*[30] case (which made a significant contribution to the evaluation of originality and in which the Court considers that the originality of the work can be expressed through the choice, combination of elements, arrangement of non-original content), or the 2012 decision in case of *Football DataCo*[31], in the United Kingdom the traditional conception of originality is changing, but remains quite different from the European conception of copyright[32]. The statement of Judge J. Pumfrey in the recent case *Shazam Productions v. Only Fools the Dining Experience*[33] is also suggestive: *„it is not enough to say that the purpose of the law is to protect skill and original work."*

In **Canada**, originality, which is not legally defined, is tied to the author, the work having to be his creation, the product of his talent and judgment, but also not a copy of another work[34]. The requirement of originality must apply to the expressive element of the work and not to the idea.[35] Yet Canadian jurisprudence has also stated that the work itself should not substantiate a finding of originality.

Surprisingly, in some American decisions the same fact is specified: the approach based on „sweat of the brow" is not consistent with the principles underlying copyright[36]. The work itself cannot substantiate an establishment of originality, "sweat of the brow" being too low a standard. The copyright law of the **United States** [17 US C. §102(a).] grants protection to original works of authorship. It is necessary for the work not to be copied from other sources, to be different from what has been done before, but to show the artistic contribution of the author in the work. An original work of authorship is a work created independently by a person requiring at least a minimal degree of creativity. Thus, compared to the UK, in the US the originality requirement is linked to a minimum degree of creativity. In the case of *Feist Publications, Inc. v. Rural Telephone Service Co*.[37], US Supreme Court argued that to be original a work must not only have been the product of independent creation, but must also exhibit a „minimum of creativity". However, the standard of creativity does not have to be very high for the work to benefit from protection. A work can satisfy the independent creation criterion - requirement even if it closely resembles other works, as long as the similarity is fortuitous, not the result of copying, The Compendium of US Copyright Office Practices states.[38]

Analysing the jurisprudence of the CJEU on the issue of originality, it was indicated that it is not necessarily the personal imprint that must be present in the resulting work, but rather the idea that the author "exercises his free and creative choices." [39]

An attempt to harmonize the standard of originality was made by creating a *European Copyright Code (Wittem*[40]*)*, whose purpose was to adopt originality standards for different categories of works, known as *„originalité à géometrie variable"*[41]. At the European level, at least for three specific categories of works (which in principle have no artistic value), such as computer programs, databases and (non-artistic) photographs, an

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Intellectual Property and Competition Law no. 44, Max Planck Institute for Innovation and Competition, 2013, p. 13, *https://doi.org/10.1007/s40319-012-0003-4*.

[30] *Infopaq International A/S v. Danske Dagblades Forening*, case C-5/08, Judgment of 16.07.2009.

[31] *Football Dataco Ltd and Others v. Yahoo! UK Ltd and Others*, case C-604/10, Judgment of 01.03.2012.

[32] A. Rahmatian, *Originality (…), op. cit.*, p. 5.

[33]*Shazam Productions v. Only Fools The Dining Experience* [2022] EWHC 1379 IPEC, para. 80, *https://8newsquare.co.uk/wp-content/uploads/Shazan-v-Only-Fools-the-Dining-Experience-Ltd-2022-EWHC-1379-IPEC-FINAL-FOR-HAND-DOWN.pdf*, accessed on 28.02.2023.

[34] For a work to be „original" within the meaning of the Copyright Act, it must be more than a simple copy of another work. At the same time, it does not have to be creative in the sense of being new or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment, the Supreme Court judge says in the resolution of this case. *CCH Canadian Ltd. v. Law Society of Upper Canada*, Supreme Court Judgments, 2004 SCC 13 (nr. 29320), 04.03.2004, *https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2125/index.do*, accessed on 06.09.2022.

[35] S. Handa, *Copyright Law in Canada*, LexisNexis Canada, 2002, p. 209.

[36] *CCH Canadian Ltd. v. Law Society of Upper Canada*, Supreme Court Judgments, 2004 SCC 13 (no. 29320), 04.03.2004, point 22.

[37] *Feist Publications Inc. v. Rural Telephone Service Co.*, no. 89-1909, 499 US 340 (1991), *https://supreme.justia.com/cases/federal/us/499/340/*, accessed on 14.02.2023.

[38] Compendium of the US Copyright Office Practice, 3rd ed., 2021, 21, *https://www.copyright.gov/comp3/docs/compendium.pdf*, accessed on 15.02.2023.

[39] P. Bernt Hugenholtz, J.P. Quintais, *Copyright and Artificial Creation: Does EU Copyright Law Protect AI-Assisted Output?*, in IIC - International Review of Intellectual Property and Competition Law, vol. 52, Max Planck Institute for Innovation and Competition, 2021, p. 1198, *https://doi.org/10.1007/s40319-021-01115-0*.

[40] A group of European academics formed the Wittem Group and launched a project on a European copyright code, published on 26.04.2010. This was not implemented. See *https://www.ivir.nl/copyrightcode/european-copyright-code/*, accessed on 13.02.2022.

[41] T.-E. Synodinou, *op. cit.*, p. 99.

attempt was made to harmonize the criterion of originality.[42] We could also add Directive (EU) 2019/790[43] (CDSM Directive), regarding works of visual art in the public domain.

Why does this very important concept not have a definition and why does no European instrument achieve harmonization in this regard? Probably, it depends on the differences in traditions and culture specific to each member state. It is certain that originality must be defined and redefined according to these traditions, taking into account the classic imprint of the author's personality, but also the author's intellectual contribution. And if we are still talking about the harmonization of legislation in the matter of copyright, this is probably also a step towards the fulfilment of the desideratum: a merger between the subjective and objective conceptions, in order to have a flexibility of the notion of originality. A convergence of the two concepts can be seen, in both continental and copyright systems, at least if we look at certain categories of works.

We can notice that the traditional interpretation of originality, as reflecting the author's personality, is no longer so current in the contemporary period, the intellectual effort being important, which has made some authors consider that a tendency to move from the protection of the author's person to that of creation is being born[44].

2. The standard of originality in artistic creations

Paraphrasing a renowned author in the field, t*he artist does not imitate, but creates new forms of expression*.[45]

In the Romanian copyright law, Law no. 8/1996, art. 7 provides[46]: *„original works of intellectual creation in the literary, artistic or scientific field, whatever the mode of creation, mode or form of expression and independent of their value and destination [...] constitute the object of copyright."* The legislation does not define the work of plastic art, limiting itself to mentioning in its content terms such as *works of plastic or graphic art*. The same art. 7 of Law no. 8/1996 enumerates within the scope of copyright, *„photographic works, as well as any other works expressed through a process analogous to photography, works of graphic or plastic art, such as: works of sculpture*[47]*, painting*[48]*, engraving*[49]*, lithography*[50]*, monumental art*[51]*, scenography*[52]*, tapestry*[53]*, ceramics*[54]*, plastic glass and metal*[55]*, drawings*[56], design[57], *as well as other works of art applied*[58] *to products intended for practical use, architectural works*[59]*, including plans, models and graphic works that form architectural projects,*

[42] Directive 2009/24/EC of the European Parliament and of the Council of 23.04.2009 on the legal protection of computer programs, OJEU L111/16 of 5 May 2009, Directive (EU) 2019/790 of the European Parliament and of the Council of 17.04.2019 on copyright and related rights in the digital single market and amending Directives 96/9/EC and 2001/29/EC, OJEU L 130/92 of 17.05.2019, Directive 2006/116/EC of the European Parliament and of the Council of 12.12.2006 regarding the duration of protection of copyright and certain related rights, OJEU L 372/12, 27.12.2016.

[43] Directive (EU) 2019/790 of the European Parliament and of the Council of 17.04.2019 on copyright and related rights in the digital single market sector and amending Directives 96/9/EC and 2001/29/EC.

[44] P.-Y. Ardoy, *op. cit.,* p. 335.

[45] N.R. Dominte, *Dreptul la calitatea de autor în compas juridico-literar*, in *Provocările dreptului de autor la 160 de ani de la prima lor reglementare legală în România*, coord. V. Roș and C.R. Romițan, Hamangiu Publishing House, Bucharest, 2022, p. 295.

[46] Article L.112-2 of the French Intellectual Property Code is limited to providing a non-exhaustive list of creations that can constitute intellectual works, including works of art, with fragmented exemplification of several types of works. Professor Pierre-Yves Gautier thus proposes to define works of art „as productions of the spirit, essentially appealing to forms and aesthetics", in P.-Y. Gautier, *Propriété littéraire et artistique*, 5th ed., PUF, Paris, 2004, p. 117.

[47] Branch of fine arts that aims to create artistic images in three dimensions, by carving or modelling a material, *https://dexonline.ro*.

[48] Branch of plastic arts that interprets reality in visual images, through colored, two-dimensional forms, spread out on a flat surface, *https://dexonline.ro*.

[49] Genre of graphics in which the artistic image is obtained by reproducing from a plate on the surface of which the design has been drawn or engraved, in depth or in relief, *https://dexonline.ro*.

[50] Method of reproducing and multiplying on paper texts, drawings, figures, etc., by using negatives printed or drawn on a special calcareous stone, *https://dexonline.ro*.

[51] Mosaic, fresco painting and stained glass.

[52] The art of making sets, costumes, etc. for a show, The art of painting scenes for the theatre, *https://dexonline.ro*.

[53] The technique and art of fabric execution. Decorative fabric of wool or silk depicting various subjects or allegorical themes, worked by hand or for war and used especially for decorating walls or furniture, *https://dexonline.ro*.

[54] The technique and art of processing clays, in order to obtain, through the homogenization of the plastic mixture, its modelling, decoration, glazing, drying and firing, various objects, *https://dexonline.ro*.

[55] It represents a kind of plastic art made by modelling, in three-dimensional forms, the two materials. Plastic works of glass can be clear, opaque, or can incorporate colors, obtained from various pigments, in M. Olariu, *Noțiunea juridică a operei de artă plastică din perspectiva legislației europene și românești și importanța valorii operei*, in RRDPI no. 2/2018, p. 76.

[56] Graphic representation of an object, a figure, a landscape on a flat or curved surface, through lines, points, spots, symbols, etc. The art or technique of drawing, *https://dexonline.ro*.

[57] Modern industrial aesthetics. Discipline that seeks to combine the beautiful with the useful in industry, *https://dexonline.ro*.

[58] They are intended to individualize, through aesthetic elements specific to plastic art, utilitarian products, industrially made, in M. Olariu, *Noțiunea (…), op. cit.*, p. 77.

[59] The science and art of designing and constructing buildings, *https://dexonline.ro*.

plastic works, maps and drawings in the field of topography, geography and science in general".

As Law no. 8/1996 does not define originality, although it addresses the notion in several articles, it is important to state that originality is one of the essential conditions that must be met for an artistic creation to be considered a work[60] for the purpose of being protected.

With regard to the right of succession, within the meaning of Directive no. 2001/84/EC on the resale right for the benefit of the author of an original work of art, *„original work of art means works of plastic or graphic art, such as paintings, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramic or glass objects and photographs, provided that they were made by the artist himself or are copies considered original works of art."* [art. 2 para. (1)].

In the context of the protection of these works, their value is not of interest, but neither is their immoral character, considering the subjective interpretation from the eyes of the viewer and sometimes even the specialists. Some creations considered worthless at one point in history, proved highly valued decades later. The originality of the work is presumed therefore the defendant must provide evidence to prove the contrary. Originality rests with the sovereign judgment of the court, which, in the case of a dispute related to plagiarism, will have to decide, without reference to the merit or economic value of the work[61].

Although in some cases the Court has shown that originality does not depend on artistic quality (computer programs), in others, it has established that regardless of whether the aesthetic effect is demonstrated, it does not mean that the work in question will be protected by copyright[62].

Just like the notions of a work of art or art itself, which have evolved over time and the concepts of **originality and protection of the work of art** have reshaped: from the perfection of the classical work, to the romantic work, to the modern one or to the „non-masterpieces" of our times. Some artworks may approach a different style, even giving birth to new styles. Yet, as we have said before, new does not necessarily mean creativity.

European courts have determined that in order to benefit from copyright protection, a work must have a certain degree of originality, and this threshold is **higher for artistic works than for other types of works.** In the landmark *Infopaq International v. Danske Dagblades Forening* case, the CJEU determined that newspaper articles must be a „distinctive" intellectual creation in order to benefit from copyright protection. Even more so, this higher standard applies to works of art.

As contemporary works of art *„do not seek to describe a situation or a feeling and have no representational function in themselves"*[63], we ask whether or not they are original and who is in a position to decide whether a creation is a work of art? It is enough to evoke the *Brâncuși case (Bird in space)*[64], in which the court specifies that the modern art school develops over time, and *„regardless of whether it sympathizes or not with the idea of the avant-garde, it must take into account facts that exist and influence the world of art"*[65].

In the press of the time, journalists gave the example of Picasso's last paintings which, like Brâncuși's art, did not fit into the customs of the times. Thus, Brâncusi's victory was the victory of modern art.

Originality must focus on the free-creative process of the artist. The work becomes „an extension of the artist", which has led many to say that we are facing an objectification of certain categories of works.

The emotions conveyed, the complexity, the style, the innovative character? What are the criteria we refer to in the case of these works?

In a study it is shown that *„beauty or related concepts, such as attractiveness, are far from being the most influential for the appreciation and processing of art"*[66].

Cubism (initiated by the French Georges Braque - *Case la L'Estaque*, 1908[67], followed by the Spanish Pablo Picasso - *Ma Jolie*, 1911 or Marcel Duschamp - *Nu descendant un escalier n° 2*, 1912), abstract art or „very concrete" art as it has been called (by Wassily Kandinsky - *Improvisation 7*, 1910 or by Piet Mondrian - *Composition with Large Red Plane, Yellow, Black, Gray and Blue*, 1921), Dadaism (by Marcel Duchamp - *Fountain*,

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[60] T. Bodoaşcă, A. Murgu, *Opinii privind semnificația juridică a plagiatului*, in RRDPI no. 4/2016, p. 81; V. Roș, A. Livădariu, *Condiția originalității în operele științifice*, in RRDPI no. 2/2014, p. 9.

[61] P.-Y. Gautier, *Propriété littéraire et artistique,* PUF, Paris, 1991, p. 792 apud Gh. Gheorghiu, I. Lisnic, *Unele considerații cu privire la contrafacere și plagiat*, in RRDPI no. 3/2012, p. 118-131.

[62] Case Cofemel, C-683/17, para. 54.

[63] N. Walravens, *La notion d'originalité et les œuvres d'art contemporaines*, in RIDA no. 181/1999, Neuilly-sur-Seine, p. 103.

[64] The judges indicated that *„we have the evidence that it is the original product of a professional sculptor and that it is, in fact, a sculpture and a work of art (…) we uphold the protest and decide that it has the right to enter the country without being subject to customs duties".* For details, see Al. Șerban, *Brâncuși împotriva Statelor Unite ale Americii: „Dacă aceasta este o pasăre, împușcați-o!"*, in Historia, 2018, *https://www.historia.ro/*, accessed on 29.08.2022.

[65] E.G. Olteanu, *Creația (…), op. cit.*, p. 16.

[66] M. Haertel, C.C. Carbon, *Is this a „Fettecke" or just a „greasy corner"? About the capability of laypersons to differentiate between art and non-art via object's originality*, in i-Perception 5(7), 2014, p. 602-610.

[67] In 1908 his canvases are rejected at the *„Autumn Salon"*.

1917) or art conceptual (whose paths were opened by Duchamp - *Bicycle Wheel and Stool*, 1913, continued by Joseph Kosuth - *One and Three Chairs*, 1965), surrealism (of Salvador Dalí - *The Persistence of Memory*, 1931, or of Max Ernst, Joan Miró, Victor Brauner), abstract expressionism (by Jackson Pollock - *Number 1* 1950 (*Lavender Mist*) or by Maurizio Nannucci - *All Art Has Been Contemporary*, 1999, neon lights, Altes Museum, Berlin), graffiti art (Jean- Michel Basquiat - *Red Skull*, 1982) or digital art (John Whitney, since the 1960s), are some examples that reveal another side of art, moments in which it was sometimes appreciated that the substance of the work consists more in the idea than in the form. The idea is actually the work. The notion of a work of art was overturned by Duchamp's ready-mades. Ready-made creations[68] and conceptual art are based on the formal elements that convey the idea of the work, this being primordial.[69] Conceptual art refuses to adhere to the previous vision of art (forms, materials), being linked to other artistic currents such as Arte povera, Land art or Body art.

These categories of works can create emotions in our eyes. White on White or White Square on White, Russian painter Kazimir Malevich's 1918 painting (which followed the 1910 Black Square), rendering a geometric shape, and denoting at first glance a lack of colour and profundity, introduced another side to the work of art (although critics at the time claimed it was not actually a work of art). At a 1956 exhibition showing orange, yellow, red, pink and blue monochromes by painter Yves Klein, viewers considered them „bright, abstract interior decorations."

Consequently, the painter turned to an absolute monochrome, focusing only on one color, blue, which would become known as International Klein Blue[70].

Imitation or plagiarism?

„*Those who do not want to imitate anything, produce nothing*" - Salvador Dali, painter.

Inspiration or theft? Plagiarism in art is a real and serious problem, the consequences of which are often quantified in impressive sums of money.

The regulation of the concept of intellectual property in native lands appears with a rather large gap since the first modern copyright law, *Queen Anne's Statute* of 1709/1710.[71] Regarding the notion of plagiarism, neither the Press Law of 1862, nor the Law on Literary and Artistic Property, 126 of 1923, nor Decree no. 321 of 1956 regarding copyright or Law no. 8/1996 in its original and amended forms does not use this term. In the current form of the law on copyright and related rights, it is a crime *for the person who appropriates, without right, in whole or in part, the work of another author and presents it as his own intellectual creation* (art. 197 para. 1). The plagiarism of creations protected by copyright and related rights has generated many writings, comments and opinions, some disunited, the approach being complicated by the fact that there is a special law in the Romanian legislative repertoire that defines this term, Law no. 206/2004 on good conduct in scientific research, technological development and innovation. [72]

I believe, given the opinions of eminent specialists who have previously researched this topic[73], that plagiarism should be properly regulated in copyright and related rights law.

However, we will not analyse the provisions of Law no. 206/2004, preferring an approach directed towards

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[68]„Ready-made means found as such, taken, borrowed from the everyday universe and recontextualized, put in a new context, detached from the everyday universe and somehow elevated by this isolation from the everyday to the value of an art object"; see A. Gombos, *Marcel Duchamp; obiectul „ready made"*, in Arta și artiști vizuali, year I, no. 2/07.12.2019, *https://artasiartistivizuali.ro/artisti/marcel-duchamp-obiectul-ready-made/*, accessed on 31.08.2022.

[69] N. Walravens-Mardarescu, *De l'art conceptuel comme création et sa protection par le droit d'auteur*, in RIDA no. 220/2009, Neuilly-sur-Seine, p. 13.

[70] Yves Klein, on *https://en.wikipedia.org/wiki/Yves_Klein*, accessed on 31.08.2022.

[71] Law known also as *Copyright Act 1710*, whose whole title was: *An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned*).

[72] Even the jurisprudence in our country has not given solutions that are based on plagiarism, but especially on the provisions of art. 139 (infringement action), respectively 197, in the situation where „texts, text fragments or expressions were taken over, without mentioning the fact of taking over and without referring to the source work (without citing or indicating the source, including of the author's name)". These actions could be interpreted as plagiarism in the context of appealing to the provisions of art. 4 para. (1) letter d) of Law no. 206/2004. For details see S. Florea, *Plagiatul și încălcarea drepturilor de autor. Studiu comparat de jurisprudență*, in Curierul Judiciar no. 9/2017, C.H. Beck Publishing House, Bucharest, 2017, p. 533.

[73] Among these, we mention: C.R. Romiţan, *Originalitatea - condiţie esenţială de protecţie a creaţiilor intelectuale din domeniul literar, artistic sau ştiinţific*, in Dreptul no. 7/2008; Gh. Gheorgiu, I. Lisnic, *Unele considerații cu privire la contrafacere și plagiat*, in RRDPI no. 3/2012; V. Roş, A. Livădariu, *Condiţia originalităţii în operele ştiinţifice*, in RRDPI no. 2/2014; A. Speriusi-Vlad, *Despre originalitate, noutate, prioritate și despre plagiat*, in RRDPI no. 3/2014; M. Dănilă, *Considerații privind plagiatul din perspectiva originalității operei și dreptului de citare. Autoplagiatul și protecția ideilor, pledoariilor și a predicilor*, in RRDPI no. 3/2015; V. Roș, *Plagiatul, plagiomania și deontologia*, in RRDPI no. 3/2016; A. Speriuși-Vlad, *Despre plagiat, dreptul de autor și protejarea ideilor sau o teorie coerentă a plagiatului*, in RRDPI no. 4/2016; T. Bodoaşcă, A. Murgu, *Opinii privind semnificaţia juridică a plagiatului*, in RRDPI no. 4/2016; S. Florea, *Plagiatul și încălcarea drepturilor de autor. Studiu comparat de jurisprudență*, in Curierul Judiciar no. 9/2017; Gh. Gheorghiu, *Examinarea originalităţii operelor litigioase*, in RRDPI no. 1/2019; N.R. Dominte, *Originalitatea într-o dimensiune juridică și non-juridică*, in Analele ştiinţifice ale Universităţii „Alexandru Ioan Cuza", Iaşi, tom LXVI/I, Ştiinţe juridice, 2020; Al. Dobrescu, *Corsarii minții - Istoria ilustrată a plagiatului la români*, vol. I, Emolis, Iași, 2007.

the artistic side of works protected by copyright[74], works that have been, are and will always be plagiarized.

„A person's act of appropriating, copying in whole or in part someone's ideas, works etc., presenting them as personal creations; to commit a literary, artistic or scientific theft", this is the definition that the Romanian language dictionary gives to plagiarism[75]. Webster's dictionary defines plagiarism as: „to steal and pass off (someone else's ideas or words) as one's own; to use (someone else's work) without acknowledging the source or to commit plagiarism: to present as new and original an idea or product derived from an existing source." [76]

The origin of the word comes, as the doctrine shows us[77], from the Latin *„plagiarius"* which means kidnapper of children or slaves, these being condemned on the basis of „Fabia plagiariis". Martial, the poet, takes the word and uses it in a poem to punish those who stole his poems. The specialized literature[78] also offers us another attempt to define plagiarism, *„the presentation as one's own work of another person's words, ideas, arguments without proper acknowledgment of the source by citation."*

Plagiarizing someone else's work means not allowing the artist to enjoy the fruits of his efforts, but also depriving art in general of new, valuable creations. It is very true that we all seek inspiration to evolve. A widespread concept is that of copying for learning purposes. Thus, many people at the beginning of their artistic career copy famous works in order to learn from the best. The initiator of the popular hashtag, #DrawThisInYourStyle on Instagram, said: *„I think everyone really enjoys seeing an idea through a thousand different lenses"*, in the context where some artists offer some of their art to others to copy it in their own way, changing the lines, colors and general style, yet at the same time mentioning the artist and the original work. The border though is very sensitive. However, past the desire and intention to learn, one can easily end up plagiarising.

In *„Le Roi du plagiat"* - The King of Plagiarism (play by Jean Fabre, contemporary Belgian artist), an angel - artist wants to become a human (man). The piece was considered an „ironic and comical reflection on the status of the artist"[79], „a mockery of vain originality"[80]. To create a brain, he uses „Steine" - stones, these are: Einstein (science), Gertrude Stein (writing), Wittgenstein (philosophy) and Frankenstein - the consciousness of modern man, medicine and the invention of artificial intelligence. Fabre makes his „plagiarist" a seducer, hoping the audience will respect, value and accept him, but is he just a manipulator? In front of a tribunal of talking monkeys – the people, he defends himself and justifies himself because he had to learn to „speak with other people's words", to plagiarize. Fabre believes that the source of originality is given by *the inability to repeat oneself identically*, in his last theatrical monologue-manifesto, entitled *The Kind of Plagiarism*, stating: *„you-are-unique-when-you-want-to-imitate-the-others-and-you-cannot-make-it".*[81] The conclusion is that the angel will have to remain original, the man will continue to imitate.

„The copy is evidence of impersonality. In art as well as in literature, the epigones sing the aria of the masters. The poem gives you the impression of hearing more, the prose - of reading, the painting - of seeing." Yet, „the atmosphere, the environment, the artistic process, the art in essence" put the seal of originality, even if "the subjects are limited and involuntarily likely to be plagiarized", wrote Cezar Petrescu in *Copie și plagiat (Copy and plagiarism – n.t.).*[82]

The creative effort of the author of a work, the indissoluble link between the creator and the creation,

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[74] Plastic art (painting, graphics, sculpture, architecture), dramatic art (theatre, dance, choreography), music (vocal, instrumental), literature (epic, dramatic, lyrical genres). Compared to the Enlightenment period, the concept of art became comprehensive, cinematography, photography, applied art, being just a few examples.

The French legislation uses terms such as *graphic and plastic work* (French CPI in art. L112 2 provides a non-exhaustive list of creations that can constitute intellectual works: works of drawing, painting, architecture, sculpture, engraving, lithography; graphic and typographic works; photographic and those made using techniques similar to photography. In the French doctrine these works are defined as *„productions of the mind, appealing essentially to forms and aesthetics"*), and in the English or Canadian one, *artistic work*. US regulations use the notions of *graphic work, sculpture and painting*. For details see E.G. Olteanu, *Creația (…), op. cit.*, p. 16.

[75] *https://dexonline.ro/definitie/plagiat*, accessed on 26.08.2022.

[76] „Plagiarize". Merriam-Webster Online Dictionary. Merriam-Webster Online - „to plagiarize is „to steal and pass off (the ideas or words of another) as one's own: use (another's production) without crediting the source [... or] to commit literary theft: present as new and original an idea or product derived from an existing source." (*https://www.merriam-webster.com/dictionary/plagiarize*, accessed on 26.08.2022).

[77] E.G. Olteanu, *Considerații cu privire la conceptul de autoplagiat*, in RRDPI nr. 4/2009, p. 48-51; B. Florea, *Reflecții despre plagiat*, Hamangiu Publishing House, Bucharest, 2018, 23-24; Y. Eminescu, *Dreptul de autor*, Lumina Lex Publishing House, Bucharest, 1994, p. 16.

[78] Editorial board of Europolis magazine - Department of Political Sciences, Faculty of Political and Administrative Sciences, Babeş - Bolyai University, Cluj Napoca, in M. Dănilă, *Considerații privind plagiatul din perspectiva originalității operei și dreptului de citare. autoplagiatul și protecția ideilor, pledoariilor și a predicilor*, in RRDPI no. 3/2015, p. 65.

[79] *https://festival-avignon.com/fr/edition-2005/programmation/le-roi-du-plagiat-27209*, accessed on 26.08.2022.

[80] *https://www.journal-laterrasse.fr/focus/jan-fabre-au-theatre/*, accessed on 26.08.2022.

[81] S. Solakidi, *Let yourself be a Mirror' Consilience between Neurophysiology and Art in Jan Fabre's Film Performance 'Do we feel with our Brain and think with our Heart?*, in Antennae - The Journal of Nature in Visual Arts, issue 48, Chicago: AntennaeProject, 2019, p. 187.

[82] C. Petrescu, *Copie și plagiat (II)*, in Dreptatea, 25.01.1929, 2, apud M. Coloșenco, *Delictul literar. Imitație, copie, plagiat. Istoria negativă a literaturii române 1882-1937*, in Timpul, Iași, 2011, p. 25.

makes us condemn plagiarism, regardless of the intentions of the one who makes it.

Plagiarism in art is not new, over time artists have been influenced by the works of their predecessors, but with access to the digital world, it has become much harder to detect. The globalization of the art world is another challenge in the application of intellectual property protection, and with the use of digital technologies art is copied and distributed very easily, the application of protection being difficult to achieve once borders are crossed. The artist's inspiration is part of the creative process, but at some point, there must be a line of demarcation between inspiration and plagiarism. Art plagiarism is a serious problem because it affects the artist, his material means, the art world and art values and can create uncertainty in the art market [83].

Is copying the work the same as copying the style?

The originality of a painting can lie in how that subject is viewed. Two paintings dealing with the same subject, which can be painted in similar styles, even on the same type of support, can be original through the artist's own imprint who, through his imagination, chooses, adds, changes, composes. Thus, this painting becomes unique, the subject being rendered in an unexplored, original manner[84].

Yet, is the sunset the property of the first painter who painted it? [85]

The *reproductions*, which are numerous in the artistic field, pose certain problems. If it is a faithful reproduction, without showing the personality of the author, there is no originality. Some authors state that even in the preconception phase, the painting is imbued with the artist's personality[86].

The personal execution of the work of art is another criterion in the analysis of originality. The distinction between the idea (not protected by copyright) and the form, makes the creative effort have the expected finality only if a tangible result is reached. A work conceived by one artist but produced by another may have both co-authors if the creator of the idea still retains significant control over the work. The famous representative of impressionism, the painter Auguste Renoir, was recognized as the author of a sculpture, even if he did not participate in the material creation of the work. Richard Guino made sculptures designed by his master, Auguste Renoir, which the latter could no longer make himself because of the rheumatism he suffered from.[87] Instead, the court found that the French painter Victor Vasarely had no personal role in the production of the work and *„did no control of the execution and no retouching of the finished work.[88]"* He asked another painter to enlarge one of his paintings, indicating only that it should be done in black, white and gray, with variations from one to ten. He later claimed co-ownership, but, according to the court, the second painter had not blindly followed Vasarely's directions, giving the work *„a new dimension and a new tone".*

But what happens in the case of many works of art that are often made by workers employed by the artist? Therefore, this criterion needs careful interpretation on a case-by-case basis.

The restorations of works of art have also given rise to some discussion. The restorer restores, recreates the author's work, basically following his intentions and not his own values or personal notes. Even so, we find restorations protected as derivative works if the restored work differs from the original, if the creative spirit and personal contribution are noted[89].

On the other hand, we can ask whether or not originality is measurable. If only part of the work is original, or if the originality is „weak", is the criterion for protecting the work met? Commenting on the solution of a case

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[83] For these reasons, many art galleries and museums have established stricter conditions for acquisitions and exhibitions, requiring artists to prove the originality of their works.

[84] S. Bailin, *On originality*, in Interchange no. 16/1985, Springer, p. 6-13, *https://doi.org/10.1007/BF01187587*, accessed on 01.09.2022.

[85] D.I. Suchianu, Copie și plagiat (III), in Dreptatea, 26.01.1929, apud M. Coloșenco, *Delictul literar. Imitație, copie, plagiat. Istoria negativă a literaturii române 1882-1937*, in Timpul, Iași, 2011, p. 28.

[86] N. Walravens, „L'œuvre d'art en droit d'auteur, forme et originalité des œuvres d'art contemporaines", *Economica*, (Paris: Institut d'études supérieures des arts, 2005), 313.

[87] The French Court of Cassation, by its decision of November 13, 1973, considered the two artists as co-authors, since the idea was Renoir's, and Guino was the author of the work, since he also imprinted his own personality, even if he only followed his Renoir's instructions. Guino was considered to have retained his creative freedom, as he sometimes worked alone for hours, away from Renoir. The Court of Cassation did not rule on the reasons that make Renoir the author of the work, but only on the reasons why Guino could be considered the author, Cour de cassation, chambre civile 1, 13.11.1973, 71-14.469, Proprieté littéraire et artistique, *https://www.legifrance.gouv.fr/juri/id/JURITEXT000006991012/*, accessed on 31.08.2022.

[88] The Paris Court ruled that there is no co-authorship if the two authors do not work together at all, TGI Paris, 21.01.1983, in C. Le Henaff, *op. cit.*, p. 36.

[89] A. Rahmatian, *Originality (...), op. cit.*, p. 26. The author quotes the judgment *Sawkins, Hyperion Records Ltd v. Sawkins*, Court of Appeal [2005] EWCA Civ 565; [2005] 1 WLR 3281; [2005] EMLR 688, 19.05.2015. See the ruling on: *https://www.5rb.com/case/hyperion-records-ltd-v-sawkins/*, accessed on 08.09.2022. The object of the litigation was the copyright protection of some editions that the plaintiff made by restoring some musical works (the works of Lalande, composer from the courts of Louis XIV and Louis XV). The plaintiff recomposed the missing elements, in addition to the work of gathering the disparate materials. The court ruled that the element of choice played a role in assessing the originality of the intellectual contribution, sufficient to create an original work because it required a high degree of skill and labor, and was not mere slavish copying (the „skill and labor" doctrine but also the author's personal contribution, his distinct note, creative personality).

from French jurisprudence[90], the specialists state that: *„originality exists, however weak the imprint of the author's personality, and it cannot be measured"*.

The Belgian painter Luc Tuymans has been found guilty of plagiarism after using a photo of politician Jean-Marie Dedecker taken by Katrijn van Giel for the Belgian newspaper De Standaard. Although there are differences between photography and painting, the scale being different, the color as well, the similarities are obvious. The painter defended himself, citing that his painting is a parody and therefore does not infringe copyright. *"How can an artist question the world with his art if he cannot use images from that world?"* reads the painter's defense. However, the court did not find the painting funny or macabre enough to warrant parody. [91]

In France, Jakob Gautel's work *"Paradise"* was embodied in the form of a panel with hand-painted gold letters spelling out the word Paradise on the wall of an abandoned psychiatric hospital in Ville-Evrard in Paris (actually on the door of a toilet in a former bedroom for alcoholics). This panel, an *in situ* creation, was the subject of several photographs that were then included in another artist's work, a documentary about the famous photographer Bettina Rheims, embodying 3 women posing in front of that door *(„The New Eve")*. When Gautel invoked counterfeiting, the court showed that the artist's choices in creation are important: through the choice of colors, exposure, materials, the author's personality materialized in the work is reflected. In addition to personal choice, the author's intention is an integral part of the criteria to be considered for the originality of the work. Thus, originality no longer comes simply from the material reproduction of the artist's conception, but the whole work must be analysed as a whole. Bettina Rheims used as justification, the fact that Gautel's work is only an idea, the word *paradise* belongs to everyone and, therefore, the work cannot be protected in the field of copyright law, the writing being ordinary, not original. The Paris Court of Appeal thus recognized the application of the subjective notion of originality in the case of a conceptual work of art, finding in favour of Gautel.[92] The particular importance of the decision lies in the admission of the protection of a work of contemporary art, a work of conceptual art: *„the intellectualization of creation does not exclude its realization in an original form"*[93].

Richard Prince, an American artist was accused of plagiarism and found guilty of copyright infringement when he reproduced 41 photographs without the author's permission, making a series of artworks, paintings and collages, entitled *Canal Zone*. The court forbade him to sell his works, which were to be confiscated and destroyed.[94] Prince appealed in 2013 and argued that his works were transformative and constituted *fair use* of the original photographs. The court partially reversed the original ruling and ruled that most but 5 of Prince's artworks fell within the concept of fair use. The same artist was also accused of copyright infringement by the model Emily Ratajkowski, whose photo she posted on Instagram was used in one of the exhibitions of Prince's works. Ratajkowski photographed herself in front of Prince's painting and produced an NFT, suggestively titled „Buying Myself Back: A Model for Redistribution", which sold at Christie's for $175,000.

In 2016, the fashion brand Zara was accused of copying the designs of Tuesday Bassen, an independent artist from the USA. Zara cited *„the lack of distinctiveness of the alleged designs, which makes it very difficult to see how a significant portion of the population anywhere in the world would associate the marks with Tuesday Bassen".* Adam J. Kurtz, another designer, compiled an image comparing the work of 12 independent artists with nearly identical products on the Zara website under the title „Shop the Stolen Art" on his personal website[95].

3. The author quality of ai systems. can artistic creations made by or with the help of ai benefit from copyright protection?

„Why couldn't we distill the artistic DNA of a painter from his body of work and create a new work of art from it?" asked Bas Korsten.[96]

The last few years in which **artificial intelligence** has developed exponentially have opened Pandora's box

[90] Cour de cassation (1ère Ch. civ.- 13-15.517) – 30.04.2014 (Droit d'auteur: Reproduction de documents publicitaires – Image - Refus de protection par les juges du fond -Originalité [non] – Contradiction de motifs), in RIDA 244/04-2015.

[91] The ruling sets a fine of 500,000 euros if the author creates any more „reproductions" of Van Giel's work or if he exhibits the original painting, which now belongs to an American collector. In A. Searle, *Why Belgium's plagiarism verdict on Luc Tuymans is beyond parody*, in The Guardian, 21.01.2015, *https://www.theguardian.com/artanddesign/2015/jan/21/luc-tuysmans-katrijn-van-giel-dedecker-legal-case*, accessed on 27.02.2023.

[92] For details regarding the case, see Conference *Regards artistique et juridique sur l'affaire «Paradis»,* Faculté Jean Monnet, Université Paris Saclay, 03.01.2018, *http://master-ip-it-leblog.fr/compte-rendu-de-la-confe rence-du-8-decembre-2017-sur-laffaire-paradis/*, accessed on 31.08.2022.

[93] N. Walravens-Mardarescu, *De l'art (…), op. cit.*, p. 7.

[94] *Cariou v. Prince*, 784 F. Supp. 2d 337, 349 3 (S.D.N.Y. 2011) and *Cariou v. Prince*, 714 F.3 d 694 (2d Cir. 2013), *https://cases.justia.com/federal/appellate-courts/ca2/11-1197/11-1197-2013-04-25.pdf?ts=1410918739*, accessed on 27.02.2023.

[95] N. Puglise, *Fashion brand Zara accused of copying LA artist's designs*, in The Guardian, 21.07.2016, *https://www.theguardian.com/fashion/2016/jul/21/zara-accused-copying-artist-designs-fashion*, accessed on 28.02.2023.

[96] Executive Creative Director at J. Walter Thompson Amsterdam agency.

in terms of copyright issues. From a simple tool that helped the artist, we reached original works created without human involvement. The computers have thus become creators of art, with little or no human input.

The human creative process can be imitated by means of artificial neural networks[97] that are most often implemented as computer programs running on virtual machines, thus, the question of the possibility of their copyright protection can be raised (and on the grounds that artificial intelligence can choose, can make rational decisions following data analysis).

In an attempt to define Artificial Intelligence (AI) we can say that *„it is a discipline of computer science that aims to develop machines and systems that can perform tasks considered to require human intelligence, with limited or no human intervention"*[98]. AI has been defined by the European Commission as *„systems that exhibit intelligent behaviors by analysing their environment and take action - with some degree of autonomy - to achieve specific goals"*[99]. AI can also be defined as *„computer-based systems that are developed to mimic human behavior".*

Machine learning and deep learning are two subsets of AI. In recent years, with the development of new techniques and hardware for neural networks, AI is usually perceived as a synonym for *deep supervised machine learning.*

AI systems are complex and are represented by: GAN - Generative Adversarial Networks - two neural networks that work together to generate new content, CAN - Creative Adversarial Networks that analyse the machine's creativity in -an art generation system, without involving a human artist in the creative process, but still assuming human creative products in the learning process, VAE - Variational Autoencoders - similar to GAN, but focusing on creating content that resembles a training dataset, style transfer (which involves using an algorithm to apply the style of one image to another image, creating a new image that combines the content of one image with the style of another).

The complexity of the issue of how copyright law applies to works generated by artificial intelligence is very topical. Copyright law recognizes the human authorship behind creative works, and it is unclear how this concept will be applied to machine-generated works, because the author and his work have always been correlative.

One proposed approach is to assign copyright to the person or organization that created the artificial intelligence software that generated the work. „The computer was just a tool [...]. It is as unrealistic as suggesting that if you write your work with a pen, it is the pen that is the author of the work, rather than the person wielding the pen."[100]

Another option would be to qualify these works as common, however, in this case it must also be determined how the man and the machine contributed to the creation of the work (by concluding license contracts with clear terms that allow the use of these works).

Others argue that AI should be considered the author.

Another approach takes these works into the public domain, free of copyright, precisely taking into account the condition of human paternity[101], on the grounds that the algorithm does not have the intention to produce art as the human-artist is, and the machine is creative because of the human. Thus, they could be incorporated into creations made by artists, which would imbue them with their personal expression. It is also shown that, regardless of the lack of any connection between the thinking of the artist/programmer and the artistic production of the machine, the claim to authorship of the work of the former is not destroyed. The designer of the content-generating machine will meet the design condition required by copyright[102].

A study by the Publications Office of the European Union[103] states that „authorship shall be given to the person or persons who contributed creatively to the result". This will probably be the user of the system, not

[97] They are a branch of the science of artificial intelligence that characterizes ensembles of simple, highly interconnected and parallel processing elements that aim to interact with their environment in a manner similar to biological brains and exhibit the ability to learn. See P.G. Buta, *Protecția rețelelor neurale prin drepturi de proprietate intelectuală*, in RRDPI no. 4/2019, p. 87.

[98] WIPO, *Revised Issues Paper on Intellectual Property Policy and Artificial Intelligence*, 21.05.2020, 3, *https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=499504*, accessed on 20.02.2023.

[99] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, COM/2018/237 final, 25.04.2018 („Artificial Intelligence for Europe").

[100] *Express Newspapers plc v Liverpool Daily Post & Echo plc* [1985] 1 WLR 1089, 1093, apud J. McCutcheon, *The Vanishing Author in Computer-Generated Works: A Critical Analysis of Recent Australian Case Law,* Melbourne University Law Review 36(3)/2013, *http://classic.austlii.edu.au/au/journals/MelbULawRw/2013/4.html#fn160*, accessed on 20.02.2023.

[101] L. Paquette, *Artificial life imitating art imitating life: Copyright ownership in AI-generated works,* in Intellectual Property Journal, vol. 33, issue 2, Toronto, 2021, p. 212.

[102] J.C. Ginsburg, *Overview of Copyright Law*, in Oxford Handbook of Intellectual Property Law, Rochelle, Dreyfuss & Justice Pila, eds, Oxford University Press, 2018, p. 414, *https://scholarship.law.columbia.edu/faculty_scholarship/1990*, accessed on 20.02.2023.

[103] European Commission, Directorate-General for Communications Networks, Content and Technology, C. Hartmann, J. Allan, P. Bernt Hugenholtz *et al.*, *Trends and developments in artificial intelligence: challenges to the intellectual property rights framework: final report*, Publications Office, 2020, *https://data.europa.eu/doi/10.2759/683128*, accessed on 10 February 2023.

necessarily the creator of this system.

A number of authors advocate the introduction of special related rights to protect the results generated by authorless artificial intelligence against misappropriation[104]. Even in the EU documents it is stated that *„the lack of protection of creations generated by AI could leave the performers of such creations without rights, as the protection of the related rights system implies the existence of a copyright on the performed work"*[105]. Thus, it is proposed that the copyright be granted to the natural person who legally edits and publishes the work, to the extent that the author of the underlying technologies does not object.

It is very important to qualify these works, both for authors and for users who would like, for example, to integrate them into their own creations, without the risk of infringing copyright. Another issue is related to the data inputted for AI creation, data that could be copyrighted works ("machine learning" would infringe copyright in this case).

One can also note the concerns at the level of the European Union related to the importance of AI, but also to the problem that arises when intellectual property meets AI[106]. They insist on the need for the EU to provide an operational legal framework for the development of a European AI. Another important aspect is the need to evaluate all intellectual property rights in relation to the evolution of AI in the artistic or technical field, which must be a priority for this area of EU legislation, which serves the purpose of promoting an environment conducive to creativity and innovation by rewarding creators. In the European Parliament's Proposal for a Resolution of October 20, 2020, on intellectual property rights for the development of artificial intelligence technologies, 2020/2015 it is even stated that, *"it seems that we are moving towards the recognition that an AI-generated creation would could constitute a work of art if we consider the creative result rather than the creative process".*

In the **United Kingdom**, art. 9(3) of the 1998 Law on copyright, designs and models and patents provides: *In the case of a literary, dramatic, musical or artistic work generated on a computer, the author is considered to be the person who makes the necessary arrangements for the creation of the work.*

The producer of the work is considered its author, and the work benefits from a shorter period of legal protection - 50 years, compared to the usual lifetime of an author plus 70 years[107]. Art. 178 defines a *computer-generated work* as a work that is generated by a computer in circumstances where there is no human author of the work.

Similar rules are found in a few states, including Ireland or New Zealand.

In **Ireland**, art. 21(f) of the Copyright and Related Rights Act, 2000, states that the author, in the case of computer-generated works, is the person who took the necessary steps to create the work.

In **New Zealand**, art. 5(2)(a) of the Copyright Act, 1994, in the case of a literary, dramatic, musical or artistic work that is generated on a computer, the person who took the necessary steps to create the work is the author.

In **the US**, AI-generated works automatically enter the public domain once they are disclosed and cannot benefit from copyright protection.

In **Romania**, there is no legal framework for protecting creations made through AI. As I have shown above, art. 7 of Law no. 8/1996, stipulates: *the original works of intellectual creation in the literary, artistic or scientific field, regardless of the mode of creation, mode or form of expression and independent of their value and destination, constitute the object of copyright*. And creativity is, at least for the time being, related to the human being.[108] There are specialists who still offer solutions for the qualification of these works, within the legal texts

[104] P. Bernt Hugenholtz, J. Pedro Quintais, *Copyright (…), op. cit.*, p. 1191.

[105] Proposal for a European Parliament Resolution on intellectual property rights for the development of technologies in the field of artificial intelligence, 2020/2015 (INI), 02.10.2020.

[106] See: Proposal for a European Parliament Resolution on intellectual property rights for the development of technologies in the field of artificial intelligence, 2020/2015 (INI), 02.10.2020; **„**Report on intellectual property rights for the development of artificial intelligence technologies", 02.10.2020 (2020/2015(INI)), *https://www.europarl.europa.eu*, accessed on 10.02.2023.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions „Making the most of the EU's innovative potential. An intellectual property action plan to support the EU's recovery and resilience." COM/2020/760 final, *https://eur-lex.europa.eu/legal-content/*, accessed on 10.02.2023.

Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts COM/2021/206 final (hereafter AI Act proposal), Brussels, 21.04.2021, COM/2021/206 final, accessed on 10.02.2023.

European Commission, Directorate-General for Communications Networks, Content and Technology, C. Hartmann, J. Allan, P. Bernt Hugenholtz *et al.*, *Trends and developments in artificial intelligence: challenges to the intellectual property rights framework: final report*, Publications Office, 2020, *https://data.europa.eu/doi/10.2759/683128*, accessed on 10.02.2023.

[107] R. Abott, Chapter 1 „Intellectual property and artificial intelligence: an introduction", in Ryan Abbott edt., *Research handbook on intellectual property and artificial intelligence*, Edward Elgar Publishing, 2022, p. 14.

[108] E.G. Olteanu, *Inteligența artificială, „Ultima frontieră" pentru dreptul de autor*, in Provocările dreptului de autor la 160 de ani de la prima lor reglementare legală în România, coord. V. Roș and C.R. Romițan, Hamangiu Publishing House, Bucharest, 2022, p. 126.

of the Romanian normative space, in the form of either collective works or common indivisible works[109].

4. AI in artistic creations

In the 1950s, Benjamin Francis Laposky, mathematician and artist, created the first computer graphics, using an oscilloscope as a creative medium for abstract art. „Electronic Abstractions" from 1953 was launched through a 50-image gallery exhibition at the Sanford Museum in Cherokee. In the 1960s, the first AI work was created by computer scientists at Bell Labs. In 1965, an image of randomly placed parallel black horizontal and vertical bars within a circle was created with the help of a computer to imitate a painting by Piet Mondrian.[110] Conceived in 2009, the e-David robot that used canvases and real colors was developed in Germany at the University of Konstanz. It calculated brushstrokes from an input image and then painted the image on a canvas[111].

However, the level of realism and creativity has improved significantly with the advent of deep learning techniques and neural networks. Thus, AI-generated art has become much more sophisticated.

AI algorithms can create abstract art as well as photorealistic paintings by analysing existing images and recognizing patterns, colors and shapes.

British artist Harold Cohen created a time-honed program - AARON - that was capable of producing art[112]. His works, located between artificial intelligence and art, have been exhibited in museums. Although the AARON program did not intend to create a work of art, it had the ability to create such a work in a personal way[113]. Harold Cohen stated during a conference that he refers to AARON as an apprentice, an assistant, rather than a fully autonomous artist. *„He's a remarkably capable and talented assistant, to be sure, but if he can't decide for himself what he wants to print, he can't achieve full autonomy."*

Rembrandt's painting *„The Night Watch"* - was originally made to an impressive size (3.63 meters by 4.37 meters, before restoration, the painting was about 4 meters high and 4.5 meters wide and weighed 337 kilograms) and was completed in three years, being commissioned by the civil guard in Amsterdam for a banquet hall at its headquarters, Kloveniersdoelen. Later, however, the edges were cut to be placed on the walls of the city hall in Amsterdam[114]. This was reconstructed with the help of AI. A team of restorers, researchers, scientists and photographers used a neural network to simulate the artist's palette and strokes, inspired by a reproduction of the original created by a painter in the 17th century.[115] Scans, X-rays and 12,500 high-resolution photographs were taken.

„The Next Rembrandt" project, created with the help of AI (deep learning algorithms and facial recognition techniques), is a 3D printed painting made exclusively from data obtained from Rembrandt's works - more than 300 paintings in the public domain. The authors of the work were many[116], from the company that created the algorithm, to the artists that were part of the team, to the computer that "created" the artwork. This work may be considered a reproduction, but could equally well qualify as a compilation or contribution to a collective work.

In this case, the question of creativity and originality arises. Is it original work, yet is it copyrightable? Can creativity be attributed to the computer as understood in copyright law? The work is not created by man, but it is created with the help of man. It is shown that an analogy can be made with the situation where a director gives directions to the cameraman. Depending on the human contribution, how significant it is compared to the work the computer is doing, copyright issues may arise. The difficulty in qualifying this work is also given by the fact that *The Next Rembrandt* is not a copy of a particular work to be called a reproduction, it is an ensemble made

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[109] *Ibidem*.

[110] A. Michael Noll, *Early Digital Computer Art at Bell Telephone Laboratories, Incorporated*, Leonardo, vol. 49 no. 1, Project MUSE, (The MIT Press, 2016), *60 muse.jhu.edu/article/608590*, accessed on 20 February 2023.

[111] A. Guadamuz, *Do Androids Dream of Electric Copyright? Comparative analysis of originality in artificial intelligence generated works* (June 5, 2020), in Intellectual Property Quarterly no 2 (Sweet & Maxwell, 2017), 1-24, *https://ssrn.com/abstract=2981304*, accessed on 20.02.2023.

[112] Originally used to create these works, the C language was considered by Cohen to be „too inflexible, too inexpressive, to deal with something as conceptually complex as color". See H. Cohen, *„A Sorcerer's Apprentice Talk" at the Tate Modern,* 20, *http://aaronshome.com/aaron/publications/index.html,* accessed on 15.02.2022.

[113] V. Constantinescu, *Potențiali subiecți ai drepturilor de autor asupra operelor de artă*, in RRDPI no. 3/2020, p. 30.

[114] The tumultuous history of this painting does not stop there. *The Night Watch* has been attacked three times: in 1911, a cook cut the canvas with a knife, and in 1975, a school principal, who wanted to destroy the painting because he thought it was God's will, and in 1990 a visitor threw sulfuric acid on the painting.

[115] C. Cojocaru, *Arta și inteligența artificială: cum una o ajută pe cealaltă*, 24.06.2021, *https://playtech.ro/2021/arta-si-inteligenta-artificiala-cum-una-o-ajuta-pe-cealalta/*, accessed on 19.02.2023.

[116] ING, J. Walter Thompson Agency of Amsterdam, Microsoft, TU Delft, Mauritshuis and Rembrandthuis, brought together a team of data scientists, engineers and art historians to analyse Rembrandt's painting techniques, style and subject matter and transfer that knowledge into software that could generate the new work using the latest 3D printing technology. In S. Schlackman, *Who holds the Copyright in AI Created Art?*, in Art Journal Antrepreneur, 29.09.2020, *https://artrepreneur.com/journal/the-next-rembrandt-who-holds-the-copyright-in-computer-generated-art/*, accessed on 08.09.2022.

up of male human typologies that Rembrandt painted in a certain period of time, thus, becoming unique and original.

Another example is the portrait-painting *„Edmond de Belamy"*, published in 2018 by Obvious Art, Paris (composed of 3 people, none of them artists[117]), signed with part of the code of the algorithm that created it[118]. An algorithm was used to create the painting that used 15,000 portraits from different periods, with the help of GAN - generative adversarial network[119]. In a recent article[120], an obvious problem is brought up. As the work was on the second resale through the auction house, it generated, according to the law, a resale right. Who is entitled to collect this quota? The 3 initiators, who declared that they did not make the painting, or the machine?

Artist Refik Anadol[121], also used artificial intelligence to interpret and transform over 200 years of art history, creating *„Unsupervised".* He has created digital artworks that change in real time, continuously generating new and otherworldly forms. The large-scale installation is powered by a sophisticated machine learning model to interpret publicly available data from the collection hosted by New York's Museum of Modern Art (MoMA)[122]. The ensemble consists of works encoded on the blockchain (over 138,000 images of individual works from MoMA's archives—including paintings, performance art, video games, and sculptures—in a machine learning model[123]).

Another „artist" who did not attend any art school, Mario Klingemann[124], is considered a true pioneer in the use of computer learning in the arts. As part of the exhibition „The Garden of Earthly Delights", his work „The Garden of Ephemeral Details" gives us a contemporary perspective on Bosch's masterpiece[125]. It comprises 143 unique frames and uses a suite of algorithms, whereby it reinterprets the original as it is viewed. His works are developed using Generative Adversarial Networks (GAN) and presented as screen art or interactive installations.

„AICAN" is an algorithm („creative adversarial network") powered by 80,000 images from the last five centuries created by Rutgers University that uses deep learning to generate images in a variety of styles. The creators of the program state that it could be considered an almost autonomous artist that learned existing styles and aesthetics and can generate innovative images of its own. AICAN's pieces have been exhibited all over the world, and the work „St. George Killing the Dragon" was sold for $16,000 at an auction in New York in November 2017.[126] The algorithm is created by the scientist, but there is, according to him, no kind of control over what the machine will generate.

Helena Sarin, an American artist uses adversarial generative applications and reassembles them in intriguing ways, precisely because of the unpredictability of these algorithms. She is the founder of Neural Bricolage Studio, which promotes AI-assisted artwork. Since 2021, the artist has been making ceramic objects - #potteryGAN, using GAN/AI to design functional 3D objects[127].

The British researcher Simon Colton has created an exhibition of architectural projects imagined by AI. Two deep learning systems, neural models, one for generation and one for guidance (generative adversarial network) were used. Images can be a source of inspiration for architects.

Cristina Lazăr, graduate of UNArte, Romania, in the diploma project *„Smile Project - Deep Immersive Art with Realtime Human - AI Interaction"*, proposes the use of convolutional neural networks (CNN[128]) through the ability to detect movement and formulate responses through light and color, real time. The ensemble includes five works located in a semicircle, with fiber optic paths connected to a WIFI modem, each of which has connected colored LED sources. The centrally positioned painting contains a phone camera in the middle that captures the viewer's movements and expression. According to this input, the algorithm is able to create real-

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[117] H. Caselles, G. Vernier, P. Fautrel. They stated that „Our brush is an algorithm developed on a computer."

[118] „min G max D x [log (D(x))] + z [log(1 -- D (G(z)))]]".

[119] It was the first artwork created with artificial intelligence to be featured in a Christie's auction, selling for $432,500.

[120] V. Roș, A. Livădariu, *Drepturile morale de autor în era inteligenței artificiale. De la inteligența naturală creatoare la inteligența artificială creatoare*, in *Provocările dreptului de autor la 160 de ani de la prima lor reglementare legală în România*, coord. V. Roș, C.R. Romițan, Hamangiu Publishing House, Bucharest, 2022, p. 65.

[121] He gave birth to the concept of „AI Data Painting and Sculpture".

[122] *https://www.moma.org/calendar/exhibitions/5535*, accessed on 19.02.2023.

[123] „Inteligența artificială, folosită pentru a interpreta 200 de ani de istorie a artei", available online at https://www.euronews.ro/articole/inteligenta-artificiala-folosita-pentru-a-interpreta-200-de-ani-de-istorie-a-arte, accessed on 19.02.2023.

[124] He stated in an interview that „Drawing or painting has never been my strong point because I've never been able to have the same control over my hand muscles as I do when writing code. So instead of fighting with my body to produce an image I had in my mind, I preferred to learn how to train machines to do so." In M. Dean, *Artist Mario Klingemann on Artificial Intelligence*, Technology and our Future, 25.02.2019, *https://www.sothebys.com/en/articles/artist-mario-klingemann-on-artificial-intelligence-art-tech-and-our-future*, accessed on 19.02.2023.

[125] Dutch painter who made fantastic works, for example, macabre representations of hell.

[126] **„**Meet AICAN, a machine that operates as an autonomous artist", 2018, https://theconversation.com/meet-aican-a-machine-that-operates-as-an-autonomous-artist-104381, accessed on 20.02.2023.

[127] „Neural Bricolage", *https://www.neuralbricolage.com/more-about*, accessed on 19.02.2023.

[128] *https://www.techtarget.com/searchenterpriseai/definition/convolutional-neural-network*, accessed on 19.02.2023.

time responses by lighting the LEDs in a rhythm similar to the movements performed by the one in front of the camera. Within this project, not only the use of new technology for artistic purposes is discussed, but also a collaboration between artificial intelligence and human creativity, the relationship between the two being this time one of coordination, not of subordination[129].

In the US, in 2018, Stephen Thaler[130] filed an application to register a copyright claim, the author of which was identified as „Creativity Machine. "A Recent Entrance to Paradise" was allegedly created autonomously by an algorithm running on a machine. The request was rejected, on the grounds that there is no human paternity. Thaler petitioned the Office to reconsider its initial refusal to register the work, arguing that „the human authorship requirement is unconstitutional and unsupported by either statute or case law". The response stated that Thaler had failed to prove sufficient contribution or intervention by a human author.

According to the US Copyright Office Compendium of Practice, the work must be created by a human being. The US Copyright Office will not register works produced by nature, animals or plants. Similarly, the Office will not register works produced by a machine or a mere mechanical process operating randomly or automatically, without any input or creative intervention on the part of a human author.

The Berne Convention does not define the *author* of a work, but leaves it up to the contracting parties to establish some criteria, yet we can unequivocally support, if we look at the period in which it was adopted, that no other variant than the human creator could be conceived. The CJEU in the *Painer* or *Cofemel* cases maintain this condition[131].

The work must be the author's own creation, as we also deduce from the *Funke Medien case*: *„the qualification as a work, within the meaning of Directive 2001/29, is limited to the elements that are the expression of such an intellectual creation".*[132] Directive 2009/24/EC on the legal protection of computer programs enshrines in art. 2 the general principle that the author is the natural person who created a work. However, the Member States are allowed to designate a legal person as the author of a computer program.

With all these developments and extraordinary results, for now the human factor is determined in the granting of copyright protection, regardless of the system we analyse. Essential is thus the symbiotic relationship between originality and paternity.[133]

5. Conclusions

The particular impact of AI in the creation of art is significant. Even if it is often seen as a threat to artists, to traditional art forms, AI can be interpreted as a new form of creativity. Complex and sophisticated works created by AI are selling for very high prices on the art market today. Machines generate works of art, independently or in conjunction with human artists, and their potential to create art that inspires and moves people remains a source of excitement and fascination. AI can be another possibility for artists that allows them to experiment with different styles and techniques and explore new artistic directions.

The human creator can produce a work even in years, unlike a machine that needs maybe a day. Thus, the commercial advantages are obvious. The financial aspects are one of the reasons why humans want to claim intellectual property of AI-created works.

Copyright and AI-made works will increasingly intersect as AI systems develop and become more creative. In the case of complex works, we will certainly find human intervention in several phases of the creation of the work with the help of AI, yet there may be simple works that require only minimal participation of the one who programs the machine. It is thus very important to identify the person behind the artificial intelligence, it all boils

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[129] T. Vindt, *Pictura inteligentă, https://revistaarta.ro/ro/pictura-inteligenta/*, accessed on 19.02.2023.

[130] „Re: Second Request for Reconsideration for Refusal to Register a Recent Entrance to Paradise", *https://www.copyright.gov/rulings-filings/review-board/docs/a-recent-entrance-to-paradise.pdf*, accessed on 20.02.2023.

Another application sought to recognize the authorship of a 6-year-old monkey, Naruto, who allegedly took a selfie with a camera belonging to a photographer. PETA tried to use this situation to set a legal precedent that animals should be copyright holders. Yet the court ruled that a monkey cannot hold copyright under the US law. But in relation to the copyright of the owner of the camera, the one who prepared the camera for photography, it was argued that this can be a justifiable claim if he „checked the angle of photography, configured the equipment to produce an image with specific effects of light and shadow, set the exposure or use filters or other special settings, the light and that everything that is needed is in the photo, and all the monkey contributed was to press the button.", *https://www.theregister.com/2015/09/24/peta_sues_photographer_macaque_selfie/*, accessed on 15.02.2023.

[131] CJEU, *Painer Case* C-145/10, *Cofemel Case*, C-683/17.

In France, intellectual property specialists have stated that the work can only be a creation of the author who is imperatively a human being, in A. Bertrand, *Le Droit d'auteur et les droits voisins*, 2e éd., Dalloz, 1999, p. 464.

Here too it was shown that „the emanation of a work of the mind necessarily takes its source from living components", in F.-M. Piriou, *Légitimité de l'auteur à la propriété intellectuelle*, Diogène, vol. 196, no. 4, PUF, 2001, p. 119-143, *https://doi.org/10.3917/dio.196.0119*, accessed on 27.02.2023.

[132] CJEU, *Funke Medien Case,* C-469/17, para. 20.

[133] L. Paquette, *Artificial (…), op. cit.*, p. 199

down to a question of responsibility. Who will be involved in a copyright infringement case? [134] Equally essential is the development of a legal framework to resolve this issue.

With all the positives[135], there are also challenges. Can AI replace human creativity? Can it evoke the same feelings and emotions as human-made art? For example, *„Stop AI stealing the show”*, a campaign by Equity[136] (a UK-based trade union of over 47,000 artists) claims that AI threatens artists and hurts their incomes, arguing that UK intellectual property law has failed to keep up step with AI. AI-generated works are only an imitation of human creativity, their originality coming from the intellectual efforts of human subjects[137].

Finally, I believe that the very foundation of copyright is the granting of authorship to man, and this foundation should not be lost. The link between the human author and the work cannot be destroyed by the evolution of science, globalization or economic development.

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[134] *Idem*, p. 208.

[135] „If copyright protection were granted to AI-generated works, the copyright system would tend to be seen as a tool that favors the consumer availability of as many creative works as possible and places equal value on human creativity and that of cars”, WIPO, *„*Conversation on Intellectual Property (IP) and Artificial Intelligence (AI)”, Second Session Revised Issues Paper on Intellectual Property Policy And Artificial Intelligence WIPO/IP/AI/2/GE/20/1 REV., 7.

[136] *https://www.equity.org.uk/campaigns/*, accessed on 19.02.2023.

[137] L. Paquette, *Artificial (…), op. cit.*, p. 214.

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EXPRESSIVENESS AND SYMBOLISM IN ARCHITECTURE INTENDED FOR JUSTICE

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Abstract

The article has the goal to underline the importance of the expressiveness and symbolism of an architecture designed for justice and to demonstrate the thesis according to which the expressiveness of the architecture designed for justice is likely to influence the quality of the act of justice (juridical process). As a particular form of civic architecture program, courts of justice had in the past a condition on the border between metaphysics and functionality, a condition that has currently migrated excessively towards the functional and bureaucratic dimension, more or less obviously neglecting the expressivity. Human activity exercised through processes of representation, in which the human subject has access to reality through abstractions and models, justice can be viewed and analysed as a phenomenon related to human subjectivity. Different historical moments attest the existence of a specific vision regarding the law and its spaces, in the wider context of the human subject, capturing one aspect or another of the reality regarding the act of justice. The modes of expression differ from one era to another, but each era considered it necessary to use expressiveness when constructing its spaces designed for justice. Conceived to enforce the notion of justice, the expressiveness of justice buildings is claimed as their fundamental characteristic.

Keywords: *architecture, designed for justice, space for justice, design, expression.*

1. Introduction

Frequently evoked in contemporaneity, Justice is an important component of social life, the judicial system being the one that gives structure to the rule of law.

Whether we are talking about county courts, tribunals, palaces of justice or penitentiaries, the buildings intended for justice are those elements that create the infrastructure of the judicial system. Characterised by a certain form of architectural prominence, a characteristic from which only the architecture of penitentiaries is an exception, these buildings are often invested in the more general framework of the city, with a symbolic importance.

The purpose of this article is to emphasize the importance of the expressiveness and implicitly the symbolism of the architecture intended for justice, considering that these attributes are able to influence the quality of the act of justice.

Located at the intersection of the study of architecture, law, arts and social sciences, the analysis of the architecture of buildings intended for justice raises, from a certain perspective, questions related to the existence of an interdependent relationship between the quality of the act of justice and the architectural quality of the space in which it takes place? Some authors even wonder if „The legitimacy of the process derives from the quality of the space where it takes place?”.

Linda Mulcahy, a British researcher who explores the interface between law and architecture from the perspective of a lawyer who, in addition to studies in Law and Sociology, has a specialization in the history of art, demonstrates in the conclusions of the work *The democratic courthouse: A modern history of design, due process and dignity*[1], that the improvement of the judicial act can also be done through the design of the courts. Moreover, the researcher points out that it would be desirable for political decision-makers to focus on the idea of defining sets of principles intended to guide design decision-making, principles that guide how the space can frame the experience of the act of justice. From another perspective, using empirical evidence, based in particular on the experience of Australian courts, her collaborator, researcher Emma Rowden, highlights the danger of using virtual courts, the use of which, it is shown in an article [2], ignores the importance of the symbolic value of the court of justice that over time, had the function of *„house of law"*.

This statement implicitly supports the thesis that the symbolic value of a court of justice is a relevant aspect. In the spirit of the work hypotheses mentioned above, we observe different concerns assumed in order to obtain

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[1] L. Mulcahy, E. Rowden, *The democratic courthouse: A modern history of design, due process and dignity*, Routledge, 2019.

[2] E. Rowden, *Distributed Courts and Legitimacy: What do we Lose When we Lose the Courthouse?*, in Law, Culture and the Humanities, 14 (2), 2018, pp. 263-281; *https://doi.org/10.1177/1743872115612966* [trad. ns. *Tribunale descentralizate și legitimitate: ce pierdem când pierdem curtea de justiție?*]; *https://journals.sagepub.com/doi/abs/10.1177/1743872115612966?journalCode=lcha*

the appropriate architectural expressiveness for the architecture of some recently built Palaces of Justice in the world. For example, on the occasion of the development of the project for the new Palace of Justice in Paris (2015), the design team led by Renzo Piano benefited from the collaboration of a group of specialists from the legal field, organized within the so-called "Reflection Group on the Symbolism of the Future Paris court". The group was established at the request of the French Institute of Advanced Legal Studies. The result of this collaboration materialized through the elaboration of a document known as the *Rapport du Groupe de refléxion sur la symbolique du futur Tribunal de Paris*,[3] a document that contains two parts, one of which refers specifically to the project of the Paris Tribunal and the second details general elements applicable to judicial architecture of the 21st century.

2. Expressiveness in architecture for justice

Considering relevant the analysis of the hypothesis according to which the expressiveness of the architecture of a space intended for justice has the ability to transform it into a place that inspires or even drives a deep and at the same time more assumed reporting of users to the concepts of Law and Justice, we will further define the aspects related to expressiveness.

As a working definition, we consider the expressiveness of an architectural object as the quality resulting from the relationship between the unit of form characteristic of that object and its content, its ability to particularly attract attention, in the direction of the message with which it was invested. Expressiveness is likely to determine an aesthetic reaction of the receiver.

On the occasion of the symposium with the theme "Art, aesthetics and International Courts of Justice", a hypothesis was recently launched that proposed deepening the understanding of the connection between art and international justice. The launched thesis starts from the premise that international justice can find support in the development of a new, experimental methodology, based on aesthetic experience. In this sense, art and architecture were considered useful tools in order to support the quality of the act of justice. Having at the same time the quality of responding to some functional requirements, but also that of generating aesthetic experiences, architecture in general and that intended for justice in particular can create through expressiveness the possibility of experiencing the idea of justice in a direct way, meant to overcome conventional methods[4].

Different historical eras constructed various spatial forms intended to house acts of justice, capturing specific visions of the law and its spaces within the larger context of how the human subject related to them. Having in the past a condition on the border between the metaphysical and the functional, the architecture of the courts of justice has nowadays excessively migrated to the functional and bureaucratic dimension, more or less obviously neglecting the expressive component. Schematically dividing the history of justice acts into two great periods, a period that extends to the beginning of the modern era, in which the sacred character of justice was exacerbated, and a second period, which begins with the modern era and amplifies after the First World War, in which the act of justice becomes more and more technical, we observe the fact that these attitudes towards the Law are also reflected in the architecture of the spaces that were intended for it. Each of these historical moments captures the existence of a specific vision regarding the law and its spaces, offering us models of expressiveness.[5]

Perceived in certain moments, as order, justice was seen in others as the possibility of freedom from a tyrannical order, but always these forms of reporting to the Law will identify specific ways of expression through architecture. Depending on the importance of the court, the need for the expressiveness of the space where the act of justice is to be carried out increases significantly in intensity. Directly proportional to the purpose of the court, expressiveness becomes a major criterion in the case of higher courts, as it follows from the experience of the International Courts of Justice.

3. Symbolism in architecture for justice

The symbolic component of the architecture intended for justice is an important factor supporting the act of justice, but also one of structuring the urban identity.

In an urban space, the presence of a building intended for justice is, from a symbolic point of view, a reflection of how the Law is perceived in that community, facilitating the connection between the law and the

[3] Published by the *L'Institut des Hautes Études sur la Justice*.

[4] *Introduction to the Symposium on Art, Aesthetics, and International Courts*, published online by Cambridge University Press: 30 March 2020, *https://scholar.google.ro/scholar?hl=ro&as_sdt=0%2C5&q=Introduction+to+the+Symposium+on+Art%2C+Aesthetics%2C+and+International+Courts%2C+published+online+by+Cambridge+University+Press%3A++30+March+2020&btnG=.*

[5] A.-M. Butnaru, *Clădiri destinate Justiției(Teză de Doctorat),* UAUIM Bucharest, 2022, p. 285.

community not only from a practical or functional point of view, but also symbolic. The directions of symbolism used in such cases refer both to the importance and grandeur of the Law, as well as to the symbolism of the identity of the community served by the respective building. By means of the expressiveness of the buildings intended for justice, the creation of a field of manifestation for the issue of moral educability and that regarding the act of justice can be considered. Numerous ethical philosophers believe that art, architecture and literature can provide an important moral and ethical foundation for a foundational society that will prove more effective from the perspective of educability than even the ethical theories themselves.

Unanimously recognised, the connection between law and ethics resides in the fact that law is not reduced to a collection of propositions, but lives in symbiosis with its spirit, which is moral in nature. Starting from the reality of the existence of an unavoidable tension between ethics and aesthetics, "between the search for good and the aspiration to beauty"[6], corroborated with the existence of a relationship between morality and law, the indisputable relationship between the ethics of a society and the aesthetics of buildings intended for justice results. As Professor Emanuel Socaciu pointed out in a conference[7], a fair and just society is not obtained through edicts, because there is a spirit of the law, which is not contained in the law, but which can be evoked through affect.

Therefore, we can consider the existence of a causal relationship between the ethics of a society, the aesthetics of a building intended for justice and the educational contribution of this aesthetics.

4. The symbolism of the position of justice buildings within the urban fabric - The issue of the central or peripheral locations of the buildings intended for justice from a symbolic perspective

In my opinion, even the location of the justice buildings within the urban fabric can be considered a factor that contributes to the expressiveness of these types of spaces. Antiquity dedicated the central spaces to the act of judgment. Analysing the examples of sites intended for courts documented from antiquity, whether we refer to those of the agoras of Greek Antiquity, or later to the Roman and Byzantine forums, we find the use of central sites without exception. To a certain extent, the Middle Ages decentralized the position of the court premises which, in the case of feudal justice, were generally dispersed in the territory, but central locations were often used for commercial disputes that were settled in the market area, reflecting a fluid exchange between law and commerce. The use of the town centre returns in the Renaissance, through the use of administrative-town buildings or guild houses for the administration of justice.

In the modern period, the tradition of central positioning of the act of justice continues, so that in the postmodern era peripheral locations are inaugurated. In the sixth decade of the 20th century, the architect Mies Van de Rohe will exemplify in Chicago a new formula for a court of justice, which will mark the break with the classic vision, proposing the absolute withdrawal of the court from the external context, expressing a strong aspiration for the autonomy of the construction and implicitly of the law in relation to the city.

In contemporaneity, the practice of using peripheral locations to house the judicial infrastructure appeared. From a strictly pragmatic point of view, peripheral locations offer the advantage of obtaining conveniently larger plots, able to meet the growing needs from the perspective of the proposed built-up areas. Thus, the practice of peripheral location of judicial infrastructure buildings is becoming a common reality these days. From a symbolic point of view, however, in my opinion, the peripheral locations do not seem to bring any service to the act of justice. This, in turn, will be perceived as an equally peripheral activity, because the city centre is not only a geometric place, but also the intersection of political, social, cultural, economic and other routes and interests. Having a semiotic value, the center is a geometric place that only reflects a hierarchy of importance of values. The presence of the Palace of Justice in the geometric center of the city affirms the importance that the community attaches to the presence of the law in its citadel.

The peripheral location of the building of the new Palace of Justice in Paris offers the author, in the second decade of the 21st century (2015), the opportunity to propose a new form of valorisation of the periphery[8].The architect Renzo Piano states, in this sense, that if in the era of designing the Pompidou Center his effort was to reinterpret the historical centre, the Palace of Justice project instead required him to be able to provide value to the periphery.

From the perspective of other traditions, however, the use of locations other than the central ones may have a symbolic motivation.

The peripheral location of the Supreme Court in Jerusalem is motivated by reference to the Jewish tradition

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[6] C. Iftode, *Introducere în estetică* (curs), University of Bucharest, Faculty of Philosophy, Bucharest, p. 1.

[7] E. Socaciu, *Centrul de Cercetare în etică aplicată*, podcast *https://www.youtube.com/watch?v=dUR-ZAuO6uc*, accessed on July 2022.

[8] NUOVO PALAZZO DI GIUSTIZIA - RPBW/ RENZO PIANO Building Workshop Parigi (FRANCIA) ~ karmArchitettura. Posted in: Architettura Invia tramite email Postalo sul blog Condividi su Twitter Condividi su Facebook.

in which judgments, according to biblical writings, were carried out at the gates of the city.

Recently, as an effect of the phenomenon of the dematerialisation of the courts of justice under the impact of video technologies and digitisation, the very physical location of the court of justice building seems that it will no longer have much relevance. Will the Courts of Justice absolutely move into virtual space? Does the path of justice from the centre of the community to virtual space pass through the periphery?

5. The use of historical sites in order to emphasize the symbolism and expressiveness in the case of buildings intended for justice

The immaterial feature of a space, the spirit of the place, complemented and supported by its history, was a factor that influenced many times the choice of a site intended for justice, giving these buildings, in my opinion, an increased presence.

In the 19th century Paris, the continuity of the use of the space called Court du Mai was maintained, when it was decided to build the new court of justice, respectively - Dendera Wing in 1868. The place had prestige and a well-grounded symbolic connotation due to the acts of justice carried out here over time. In London, the Courts of Justice (Royal Courts and Old Bailey) are arranged on a predetermined axis, collinear with St. Paul's Cathedral, resulting in the creation of a strong link between royal powers, justice and the Church.

In Brussels, the Palace of Justice, the Parliament and the Royal Palace are compactly located on the city's highest hill, evoking the Athenian Acropolis.

In Rome, the Palace of Justice is built on the site of the Pontifical Prisons, being called, in the founding speech, "temple of justice".

In France, in Angers, the Court of Appeal of Angers and the Court of Saumur, Place Saint-Michel, newly built buildings, were attached to the Castle of the Counts of Saumur[9], an old medieval administrative centre, where acts of justice took place.

In Romania, at Râmnicul Vâlcea, the two justice buildings (the tribunal and the courthouse) are located face to face, on one side and the other of the central boulevard, forming a triangle with Capela Hill, the core of the medieval city.

In Bucharest, with the proclamation of the Kingdom on May 10, 1881, as part of the modernization process of the young state, the construction of a series of buildings intended for justice continued. In 1882, the design of the Palace of Justice building, the current Court of Appeal of Bucharest began, a building whose foundation stone was laid in 1890.

The new building was erected on the site where the former *Judicial Divan* had functioned during the time of the Organic Regulation. This location on the right bank of the Dâmboviţa was chosen opposite the *Curtea Veche Voivodeship Palace*, the residence of the Lords of Wallachia between the 14th and 18th centuries, thus evoking the continuity of the tradition of holding important trials around the Royal Court.

At the end of World War II, a series of trials of important members of the military and political leadership of Nazi Germany took place for the first time in history. The choice of Nuremberg as the site of the trials had a symbolic connotation, as it had been the city of the Nazi party congresses ("Reichsparteitag").

The examples can go on, confirming that the positioning of the court was most often done in correlation with the symbolic geography of the cities.

6. The symbolism of the neighbourhood relationship between the location of buildings intended for Justice and that of other public buildings

The existence of a relevant relationship between the locations of the buildings intended for justice and the locations of other public buildings, political-administrative headquarters or religious edifices, is, in my opinion, a factor of expressiveness. The phenomenon of association of these locations is manifested starting from the ancient period and continues until the modern era. The postmodern era does not fully confirm this urbanistic approach.

A political power that is not supported by justice is considered undemocratic, and justice that is not supported by political power is meaningless. This is why the architecture designed to house the buildings of the rule of law seeks various forms of expression of this cooperation.

Emphasizing the connection between the creators of the law and its judges is symbolically expressed, for example in Washington, by the location of the Supreme Court in the vicinity of the Capitol, but also of the White House. The geometric relationships between the three sites symbolically reflect the collaboration between these institutions. In Brussels, aiming to express the omnipotence of the recently created Belgian state in the second

[9] Tribunaux de Saumur | Cour d'appel d'Angers (*justice.fr*).

half of the 19th century, the Royal Palace building, the Parliament Palace building and the Justice Palace building were united on the highest plateau of the city.

In Chandigarh, the Court of Justice is placed in a special relationship "through a learned plasticity"[10] with the Parliament Building and the Governor's Residence.

7. The symbolism of the courtroom

The process itself, over time, had a symbolic component, representing the gesture of exercising justice in a state. Its perception as a ritualized event was followed. As a venue for the process, the courtroom was treated from an architectural point of view in order to create an adequate framework from a functional point of view but also symbolic of the process. It is noticeable in the contemporary period, the tendency to give up this transfigured vision of the act of justice and to bring it into the perception zone of a simple bureaucratic gesture. Norman Spaulding draws attention to the symbolic death of this process metaphor in the article "The Enclosure of Justice: Court House Architecture, Due Process and The Dead Metaphor of Trial"[11]. However, efforts are still being made to bring certain elements of its nature to support the expressiveness of the architecture of these spaces either through the rhetoric of some elements of the architectural decor or through spatial means related to the field of architecture. The flattening of the topography of the courtrooms and the minimalism of the decorations, however, reflect in aesthetics the conceptions of contemporary ethical minimalism.

8. Political power and architecture for justice

The political ideology of the regimes that command the investments in the judicial infrastructure is reflected in the architecture of the buildings intended for justice. Katherina Fischer Taylor published a book[12] about the historical, social and architectural significance of the Palace of Justice in Paris, identifying the existence of a link between the architecture of this building and the political ideology of the French post-revolution era, arguing that the analysis of the architecture of the courts of justice can be a means of mapping the political ideologies that build them.

This is why the architecture of justice is in a position to combine in expression the notion of "majesty of the law" with that of the power of the rule of law.

The phrase "*form follows finance*"[13], launched by Rowan Moore, plastically describes this phenomenon also in the case of buildings intended for justice.

9. Conclusions

Undoubtedly, the Court is a "place of power", and the architecture of the buildings intended for justice is part of the "architecture of power".

A court, a tribunal, a palace of justice are buildings that, perhaps more than others, express the vision of a certain community, of a certain historical period, of a certain spiritual and cultural orientation.

Is it good to invest them with cultural, historical, traditional or even spiritual meanings, or can we design them today as simple office buildings that correspond impeccably to the function, but which will not express any form of identity?

To what extent will the location of specific symbols of Justice, an image of the Archangel Michael or the Goddess of Justice, the blindfolded one, contribute to the decisions taken by the magistrates reflecting universal and spiritual principles?

Can architecture transform a space dedicated to Justice into a place that inspires an ideal relationship to the concepts of law and justice?

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THE AUTHOR'S RIGHT TO DECIDE WHETHER, HOW AND WHEN THE WORK WILL BE MADE PUBLIC

Ciprian Raul ROMIŢAN*

Abstract

Moral copyright is the legal expression of the link between the work and its creator; it precedes the patrimonial rights, outlives them and exerts a permanent influence on them. Moral rights are independent of patrimonial rights, and the author of a work retains these rights even after the assignment of his/her patrimonial rights.

Romanian law has a tradition of recognizing the moral rights of authors of scientific, literary or artistic works. In this respect, Law no. 126/1923 on literary and artistic property was the first Romanian law and one of the first international laws to contain provisions ensuring the protection of moral copyright. At the Rome Conference in 1928, when the second conference to revise the Bern Convention was held, introducing art. 6 bis, it was noted that the Romanian law of 1923 contained very clear provisions on moral rights and was appreciated by the participants for the liberalism of its provisions.

This study presents an analysis of the right of disclosure, referred to in the literature as the right of first publication, which is the author's right to decide whether, how and when the work will be made known to the public. As the author of the study also considers, the right of disclosure is a discretionary and absolute right, recognized by all national laws as one of the most personal rights.

Keywords: *author, copyright, moral rights, right of disclosure, right of first publication, public knowledge.*

1. Introductory concepts on moral rights

Man's creative activity is embodied in his work in any of the scientific, literary or artistic fields. By creating a literary, artistic or scientific work, the author of the work acquires both *patrimonial rights,* which allow the author to derive profit from the use of his/her creation, and *moral rights (non-patrimonial),* rights that link the work to its creator, while also being an effective means of protecting the creator's rights. It must be stressed that the moral rights of the author of a work "precede the patrimonial rights, outlive them and exert a permanent influence on them. *Moral rights are independent of patrimonial rights*, and the author of a work retains these rights even after the assignment of his/her patrimonial rights"[1].

Moral rights, said Professor Viorel Roș, on the occasion of the International Conference "*The challenges of copyright 160 years after the first regulation of copyright in Romania and 150 years of moral rights in the world*", organized on 24 June 2022 by the ALAI Romania Association, a member of the International Literary and Artistic Association (founded in 1978 on the initiative of Victor Hugo), "*represents a 19th century gain in copyright law, on ground prepared by philosophers, creators and artists, but its affirmation, its recognition in favor of authors as a means of protecting their personality, its affirmation in legal life is due to the jurisprudence (lawyers and judges) and doctrine that preceded the introduction of this category into positive law, which only happened in the 21st century*" [2].

Although the Romanian legislator recognizes the pre-eminence of moral rights, placing them, in the text of the law[3], before patrimonial rights, it did not define them but only briefly listed the attributes conferred on the owner. The task of defining these moral rights, which are regulated in the national laws of most of the world's countries, has fallen to doctrine and specialists in the field, who have defined them as "*the legal expression of the link between the work and its creator*"[4] or "*the rights enjoyed by the author of an intellectual creation as a*

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[1] C.R. Romițan, *Drepturile morale de autor,* Universul Juridic Publishing House, Bucharest, 2007, pp. 47-48.

[2] V. Roş, A. Livădariu, *Provocările dreptului de autor la 160 de ani de la prima reglementare a acestora în România și la 150 de ani de drepturi morale în lume,* Hamangiu Publishing House, Bucharest, 2022, p. 28.

[3] In Chapter IV, with the margin "*Copyright Content*" of Law no. 8/1996 on copyright and related rights (republished in Offizial Gazette no. 268 of 27 March 2018, with subsequent amendments and supplements), the moral copyright is regulated before the patrimonial copyright.

[4] V. Roș, *Dreptul proprietăţii intelectuale. vol. I. Dreptul de autor, drepturile conexe și drepturile sui-generis,* C.H. Beck Publishing House, Bucharest, 2016, p. 286.

consequence of the fact that his/her personality is expressed and reflected in the work"[5].

In other opinions, moral rights "*are those non-patrimonial prerogatives which give the owner the possibility of controlling the exploitation of the creation and its respect by others*"[6] or "*those non-patrimonial prerogatives recognized to the author of a work or, in cases expressly provided for by law, to other natural or legal persons, by virtue of which they can have a certain conduct towards the work and can claim a conduct corresponding to the other subjects of law, and if necessary can appeal to the coercive force of the state for their protection*"[7].

Internationally, the first jurist to use the concept of "*moral right*" was André Morillot[8] in his work "*De la personnalite du droit de copie qui appartient a un auteur vivant*", published in 1872[9], and the jurist Alain Darras was the first to explain it in a precise and correct formula. The latter, in his work "*Du droit des auteurs et des artistes dans les rapports internationaux*", published in 1884, said that "*Every literary work, every artistic work, requires intellectual effort for its creation or its carrying out. Each of them is the product of an effort without which the work would not exist. Every author must be respected. All work must be rewarded. These are the sources of the double right recognized to authors and artists: the moral right and the pecuniary (patrimonial) right*"[10]. Also in older French doctrine, the moral right of the author was defined in 1897 by Jules Lermina[11]as "*the author's right to defend the integrity of his/her work in substance and form*"[12].

One of the first laws to contain provisions on the moral right of the author was the law adopted in France on 13.01.1791, which, in art. 3, regulated the rights of playwrights to object to the public performance of their works, thus conferring on them "*a right attached to the person (the right of authorization)*". Shortly afterwards, on 19.07.1793, another law was promulgated in France which, in art. 3, "*forbade any person to publish a work without the express permission of the author*". We can also recall the Prussian law of 11.06.1837, which, in art. 7, regulated the action of counterfeiting, stating that "*the true name of the author must be indicated either in the title or at the bottom of the dedication or preface*".

In Romania, the moral right of the author was enshrined with the adoption of Law no. 126/1923 on literary and artistic property[13], which, in art. 3, stipulated that, in the event of transmission of his/her work, the author or his/her heirs retain the moral right to prevent the work from being distorted. Moral rights could not be assigned, and were therefore *non-transferable* and could not be the subject of any transaction. Based on the provisions of this normative act, Professor Florin C. Tărăbuță gave one of the first definitions of this right, which he defined as "*the author's right to create, to control his/her work and to claim from anyone the respect due to his/her personality manifested through his/her work*"[14].

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[5] V. Roș, T. Bodoașcă, P.G. Buta, C.R. Romițan, *Enciclopedia Juridică Română,* vol. II, letters D-E, Academiei Publishing House & Universul Juridic Publishing House, Bucharest, 2021, p. 409.

[6] E.G. Olteanu, *Drepturile morale și creația intelectuală,* Didactică și Pedagogică Publishing House, Bucharest, 2006, p. 72.

[7] T. Bodoașcă, L.-I. Tarnu, *Dreptul proprietății intelectuale,* 5th ed., revised and added, Universul Juridic Publishing House, Bucharest, 2021, p. 49.

[8] André Morillot (1849-1922), French lawyer at the Council of State and the Court of Cassation of France.

[9] A. Morillot, *De la personnalite du droit de copie qui appartient a un auteur vivant*, in Revue Critique de Legislation, 1872, see RECHT, supra, note 23, at 110, *apud* Wojciech W. Kowalski*, A comparative law analysis of the retained rights of artists*, available online in *http://www.accessmylibrary.com/coms2/summary_0286-17461882_IT* and in *https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1547&context=vjtl* (accessed 04.02.2023).

[10] Toute œuvre littéraire, toute œuvre artistique, réclame pour sa conception, ou pour sa réalisation, un travail intellectuel. Chacune d'elle est le produit d'un travail sans lequel elle n'existerait pas. Toute personnalité doit être respectée. Tout travail libre mérite salaire. Telles sont les sources du double droit reconnu aux auteurs et aux artistes : droit moral droit pécuniaire (M. Beiller, *Dreptul moral al autorului*, in Pandectele române, Part 4, 1929, p. 25).

[11] Jules Lermina (1839-1913), French writer and journalist committed to the Socialists, which led to his imprisonment and support of Victor Hugo.

[12] J. Lermina, *Raport depus la Asociaţia literară şi artistică internaţională,* Congress of Monaco, 1897, *apud* Barbu I. Scondăcescu, Dumitru I. Devesel, Constantin N. Duma, *Legea asupra proprietăţii literare şi artistice* - commented and annotated, Cartea Românească Publishing House, Bucharest, 1934, p. 60.

[13] Published in the Official Gazette of Romania no. 68/28.06.1923. In the explanatory memorandum to the law, Constantin Banu, Minister of Culture and Arts, pointed out that, although "the recognition of literary and artistic property rights meant that writers and artists could derive not only moral but also material benefits from their works, there are so many writers and artists who barely make a living from their works, and there are so many publishers who get rich by publishing and distributing these works. At the Rome Conference in 1928, when the second conference to revise the Bern Convention was held, introducing Article 6 bis, it was noted that the Romanian law of 1923 contained very clear provisions on moral rights and was appreciated by the participants for the liberalism of its provisions. It was also noted on this occasion that when drafting new laws on the subject, most participating states were inspired by the Romanian Law no. 126/1923 on literary and artistic property" (C.R. Romițan, *Nașterea și evoluția dreptului de autor,* Universul Juridic Publishing House, Bucharest, 2018, p. 107).

[14] F.C. Tărăbuță*, Dreptul moral al autorului asupra operii sale intelectuale*, Tipografia şi Legătoria de Cărţi Penitenciarul „Văcărești", Bucharest, 1939, p. 45.

2. First court rulings on moral rights

The first international ruling on moral rights was given by the Court of Cassation of France in April 1804, which, in a dispute, decided, with reference to a dictionary, that "*an edition added to and altered without the consent of the authors constituted reprehensible counterfeiting*"[15]. We can also cite a decision of 1814 of the Seine Civil County Court, which stated that "*a work sold by an author to a printer or bookseller, and which must bear his/her name, must be printed in the state in which it was sold and delivered*"[16], as well as a decision of 1826 of the Paris Court of Appeal, which ruled that "*the misuse of another's name by falsely attributing a work constitutes a violation of property*"[17].

Also from the first half of the 19th century, also in France, we can mention the decision of 30 March 1835 of the Seine Civil County Court in which the court ruled that "*the right to modify a work is the sovereign attribute of its author*"[18].

Romanian courts have also ruled on moral copyright, even before this right was regulated in national law. For example, a 1906 decision of the Ilfov County Court, Commercial Section, spoke of the *infringement of the moral right to respect for the integrity of the work* on the occasion of the authorized reproduction of a painting and of the author's right to compensations[19].

3. Moral copyright in Romanian law

Although moral rights have been the subject of numerous scientific disputes in Romania over the years, with the adoption of Law no. 8/1996 on copyright and related rights[20], any controversy has ceased since, as mentioned above, the Romanian legislator has recognized the pre-eminence of moral rights, and the legislation in force in our country is now very generous and recognizes a wide range of moral rights. Thus, according to the provisions of art. 10 of Law no. 8/1996 on copyright and related rights, republished[21], five categories of moral rights of authors of literary, artistic or scientific works are recognized and protected in Romania:

a) the right to decide whether, how and when the work is to be brought to public knowledge (right to disclose the work);

b) the right to claim the acknowledgment of the capacity of author of the work (right to paternity);

c) the right to decide under which name the work will be brought to public knowledge (right to name);

d) the right to claim respect for the integrity of the work and to oppose any alterations or any damage to the work if it prejudices his/her honor or reputation (right to respect for the work integrity or work inviolability);

e) the right to withdraw the work, compensating, where appropriate, the right holders of the rights of use who are prejudiced by the exercise of the withdrawal (right to withdrawal).

4. The right to make the work available to the public (disclosure right)

The right of the author of a literary, artistic or scientific work to decide whether, how and when the work will be made known to the public is also referred to in the doctrine[22] as "*the right of first publication*" or "*the right of disclosure of the work*"[23].

The right of disclosure, enshrined in Romanian law by art. 10 para. (1) of Law no. 8/1996 on copyright and related rights, republished, is the *author's right to decide whether, how and when the work will be made known*

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[15] A.R. Bertrand, *Droit d'auteur*, Dalloz, Paris, 2010, p. 10, *apud* V. Roș, A. Livădariu, *op. cit.*, p. 36.

[16] A.R. Bertrand, *Le droit d'auteur et les droit voisins*, 2nd ed., Dalloz Publishing House, Paris, 1999, p. 36.

[17] *Ibidem*.

[18] F.C. Tărăbuță, *op. cit.*, p. 87.

[19] In the case cited, the court ruled that "the execution in autotype of an original painting was made in the most rudimentary manner and without any aesthetic character, for it is actually seen on examination that it possesses none of the qualities of the original work of art of which the faithful copy was intended to be. In truth, it totally lacks the lines, the colors, the perspective, in a word the tonality that is found in the model painting. Moreover, the paper used for its execution has neither the fineness nor the gloss of the paper on which the painting used as a model is printed. Therefore, under such conditions, the plaintiff's artistic work has been completely distorted and its artistic value completely lost. Thus, on the one hand, there will be the depreciation of the work, and on the other hand, the minimization of the sale of the copied counterparts in public, in other words, a moral and material damage that the artist will have to suffer" (Ilfov County Court, Commercial Section, hearing of 30.08.1906, in Dreptul no. 76/1906, p. 606).

[20] Published in the Official Gazette of Romania no. 60/26.03.1996.

[21] Republished in the Official Gazette of Romania no. 489/14.06.2018.

[22] V. Roș, *Dreptul proprietăţii intelectuale. Curs universitar,* Global Lex Publishing House, Bucharest, 2001, p. 107; V. Roș, D. Bogdan, O. Spineanu-Matei, *Dreptul de autor și drepturile conexe. Tratat,* All Beck Publishing House, Bucharest, 2005, p. 198; V. Roș, T. Bodoașcă, P.G. Buta, C.R. Romițan, *op. cit.,* pp. 348-349; I. Macovei, *Tratat de drept al proprietăţii intelectuale,* C.H. Beck Publishing House, Bucharest, 2010, p. 445; E. Ulmer, *Urheber und Verlagsrecht*, 3rd ed., Berlin, Heidelberg, New York, Springer Verlag, 1980, *apud* Y. Eminescu, *Opera de creație şi dreptul. O privire comparativă*, Academiei Publishing House, Bucharest, 1987, p. 92.

[23] Throughout this paper we will use the term "the right to disclosure of work".

to the public. In other words, it is the author's right to decide *whether, under what conditions and when to make his/her work available to the public*. From the above we can say that the right of disclosure *is a discretionary*, *absolute right* and, in our opinion, *is one of the most personal rights*.

In our country's legal literature, Professor Stanciu D. Cărpenaru, stressing the absolute and discretionary character of this right, linked to the author's person, stated that "*only the author, aware of the moral and sometimes even legal responsibility he/she assumes, can assess, in a discretionary manner, whether the work has reached an adequate level to be made known to the public. As one of the most personal rights, the right to make the work known to the public belongs exclusively to the author*"[24]. In the same sense, Professor Octavian Căpăţână pointed out that "*the most authorized censor of his/her creation being the author, he/she alone has the capacity to assess whether a new work he/she is working on has reached the degree of perfection that makes it worthy of being published*"[25]. Other authors[26] have also spoken of the author's "discretionary right" to make the work known to the public and have stated that the exercise of this right "*depends on the very existence of his/her patrimonial right to derive material benefit from the publication or other dissemination of the work*".

Disclosure is "*an act of will by the author of a work whereby the work is revealed, brought to the public's knowledge*"[27]. As we have already indicated[28], *the action of disclosing* a work can be done by any means of *public communication*[29], including publication. In French doctrine, Henri Desbois pointed out that the author exercises his/her right of disclosure from the moment he/she "*takes the decision to communicate his/her work to the public*"[30].

Publishing is *an act of editing* the work. ”Publication", according to art. 3(3) of the Bern Convention for the Protection of Literary and Artistic Works of 9 September 1886[31], means "works edited with the consent of their authors, irrespective of the manner in which the copies are made, provided that the availability of the copies is such as to meet the normal needs of the public, having regard to the nature of the work. The performance of a dramatic or dramatic-musical work, the recitation in public of a literary work, the transmission or broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture do not constitute publication"[32].

As one can notice from the interpretation of this text, the essential condition for a work to be published is that it should *satisfy the normal needs of the public,* without, however, specifying the number of copies (print run) that would satisfy these needs.

In view of the above, it should be stressed that a work is only considered disclosed when it *is accessible to the general public* for the first time and *not only to the normal circle of a family and its relations*. Although, Law no.8/1996, republished, does not define the concept of "*normal circle of members of a family and its acquaintances*", foreign case law has established that it is constituted by meetings of relatives, partners or persons between whom relations are habitually established[33] or by members of the same family, united by blood and cohabitation[34]. In this regard, for example, a decision of 9 September 1931 of the Court of Appeal of Venice[35] admitted that the concept of "*ordinary family circle*" cannot be limited to the environment of persons united by blood ties or living in the same family, but must be extended to those persons who, because of intimacy or other relationships, participate in family life[36].

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[24] St.D. Cărpenaru*, Drept civil. Drepturile de creaţie intelectuală. Succesiunile*, Didactică şi Pedagogică Publishing House, Bucharest, 1971, p. 43.

[25] O. Căpăţână, *Alcătuirea masei succesorale în cazul transmiterii prin moștenire a dreptului de autor*, in Legalitatea Populară no. 10/1957, p. 1179.

[26] A. Ionașcu, N. Comșa, M. Mureșan, *Dreptul de autor în R.S.R.*, Editura Academiei R.S.R., Bucharest, 1969, p. 29.

[27] For developments, see V. Roș, T. Bodoașcă, P.G. Buta, C.R. Romițan, *op. cit.,* vol. II, pp. 252-253.

[28] C.R. Romițan, *Drepturile morale de autor, op. cit.,* (2007), p. 97.

[29] According to art. 20 para. (1) of the Law no. 8/1996, republished, „1) Any communication of a work, made directly or by any technical means, made in a place open to the-public or in any place where a number of persons exceeding the normal circle of members of a family and its acquaintances are assembled, including a stage performance, recitation or any other public performance or direct presentation of the work, the public exhibition of works of visual, applied, photographic and architectural art, the public screening of cinematographic and other audiovisual works, including works of digital art, the presentation in-a public place by means of sound or audiovisual recordings, and the presentation in a public place by any means of a broadcast work is considered public communication. Any communication of a work by wire or wireless means, by making it available to the public, including via the Internet or other computer networks, shall also be considered to be public, such that any member of the public may have access from any place or at any time individually chosen is also considered public communication”

[30] H. Desbois, *Le droit d'auteur en France,* 3rd ed., Dalloz, Paris, 1978*,* p. 388.

[31] Romania acceded to the Bern Convention by Law no. 77/1998, published in the Official Gazette no. 156 of 17 April 1998.

[32] C.R. Romițan, *Drepturile morale de autor, op. cit.,* (2007), p. 97.

[33] Grenoble CA, dec. of 28.02.1968, in RIDA no. 57/1968, p. 166.

[34] „Il dirito di autore”, 1931, p. 86, *apud* B.I. Scondăcescu, D.I. Devesel, C.N. Duma, *op. cit.*, p. 141.

[35] Venice CA, dec. of 09.09.1931, in "Il dirito di autori", 1931, p. 491, Ibidem.

[36] The condition of the existence of a normal family circle is not met in the case of employees of a company (Douala CA, dec. of 03.03.1967, in RIDA no. 57/1968, p. 164), concerts, artistic evenings and other meetings organized by circles, casinos (Hungarian Superior

As mentioned above, *the author is free to judge* if and when to publish the work he/she has created. At the same time, *the author may object to* a prose work, for example, being rendered in verse, to a novel being dramatized, or to a dramatic work intended exclusively for theatrical performance being published, or to the subject matter being only briefly reported in newspapers, thus going beyond a strict press account that would accompany promotional actions or criticism of that work. The author of a song can also object to the partial reproduction of the song in an advertisement. Thus, in a 2001 decision of the French Court of Cassation, the court held that the partial reproduction, without the authors' authorization, of Jaques Detronc and Jaques Lanzmann's song "*Et moi, et moi, et moi*" in an audio-visual advertisement which did not have as its sole purpose the exploitation of this work, infringes both the moral right of disclosure and the patrimonial right of the assignee of the right to exploit the work[37].

4.1. Effects of the right of disclosure of a work

Being inextricably linked to the author's personality, *the right of disclosure* belongs exclusively to the author. With the publication of the work, *the author assumes both a moral* and *a legal* responsibility, which is only incumbent on him/her if he/she himself has decided to publish his/her work.

As mentioned above, one of the most important effects of the disclosure of a work is *the creation of patrimonial rights*. In other words, *patrimonial rights are contingent rights*, they become effective only when the author has published his/her intellectual creation[38]. However, according to the provisions of art. 1(1) of Law 8/1996 on copyright and related rights, republished "a work of intellectual creation is recognized and protected, independently of its being made known to the public, by the mere fact of its realization, even in unfinished form". From the interpretation of this text, it follows that prior to the disclosure of the work, the patrimonial rights are, as mentioned, *virtual, possible,* they *become actual*, effective, *only after the author exercises the moral right of disclosure*[39].

Patrimonial rights are rights that allow the author *to derive material benefit* from the use of his/her creation, *they link the work to its creator* and are also *an effective means of protecting his/her rights*. Copyright has the following legal characteristics: it is linked to the person of the author (personal), it is exclusive and limited in time (temporary).

In the same sense, the French professor Andre Françon pointed out that "*the author's decision to publish his/her work is all the more important because it depends on the birth of patrimonial rights that arise from the moment the work is published*"[40] and Claude Colombet said that "*before disclosure the work is part of his/her personality and once it is disclosed, the work becomes a patrimonial asset; it is at this moment that the author's patrimonial rights are born*"[41].

4.2. Disclosure of posthumous, joint and collective works

The issue of publishing *posthumous works* has generated numerous disputes both in the literature and in civil society in our country and abroad[42]. Both doctrine and case law agree that posthumous works must be made known to the public, regardless of whether or not the author expressed this wish during his/her lifetime. For these reasons, the amendments made by the Romanian legislator by Law no. 285/2004 amending and supplementing Law no. 8/1996 are to be appreciated, whereby the right of disclosure may be transmitted by inheritance, according to civil law for an unlimited period.

An issue which is likely to give arise to disputes is possible to appear in the case of disclosure of *joint* and

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Court, dec. of 02.02.1930, in "Le droit d'auteur", 1930, p. 21, *apud* B.I. Scondăcescu, D.I. Devesel, C.N. Duma, *op. cit.*, p. 141), of an evening organized by a sports association in honor of an opposing foreign team, in the case of people in old people's homes or children's homes who meet in games halls without parental or alliance ties (C. Colombet*, Propriété litteraire et artistique et droits voisins*, 7th ed., Dalloz, 1997, pp. 180-181) nor an association to which any person may freely adhere (French Court of Cassation, dec. of 14.06.1972, Dalloz, in Revue Trimestrielle de Droit Commercial, 1973, p. 262, *apud* Y. Marcellin, *Protection pénale de la propriété intellectuelle*, Cedat, Paris, 1996, p. 129). In order to meet the condition of the existence of the family circle, it is necessary that this communication is free of charge, which means that the persons forming the normal circle of family members do not pay any money to watch the performance. French case law has ruled in one case that any "private" and free performance made exclusively in a family circle is exempt from the consent of the right holders of the work broadcast (French Court of Cassation, Civil Chamber, dec. of 14.06.1972, Dalloz, 1972, p. 659, *apud* Y. Marcellin, *op. cit.*, p. 137).

[37] French Court of Cassation, 1st civ. s., dec. of 12.07.2001, in Pandectele române no. 2/2002, p. 239.

[38] C.R. Romițan, *Protecția penală a proprietăţii intelectuale*, C.H. Beck Publishing House, Bucharest, 2006, p. 94.

[39] V. Roș, *op. cit.,* (2016), p. 289. See also V. Roș, *Dreptul proprietăţii intelectuale*, Global Lex Publishing House, Bucharest, 2001, p. 108.

[40] A. Françon, *Cours de propriété litteraire, artistique et industrielle*, Litec, Paris, 1996, p. 214.

[41] C. Colombet, *Propriété litteraire et artistique et droits voisins*, 7th ed., Dalloz, 1997, p. 117.

[42] *Posthumous work* is "a work that was not published during the author's lifetime" (C.R. Romițan, J. Drăgan, *Mic dicționar de proprietate intelectuală. Dreptul de autor și drepturile conexe*, Lumina Lex Publishing House, Bucharest, 2004, p. 87).

collective works. In this situation, the solution is given to us by the law itself, which, in art. 5 para. (2) provides that the *copyright in the joint work belongs to the co-authors*, one of whom may be the principal author. In other words, the main author has the moral right to decide whether, how and when the work is to be brought to public knowledge; The status of main author of a work must be *acknowledged by the other authors in a written agreement*. In the absence of a written agreement, the work can only be made available to the public by mutual agreement.

In practice, there may be a possibility that one of the co-authors may not agree to the work being made public or may object to the way in which the work is to be made public. In this situation, according to art. 5 para. (3) of Law no. 8/1996 on copyright and related rights, republished, the co-author's refusal must be duly justified and we consider that this refusal can be challenged in court by the other co-authors.

In the case of *a collective work* in which the personal contributions of the co-authors form a whole, in the absence of an agreement to the contrary, the copyright in the work, including the right of disclosure of the work, belongs to the natural person or legal entity on whose initiative, under whose responsibility and under whose name the work was created (art. 6 of Law no. 8/1996, republished).

5. Disclosure right after conclusion of a publishing contract for the work

If the author can exercise his/her right of disclosure without any impediment until the conclusion of a publishing contract[43], by which he/she gives his/her consent for the work to be made available to the public, the question arises *whether an author can still exercise this right after signing such a contract*, or does his/her discretionary right to decide whether to make the work available to the public ceases once the contract is concluded?

We believe that the author's right to decide whether to make the work available to the public is maintained, but within certain limits, even after the conclusion of the contract. The author may *temporarily* or *permanently* withdraw his/her work in order to make changes or additions, but the reasons given must be duly justified.

If the person who assumes responsibility for bringing the work to the public's attention does not agree to the withdrawal of the work, the task of determining whether the reasons given by the author are justified and whether they justify the cessation or termination of the contract lies with the court, which will also decide on the compensation for non-performance of the contract concluded. In this respect, for example, the Paris Court of Appeal ruled in a case concerning a photographer who refused to have his photographs published in a magazine, even though a set of photographs from that series had been published in a previous issue. The Court ruled that the exercise of the right of disclosure in the present case is abusive and the refusal to disclose the work jeopardizes the achievement of the contractual causes over the assigned patrimonial rights[44]. In another case, decided by the Paris County Court, it was accepted that a painter's moral right to his work is subject to limitation period. This right allows him to modify or destroy the work as long as it has not been made public. Consequently, the action of a decoration house to refuse, a few months after taking possession of some sketches, to return them to the artist, is abusive and also represents an infringement of the artist's rights[45].

According to art. 54 of the Law no. 8/1996, republished the publisher is bound to allow the author to make improvements or other changes to the work in the case of a new edition, provided that the same do not essentially increase the publisher's costs and that they do not change the nature of the work, unless otherwise stipulated in the contract.

Also, according to art. 56 of the law mentioned herein above, the publisher is bound to return the original of the work to the author, the originals of the works of art, the pictures, and any and all other documents received for publication, unless agreed otherwise.

Also, according to the provisions in art. 57 para. (3) of the same enactment, if the publisher does not publish the work within the agreed term, the author may request the termination of the contract and non-performance damages. In this case, the author maintains the remuneration received, or, as the case may be, can request the payment of the full remuneration stipulated in the contract.

6. Transfer of the right of disclosure

The right of disclosure being a non-patrimonial right cannot be transferred by *inter vivos* acts. In this regard,

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[43] For developments on the publishing contract, as well as other contracts for the exploitation of copyright and case law, see V. Roș, Dragoș Bogdan, Octavia Spineanu Matei, *Dreptul de autor și drepturile conexe. Tratat*, All Beck Publishing House, Bucharest, 2005, pp. 371-404.

[44] Paris CA, dec. of 17.03.1989, *apud* A. Bertrand, *op. cit*.

[45] Paris County court, dec. of 11 February 1953, *apud* Pierre Greffe, Francois Greffe, *Traité des dessins et des modeles*, 7e ed., Litec, 2003, p. 341.

art. 11 of Law no. 8/1996, republished, provides that the right to decide whether, how and when the work will be made available to the public cannot be subject to any renunciation or alienation. However, after the death of the author, the exercise of this right is transmitted by inheritance, according to civil law, for an unlimited period and if there are no heirs, the exercise of the right of disclosure is vested in the collective management organization which administered the author's rights or, as the case may be, the organization with the largest number of members in the field of creation concerned.

It follows from an interpretation of the specified provisions that, where the exercise of these rights is transferable, it may also be made to persons other than the legal or testamentary heirs of the authors, namely, collective management organizations of patrimonial copyright[46]. Given that collective management organizations are created directly by the holders of copyright or related rights, we believe that they can, through the means and possibilities at their disposal, ensure, on a permanent basis, the best conditions for protecting the moral rights of the deceased author. Also, in our opinion, as has been pointed out in the older specialized literature[47], the provisions of art. 11 of Law no. 8/1996, republished, concerning the transfer of rights, do not concern a transfer as such, but merely organize a system of protection of the moral rights of the author after his/her death. We believe that by entrusting collective management organizations with this task, the legislator aimed to prevent the author's intellectual creations from being damaged after his/her death (publication of the work under another title, deletion of texts, additions, supplements, abridgments or use of the work in conditions inappropriate to its nature). In this way, the author's personality does not disappear with his/her death but survives and the moral rights will be protected as belonging to the author.

Currently, following the amendment of Law no. 8/1996 by Law no. 285/2004, the deed of bringing the work to the public knowledge without the authorization or, where appropriate, the consent of the holder of the rights recognized by the law on copyright and related rights has been decriminalized and *is therefore no longer an offence*.

Infringement of the right of disclosure is sanctioned by civil law, through a legal action by the right holder, which may be aimed at *ordering the cessation of the infringement and awarding damages*[48].

7. Conclusions

At the end of our study on the right to make a work available to the public (disclosure right) we can present some conclusions, namely:

- the right of disclosure is the author's right to decide whether, under what conditions and when to make his/her work available to the public;
- the right of disclosure is a discretionary, absolute right and is one of the most personal rights of the author of an intellectual creation;
- a work is only considered disclosed when it is accessible to the general public for the first time and not only to the normal circle of a family and its relations;
- with the publication of the work, the author assumes both a moral and a legal responsibility, which is only incumbent on him/her if he/she himself/herself has decided to publish his/her work;
- one of the most important effects of the disclosure of a work is the creation of patrimonial rights, which are contingent rights and only become effective when the author has published his/her intellectual creation;
- the right of disclosure, like any non-patrimonial right, cannot be transferred by *inter vivos* acts and therefore cannot be subject to any waiver or alienation;
- after the death of the author, the exercise of the right of disclosure is transmitted by inheritance, according to civil law, for an unlimited period and if there are no heirs, the exercise of the right of disclosure is

[46] According to art. 150 para. (1) of Law no. 8/1996, republished, "collective management organizations are, for the purposes of this law, legal persons established by free association, having as their sole or principal object of activity the management of copyright or rights related to copyright, categories of rights, types of works or other protected objects, which is entrusted to them by several authors or holders of copyright, for their collective benefit". Collective management organizations are established under the law, with the approval of the Romanian Copyright Office, and operate according to the regulations on non-profit associations and according to the provisions of this law. Collective management organizations are set up directly by the holders of copyright or related rights, natural or legal persons, and act within the limits of the mandate entrusted to them and on the basis of statutes adopted following the procedure laid down by law. They may also be created separately for the management of distinct categories of rights, corresponding to different fields of creation, as well as for the management of rights belonging to distinct categories of right holders (art. 151 of Law no. 8/1996, republished).

[47] Y. Eminescu, *Opera de creație și dreptul, O privire comparativă*, Academiei Publishing House, Bucharest, 1987, p. 164.

[48] For example, in a dispute concerning the right of disclosure, the Spanish Supreme Court, in a 1992 decision, obliged a film producer to disclose the novel he had adapted as a film script, and in a decision of the Paris High Court of 17.02.1999, the court held that the moral right of disclosure had been infringed by the publication in the press, without the author's consent, of a screenplay and excerpts of dialogue from a film prior to its screening in cinemas (N. Perez de Castro, *Las obras audiovisuals, Panoramica juridical*, REUS, Madrid, 2001, p. 77, *apud* Gh.e Gheorghiu, L. Iacob, *Audiovisual works (II). Drepturile morale,* in RRDPI no. 4/2005, pp. 12-13).

vested in the collective management organization which administered the author's rights or, as the case may be, the organization with the largest number of members in the field of creation concerned. In other words, where the exercise of these rights is transferable, it may also be made to persons other than the legal or testamentary heirs of the authors, namely, collective management organizations of patrimonial copyright.

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PUBLIC POLICY AND MORALITY IN TRADEMARK LAW

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Abstract

The existence of signs registered as trademarks (national, European, international) is necessary in the public interest, as they serve producers of goods and services and consumers alike. While any sign may in principle constitute a trademark if it is capable of distinguishing the goods and services of one undertaking from those of other undertakings and if it can be represented in a register (of trademarks) in such a way as to enable determination of the subject-matter of the protection conferred, the scope of registrable signs is limited by two categories of grounds established by law (EU Regulation) with a view to: (i) the effective protection of the rights previously acquired by other persons and the prevention of the risk of confusion/association between the goods/services of different traders, which are „relative grounds for refusal of registration", and (ii) the prevention of registrations and, where appropriate, the invalidation of registrations of the signs which, objectively, cannot constitute trademarks for intrinsic reasons (impossibility of representation, lack of distinctiveness, shape required by the nature of the goods, shape necessary to obtain a technical result, shape which gives substantial value to the product), or extrinsic ones (they must be available to everyone because they are of use to trade in general, or are misleading as to the nature, quality or geographical origin of the product/service, are protected against use in trade as being „of special public interest" and belong to, and are used by, the states, international organizations, and/or other public entities, including coats of arms, logos, seals, Olympic signs, but also those which are contrary to public order and public morality), which qualify as „absolute grounds for refusal of registration".

*The grounds for refusal of registration and/or, where appropriate, for declaration of invalidity of registered trademarks on account of coming into conflict with public order or public morality in the European Union and in the USA are not few, quite the opposite, but the relevant jurisprudence is not uniform. For example, of the 81 applications for registration as trademarks of a number of signs, among them the word „mafia", 51 were rejected, 20 were granted, and 5 are under examination, one of the applications (for the **Coffemafia** trademark) was granted in 2020, although in 2016-2018, the Boards Appeal and Revocation (Cancellation) of the EUIPO, and subsequently the EU Court, at the request of the Italian Republic, ruled the **„La Mafia se sienta a la mesa"** trademark to be invalid on the grounds that the word **„mafia"** was contrary to public order and its use was detrimental to public interest. However, despite the **„Fack Ju Göhte"** trademark being ruled to be contrary to public morality by the EUIPO and the EU Court, the Court of Justice of the European Union allowed its registration by ruling it was not contrary to public morality. In the USA, which seems to have an extremely interesting and well-reasoned jurisprudence, things aren't any different. A number of six trademarks containing the word **„Redskins" (red skin)** belonging to the Washington Redskins football team (currently under a different name), registered in the 60s and 70s, challenged at registration in 1992, then in 2014, after a first decision rejecting the application, following a second application (supported by the US President and 50 senators), were revoked on the grounds of being discriminatory against the Native Americans. However, the **„The Slants"** (from „slanted-eye", a pejorative term used to describe Asians) walked an entirely different path. The application (filed in 2006) to register it as a trademark for entertainment services by an all-Asian band of the same name **(The Slants)** was rejected by the U.S. Patent and Trademark Office - USPTO. Then, after a lengthy legal battle it was allowed for registration, with the courts, including the Supreme Court, ruling that the Lahman Act (i.e., the U.S. trademark law) provisions on the discrimination clause are contrary to the Constitution and the fundamental right to free speech.*

*These judgments, plus another one on the sign for which registration was requested, and refused, as **„CANNABIS STORE AMSTERDAM",** an EU trademark, are underlying our examination of such notions as „general/public interest", „public order" and „public morality", based on the finding that while important and used frequently, they are neither defined nor analysed in the legal doctrine and jurisprudence, and are used as something that needs no explanation. Such a need exists, though.*

*After analysing them, we were able to issue our (rather critical) opinions on the EU Court judgment of 15 March 2018 that ruled the invalidity of the **„La Mafia se sienta a la mesa"** trademark, which we find to be wrong*

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*on the merits and, in any case, to be lacking the necessary supporting documents, while also infringing the fundamental right to free speech. However, we also found that the revocation of the **„La Mafia se sienta a la mesa"** trademark on the grounds of conflicting with the public order did not serve its purpose because it is not possible to prohibit the use of the sign as an unregistered trademark, because that sign is still successfully in use, because the network of restaurants that continue to use it is thriving and will even expand to other countries, and because the EU Court's decision (which probably would not have been upheld by the CJEU if appealed, as we could conclude from analysing the judgment issued in the **„Fack Ju Göhte"** trademark**)** has contributed to its growing reputation, so it may be claimed as a well-known trademark in the future, which makes the victory of the Italian Republic, which filed the application for declaration of invalidity, a bitter one. And also because the word **MAFIA** is at the centre of the debate, we considered it important and sought to identify its origins and uses, as well as denotations and connotations.*

Keywords: *public interest, general interest, public order, public morality, absolute grounds for refusal of registration, trademarks contrary to public order, trademarks not contrary to public morality,* ***„La Mafia se sienta a la mesa", „Fack Ju Göhte", „The Slants", „Redskin",*** *failure to declare invalidity.*

1. The forbidden fruit of trademark law: the signs contrary to public law and good morals and the legal disputes

Nick Squires, an Oxford University-educated journalist who has worked in Hong Kong, Australia, Africa and the United Kingdom, stopped in 2008 in Italy, where he has been investigating, analysing, writing extensively and engagingly in a variety of fields. Of the writings we have been able to read, two, seemingly unrelated, have caught our attention.

The first is the one of 21st of April 2022[1] and from which we learn (with envy and admiration), that to save from extinction by depopulation (it still has only 90-140 inhabitants of 2,500 as it had before the First World War), a village called Calascio in the Apennines, is to receive from the Italian government €20 million of an "*unprecedented €200 billion grant and low-interest loans that the European Union is giving Italy to help it recover from the post-pandemic economic crisis*".

The second (but not his only article dedicated to the Italian Mafia), dated 22.02.2014, is entitled "***Italians take a stand against "Mafia" branding in Spanish restaurants"*** and describes the outrage of Italians at the use in a figurative brand used in Spain for a restaurant chain of a word synonymous with absolute evil in Italy. It is an article that has an explanation that has to do with the position of the state authorities and the Italians towards the mafia in their country and that has had unexpected consequences, because the Italian Republic has requested the cancellation of the European Union trademark ***"La Mafia se sienta a la mesa" (The Mafia sits at the table)***, the EUIPO and the TEU having definitively decided in 2018 (more than 10 years after its registration by the EUIPO) to cancel it. But the consequences of the invalidation – which we had the opportunity to comment on in various ways below – are far from what the trademark's challengers expected. And perhaps the trademark proprietors did not foresee them either.

Indeed, the consequences were formally important for Italy which obtained the cancellation of the trademark ***"La Mafia se sienta a la mesa"***, because in fact, the Spanish owners of the trademark definitively outlawed by the General Court of the European Union in its Judgment of 15 March 2018 have gained not lost. The business in Spain of restaurants operating in a franchise network under a distinctive sign containing the verbal elements ***"La Mafia se sienta a la mesa"*** has not only continued to exist and be used, it has also expanded and, according to the owners, the franchise is to cross the thin border that still exists between EU member countries. And one of the restaurants operates in Spain in Alicante, the host city of the EUIPO.

Was the application for registration of the trademark ***"La Mafia se sienta a la mesa"*** the result of an act of frivolity or an inspired choice? Is the sign, as applied for registration, an original creation eligible for copyright protection? Did the trademark applicants or their successors see the potential of the trademark since they also created a company with the trade name ***"La Mafia Franchises SL"*** to exploit the trademark as a restaurant franchise?

Was the EUIPO wrong in 2006 when it granted the application for registration of the mark ***"La Mafia se sienta a la mesa"***? Were the judges of the EUIPO and the General Court of the European Union wrong, more than 10 years after its registration, when they decided that the mark was contrary to public order and invalidated it on that ground?

[1] Available on *Italy is investing heavily to bring life back to its dying villages – CSMonitor.com* In his article he justifies and asks: WHY I WROTE THIS. *When countries try to save dying villages, is it better to spread resources widely among all needy communities or to invest heavily in a select few? Italy is trying the latter.*

The context is, we believe, appropriate to recall that 81 trademark applications containing the word element ***"mafia"*** have been filed with the EUIPO, of which 20 have been accepted for registration, 5 are under examination and the remaining 56 have been denied registration.

Among those registered are ***"Mafia Poker"*** (filed for registration in 2013 and admitted for registration 2014), ***"Mafia Clowns"*** (filed for registration in 2015), ***"House Mafia"*** (filed for registration in 2010, owner SSA Merchandise Ltd, the same owner of the trademark ***"Swedish House Mafia"***), ***"coffeemafia"*** (filed for registration in 2020 and registered in 2021 by a German Simon Planken), ***"Girl Mafia"*** (with figurative elements, UK owner).

Among those denied registration are: ***"Mafia"*** (German applicant), ***"Mafia Wars"*** (US applicant), ***"Wagyumafia"*** (Japanese applicant), ***"Mafia and Crime We are la Familia"*** with the figurative element a skull and two guns (German applicant), ***"ToxicMafia"*** (Spanish applicant), ***"Swedish meatball mafia"*** (Czech applicant), ***"Miss Mafia"*** (Australian applicant).

And it is natural to ask: why is ***"Girl Mafia"*** registrable as a trademark and ***"Miss Mafia"*** is not? When is and when isn't the word mafia "forbidden fruit" in the trademark law? According to recital 25 of the 15 March 2018 judgment, "where a sign is of a particularly shocking or offensive nature, it must be considered contrary to public order or to accepted principles of morality, whatever the goods and services for which it is registered". Why, then, in other cases and even after the EUIPO and TEU judgments commented on have marks containing the word "mafia" been granted registration? The TEU's argument that the legality of registration or invalidation decisions must be assessed solely on the basis of the EU Trade Marks Regulation and not on the basis of previous decision-making practice cannot be qualified as anything other than flimsy as long as signs containing the word "mafia" continue to exist and be registered as trademarks on the market.

We don't believe that these questions can be answered with "yes" or "no". What is clear, however, is that the Italian authorities failed to see the perverse effect of the cancellation of the registration of this mark and that the cancellation only increased the notoriety of the mark ***"La mafia se sienta a la mesa"***, even though it is no longer a registered trademark of the European Union.

We also believe that the measure of cancellation of the registration of this mark for the reason invoked by the Italian Republic (which does not belong only to the judges of the TEU, but also to the EUIPO "judges") also demonstrates how difficult it is to establish the content of public order and to operate with this concept, how uncertain is what the doctrine calls the "hard core" of the law. It shows how hard it is to dissociate public order from public decency and how subjective public order is and how true the statement that public order is what we want (say) it to be is.

If the EUIPO and TEU rulings cancelling the registration of the mark (which we will call hereafter and only ***"La Mafia"*** when it is not necessary to use the other word elements) is a victory for the Italian Republic, then it seems a bitter victory. We could even call it a victory as much as a defeat.

However, the prohibition of the sign ***"La Mafia se sienta a la mesa"*** was not only a formal but bitter victory for the Italian Republic (which, it must be admitted, proved to be caring towards its citizens, acting with good intentions) and for the Italians, but also a de facto victory for the Spanish trademark owners whose business not only did not suffer from the cancellation of the trademark, but, on the contrary, brought them a gain, its invalidation generated numerous topics of discussion, including: (i) can the use of an unregistered distinctive sign containing the word elements ***"La Mafia se sienta a la mesa"*** be prohibited in the Member States of the European Union; (ii) can such a sign become a well-known trademark and therefore eligible for protection as an unregistered trademark; (iii) can a word mark containing the sign ***"La Mafia"*** (the only one which can, however, be regarded as prohibited) be registered nationally in the Member States of the EU; (iv) can such a trademark be registered nationally or internationally in other non-EU countries? (v) is the sign registered by the EUIPO as a trademark of the European Union under no. 5510921 in 2007 and definitively invalidated in 2018 original and eligible for copyright protection? (vi) Can the use of this original copyright-protected creation be prohibited on the grounds that it is contrary to public order and copyright?

We add: if the TEU judgment of 15 March 2018 confirming the cancellation (by the EUIPO) of the trademark ***"La Mafia"*** for the sign's conflict with public order should also be considered as a binding ruling but also as relevant content for what we call "public order of the European Union" in the field of trademarks (with the consequence that the trademark "La Mafia" could not be registered nationally in the EU Member States either), then this means that either this content has been hastily and/or wrongly established, or that we are faced with a severe breach of public order in intellectual property law since the sign, formally outlawed, continues to be used successfully by the trademark proprietor as an unregistered trademark or other intellectual property right (trade name?, copyright?).

Faced with so many unanswered questions (and we are not even sure that we have identified them all) and to which we do not believe that we will find the answers most in keeping with the spirit of trademark law and

public order in intellectual property and in the face of so many uncertainties, it seems to us that more than 200 years later we are rewriting the legal dispute generated by the Shakespearean dilemma in "The Merchant of Venice" between the two (German-speaking) giants of the law: Joseph Kohler and Rudolf von Jhering, that of the primacy of morality over law or the primacy of law over morality. That we have proof again and that we have to admit that life and law (with all its hard core which is public order) are sometimes in conflict and that law must adapt to life, not life to law.

2. "Mafia": denotations and connotations or meanings, sub-meanings and uses

There are many reasons why the words "mob" and "mobster" seem magnetic, in that they simultaneously repel and attract, are considered hateful by some and innocent by others, hated by some and appreciated by others, outlawed by some, fully usable by others. And because you cannot be simultaneously an opponent and a friend of what we conventionally call the mafia, you cannot at the same time disapprove and approve of the mafia and its criminal activities, we state at the outset, and to prevent any misunderstanding, that nothing we write here should and cannot be construed as a position in favour of the mafia. We add here, however, that it is not only the mafia, in the sense of a criminal organization, and mafia-type membership and activities that are odious, but that states[2] that collaborate with the mafia and mafia members are even more odious when they hire them to commit criminal acts, regardless of the target and purpose, because in such cases, apart from the fact that the hiring state itself compromises its image and the power on behalf of which it works, by hiring them, it also bails out the mafia and mafia members, thus contributing to their credibility. And history knows such cases.

Denotatively (not quite correctly, but the explanation is provided by the dictionary), the word "mafia" is used with the meaning of criminal organization. The negative connotation of the same word is, for many people and especially for Italians, that of the embodiment of evil. Outside Italy, the denotation and primary connotation of the word "mafia" is diluted and no longer seems so serious, although it cannot be said that it has acquired anywhere a positive connotation (except, of course, the mafia) proving that the additional meaning of a word, especially the connotation, is negative, or positive (the word haiduc, for example, has a positive connotation for Romanians, although the original meaning is "highway robber" or "bandit"), is a cultural and emotional association added to a word, it is the "aura" that accompanies it, it is something in addition to the literal or explicit meaning of the word.

The connotation attributed to a word is the result of the experience of the group that uses it and this explains the difference in the attitude of Italians and Spaniards, in our case, towards the same word. And this is why we believe that we cannot condemn those who, having a different cultural and emotional experience, perceive one word or another differently and attribute different denotations and connotations to it, or are simply indifferent to the denotations and connotations attributed by others to the same words. The first judge to fall victim to the Mafia (Giovanni Falcone[3], killed with his wife and three members of his guard on 23.05.1992, followed 53 days later by Judge Paolo Borsellino, killed with five members of his guard[4], both born, raised and educated in Palermo, considered the birthplace of the Mafia) understood that the Mafia is a myth and organised crime, which has been given this generic name, a reality, and that the temptation to use it for various purposes is great. *"While there was a time when people were reluctant to say the word „Mafia", said G. Falcone, nowadays people have gone so far in the opposite direction that it has become an overused term ...* ***I am no longer willing to accept the habit of talking about the Mafia in descriptive and all-encompassing terms that make it possible to lump together phenomena that are indeed related to the field of organised crime but have little or nothing in common with the Mafia".***

Regardless of the denotation and connotation attributed to it, the word "mafia" attracts with the power that the unknown, the mystery, the secret, the legend in which it is shrouded always have. From the very different positions that observers take, the word attracts, challenges, and calls for attention, and we believe that if a survey on the perception of this word were done, the surprises could be great. Of course, for some, many and especially for Italians, the mere mention or reading of the word "mafia" causes repulsion and resentment, for others, sympathy (restrained?) or even envy and admiration, to some a reaction of disapproval, to others appreciation, to some it arouses interest and the urge to know more about what we generically call "mafia",

[2] Leonardo Sciascia denounced the complicity between the Italian government and the mafia in his 1965 work, L`onorevole (The Honourable), but it is not the only book in which he did so.

[3] He was the judge in the trial known as the "Maxi Trial" in which 360 of the 474 defendants on trial were convicted of serious crimes. The trial took place in 1986-1987. His murder was the "work" of the Cosa Nostra family.

[4] His murder is due to the fact that, after the murder of his colleague and friend G. Falcone, he opposed the authorities" intention to conclude a pact with the Mafia, thus becoming a declared enemy of Cosa Nostra.

while to others it says nothing and we cannot know whether the latter are uneducated or relevant or irrelevant to a brand.

However, there are also people who, unaware of the original denotation and/or connotations of the word "mafia", have intuited its commercial potential in itself, its power to attract customers, its ability to distinguish products and services that have nothing illicit in them, who have understood that, when used lucratively and honestly, it can bring financial profits, significant gains without any other notable intellectual effort. It has contributed to this, of course, the fact that the mafia has also become a cultural phenomenon, with scientific works, novels, films, songs dedicated to it, through which the image of the mafia has acquired a note of honor and respect.

Human nature and the morals that tell each and every one of us what is right and what is wrong (moral or immoral) are constantly changing, but the change now is so radical and brutal, denying the values that seemed perennial to us (we are now living in a time of challenging a morality that for hundreds or even thousands of years we have considered to be in keeping with human nature and its spirit and imposing a new one, even though the adjective "new" is not proper to morality, whose fundamental values are clearly different from those of the old morality), that for very many people this change is impossible to accept. The new morality even overturns the laws to impose yesterday's immoral as moral today and even more, to put yesterday's morality against the wall, considered illicit today. It is obvious that we live in a time when disagreement with the new morality (its new core values) is a ... reprehensible immorality and that we live in a time when even the (sacred?) right to disagree is denied.

Intellectual property, the morality and/or legitimacy of which has been historically and still is today contested (and not only verbally and/or in writing), has often faced the issue of morality/immorality of some creations and/or creators and has a long history where works and their authors or those who read them and became followers of the authors have been "purified" by fire or buried alive[5] under the accusation of moral violation. But even the history of protected intellectual property (which is a little over 300 years old) is full of conduct and judgments to the contrary, of creators who were severely condemned for the immorality of themselves or their works during their lifetime and who were acquitted and raised to the pedestal after death, when the new morality overcame the old morality and proved that moral and/or immoral is what we want it to be.

When it comes to trademarks, if we pay attention and judge objectively, we find that signs/words that in common parlance are synonymous with absolute evil are today successful trademarks. This is the case of the marks ***"Rasputin", "Stalin(skaya)"*** and its derivatives, ***"Opium"***, etc.

In contrast to these, a word which generically designates associations of persons constituted for the purpose of serious illicit actions, but which has not, however, done as much harm and caused as many victims as Rasputin, Stalin and opium, *i.e.,* "mafia", has been outlawed by the General Court of the Union, and in principle, this ruling takes effect in all EU Member States. Except that the invalidated mark containing this word refuses to accept its fate! The explanation for the double standard is, we believe, very simple: no one complained about ***"Rasputin"*** and ***"Stalin(skaya)"***, a country complained about the registration of the trademark ***"La Mafia"***: The Italian Republic. A country where the wounds inflicted by the mafia are many, deep and unhealable.

But what are the origins of the word and what was the evolution through which the initial denotation acquired the negative connotations of today?

3. The (honorable) origins of the word "mafia"

The word "mafia" is used in common parlance mainly to designate (denotatively) associations of persons formed for the purpose of committing crimes, often spread over the territories of several states, of acting to control completely or monopolise certain activities, including by physically eliminating members of competing groups in a territory. It is a generic word, with the value of a common noun, and its derivative, the word "mafia", has the value of an adjective or epithet, designating (i) belonging to a mafia-type criminal organization or (ii) behaviour outside the law or on the edge of the law, a way of being that is usually manifested by self-centeredness, lack of scruples, lack of empathy, arrogance, contempt for others, the law and morality. "*I am a mobster* - says a notorious character in Romania, but with a controversial image - *because I am a mobster by the way I behave. Yes! I park the car, I give a million bribe. I"ll go to the waiter... I"ll bribe two million! I don't talk to just anyone! I don't pay attention to just anyone (...). I am ... the millionaire, the hustler, the mobster, how can I make anyone pay attention, how can I not have my presence when I get out of a Rolls Royce? (...) The modern mobster doesn't shoot, he doesn't rake in money anymore, today's mobster makes money where nobody knows*

[5] In 213 BC. the books of Confucius (551-479 BC.) were burned and 460 of its followers were buried alive by order of the first emperor of unified China (Qin Shi Huang, 246-210 BC).).

him and behaves like a gentleman", the expression used by this character became viral on the Internet in Romania[6].

It is a behaviour that provokes some people to disapprove and/or (charmingly) ironic reactions[7], while others admire it and wish to imitate it[8] but we cannot dispute, we believe, that we are witnessing a use of the word "mafia" and its derivatives that no longer have the meanings that associate it with organised crime and that contextually, often, the use is made for the purpose of irony, pamphlet, mockery, the intention of making a direct link with what .

A criminal organization called "Mafia" does not exist in Italy either. But criminal syndicates are numerous (about 5,000 in the EU[9] countries), but among them, some are distinguished by the fact that they are made up of people belonging to the same family (which is not necessarily biological), are conspiratorial, have an organization with well-established hierarchies, secret rituals and rules of loyalty, silence and succession at the top, with their own strictly observed "laws" with a long history (since the first half of the 19th century) and significant wealth.

Italy is the country where mafia-type organizations have the longest and richest history of serious criminal activities (corruption, extortion, extortion, drugs, arms, waste exploitation, loan-sharking, protection taxes, gambling) and crimes for the purpose of elimination, punishment or intimidation, including against judges, prosecutors, police officers or politicians who have been actively involved in fighting them. Italy, which also has the sad reputation of having "exported" the mafia to other countries, including the United States (which has become a sort of adopted country), is the country that has the most to suffer and to fight against mafia-type organizations. In this country, the turnover of mafia-type organizations is estimated at hundreds of billions of euros and the number of people involved in mafia business is around 200,000. All these are the reasons why an amendment to the Criminal Code by a law of 13 September 1982, in the chapter on offences against public order, introduced art. 416 bis, which incriminated ***"mafia-type associations of three or more persons"***, an association being considered a mafia-type association ***"when its members make use of the intimidating force of the associative bond and the condition of submission and silence deriving from it in order to commit offences, to acquire directly or indirectly the management or, in any case, control economic activities, concessions, authorizations, contracts and public services or to make profits or unfair advantages for oneself or for others, or to prevent the free exercise of the vote or to obtain votes for oneself or for others in elections"***[10]. According to the provision at the end of the incriminating text: "The provisions of this article shall also apply to ***Camorra, Ndrangheta and other associations, however locally called, including foreign ones, which, making use of the intimidating force of the associative bond, pursue aims corresponding to those of the mafia"***, and this only confirms that the term "mafia" is a common noun used to designate associations constituted for the purpose of committing somewhat circumstantial crimes.

The strongest, most violent, richest and best-known organizations of this type in Italy are: `Ndragheta[11], Camorra, Cosa Nostra and Sacro Corona Unita (generically referred to as the `Italian Mafia"), and in the US, (where it is generically referred to as the `Sicilian Mafia") is made up of the Boanno, Colombo, Gambino, Genovese and Lucchese[12] families. But groups designated with the epithet "mafia" exist in all countries of Europe, Asia, America (North, Central and South) or Australia, some of them hundreds of years old (Yakuza in Japan, Triada in China, Cartels in Colombia, etc.). The Mafia is in Italy one of the most profitable and dangerous "businesses"[13] and it is therefore not surprising that Italy and Italians are extremely sensitive to the way the word "mafia" and its derivatives are used.

The etymology of the word "mafia" is difficult to establish[14], as there is no evidence on which to draw a firm conclusion about its origins. Traditionally Sicily is considered to be the birthplace of the word, but the true parents seem to be the Arabs. Sicily was the land of wars and successive occupations of several peoples, under Muslim rule and under the name of the Emirate of Sicily from 827-1091. On the Arab-occupied island (followed

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[6] S. Voicu, The Romanian Theory of Trickery: where the expression "That's what it means to be a mobster!" comes from and how it became famous. *The Romanian theory of trickery: where the expression "That's what it means to be a mobster!" comes from. and how it became famous | adevarul.ro*, accessed 29.04.2023.

[7] Watch the "I"M A MOBSTER SONG" parody song posted at *https://www.youtube.com/watch?v=0Sy_t8OcXSc*.

[8] Watch *https://www.youtube.com/channel/UCPUxqDQ7nz9ZxT6olZvGigg*.

[9] Mafia organizations in Europe - DW - 06.12.2018 at *https://www.dw.com/ro/organiza%C5%A3iile-mafiote-din-europa/a-46607287*.

[10] *https://www.google.com/search?q=codice+penale+italiano*.

[11] This most powerful Mafia-type organization controls alone 3% of Italy's GDP.

[12] Italian Mafia: look, first and last name – other 2023, at *https://rum.culturehatti.com/italyanskaya-mafiya-istoriya-poyavleniya-imena-i-familii-read-435923*.

[13] How the Sicilian mafia earns most of the money. The business that goes beyond drug trafficking, at *https://playtech.ro/stiri/din-ce-castiga-mafia-siciliana-cei-mai-multi-bani-afacerea-care-depaseste-traficul-de-droguri-469180*.

[14] Italian Mafia: look, first and last name – other 2023, at *https://rum.culturehatti.com/italyanskaya-mafiya-istoriya-poyavleniya-imena-i-familii-read-435923*.

by the French and Spanish) a Sicilian-Arabic language was spoken (which was also spoken in Malta and from which the Maltese language later developed), the Sicilian language of today retaining (like Spanish where 10% of the words are of Arabic origin) Arabic influences.

In a 17th century dictionary of the Sicilian language, the word ***"mafioso"***, thought to be the origin of the word ***"mafia"***, was used with several meanings: crass misery, dire poverty, bold, brave, handsome, self-confident, but also of impudent, arrogant peasant, unmannerly man, as well as that of thief, or robber. But ***"mafioso"*** has its origin in the Arabic word "marfudz" (مرفوض), which has the meaning of rejected, refused, unacceptable, poor stuck up, broke (from Turkish we have the word mofluz, in Turkish mulfuz). In Arabic, however, there are other words with a closer pronunciation that could be the origin of the Sicilian word "mafioso". *maʿāfir* (معافر), for example, was the name of the tribe that ruled Palermo under Arab rule, *mahyāṣ* (مهياص) meaning aggressive or boastful, *muʿāfā* (معافى) meaning safety or protection or *muʿāfā* (معافى) meaning shelter, shady place. Another author Selwyn Raab, who also found the Arabic origins of the word, points out that until the 19th century the word "mafioso" did not designate a criminal but a "person who was suspected to have authority", and the original meaning would have been "*defender, protector against occupiers*", actions against successive occupiers of the island were carried out by families or groups of families (led by a small local "don" who was obliged to protect those on their domain[15]), who later, taking advantage of the chaos and violence on the island, began to demand protection money from the owners and then became what it is today[16]. Quoting the same S. Raab, another author argues that the origin of the word "mafia" would be in the expression "Ma Hias" which would mean "*a kind of protector of the weak against the silence of the strong*" the word would have originally meant, the protection of the weak and poor against the silence of the strong[17]

Leonardo Sciascia[18], however, identified a document from 1658 in which Maffua was the name of a witch from Sicily[19].

In the second half of the 19th century in Sicily the word *"mafioso"* had no negative connotation, but neither a very clear denotation. It was used in common parlance to denote a beautifully knotted tie, a respectable (rounded) belly indicating prosperity, an elegant suit, an exquisite hat, a woman's beautiful eyes, an enterprising and courageous man, a woman full of femininity, a person of extraordinary qualities.

In 1863, at the request of a publicist, Gioacchino D"Angelo (who had spent half his life in Palermo prison, had a deep scar on his proud face and had become the leader of the prisoners) asked a young playwright (Gaspare Mosca, a former political dissident and revolutionary and fighter in Garibaldi's army) and an actor (Giuseppe Rizzotto) to write a play inspired by prison life, giving them a vocabulary of words (slang) used by the prisoners.

The play written by the two was initially entitled "La Vicaria di Palermo" (The Prison of Palermo) and later (at the suggestion of G. Mosca) "***I mafiusi di la vicaria di Palermo"***. The play was a huge success, so that the idea was taken up by other authors who contributed to the spread of the "mafia" word and the negative connotations it acquired, although the original plot was that of poor people, pushed by both local and governmental Italian authorities and foreign occupiers and forced by circumstances to seek and take justice into their own hands in the belief that they were participating in a noble social protest.

The work of the two and of those who wrote later on the same theme in a poor Sicily with Sicilians for whom their own family was more important than the state and who were in constant conflict with the Italian government and the occupiers (some of them samavolnici) "*took the terms mafia and mafioso out of the cocoon of popular Sicilian culture, introducing them to the general public and giving them the sinister meaning they have today*".[20] And this new meaning quickly won out over the old, with a government report of 1865 on criminal activities in Sicily using the word "mafia" as a common noun to designate them, which then also crossed the island's natural borders.

A contemporary of the two writers, a little younger but more rational and fonder of Sicilians and their cultural traditions, Giuseppe Pitrè[21], reacted vehemently accusing Mosca and Rizzotto of degenerating the word,

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[15] Don was a small local nobleman, keeper of the Sicilian traditions and unwritten laws who assumed the obligation of protection and it is believed that from this tradition of defense was born the custom of kissing the hand of a don.

[16] Selwyn Raab is an American writer Five families: The Rise, Decline and Rebirth of America's Most Powerful Mafia Empires, *The Origins of the Mafia – HISTORY – Topics, at https://ro.royalmarinescadetsportsmouth.co.uk/origins-mafia*.

[17] The Origins of the Mafia. It originated from an Arabic word and originally meant the protection of the weak and poor from foreign invasion, article available on *Origins of the Mafia. It originated from an Arabic word and originally meant the protection of the weak and poor against foreign invasions, at https://adevarul.ro/stiri-locale/botosani/originile-mafiei-a-pornit-de-la-un-cuvant-arab-si-1873155.html*.

[18] Leonardo Sciascia (1921-1989), politician and writer (The Day of the Owl is his best-known novel), was a member of parliament and a connoisseur of the Mafia, about which he wrote many works.

[19] Nike La Sorte, *Sicily and the Mafia*, *https://www.americanmafia.com/Feature_Articles_264.html*.

[20] Mike La Sorte, *How the word Mafia got its modern meaning*, article available on *https://www.americanmafia.com/Feature_Articles_264.html*.

[21] Giuseppe Pitrè (1841-1916), Sicilian folklorist, physician, teacher and Italian senator from Sicily.

concluding deeply disappointed that "***the term was good and innocent before and they turned it into a bad one. In the past, mafia meant beauty, attractiveness, perfection, boldness, indulgence and excellence. Now its meaning has been so corrupted that any definition is impossible."***

There are authors who find a different origin and more honorable and older, they claim that as early as the 13th century Sicilians were fighting against the French occupation under the slogan ***"Morte ai Francesi Indipendenza Anela"*** ("Death to the French, independence we cry")[22] and in 1882, an entity called the "Sicilian Wasps", with a Mafia-like organization (the first of its kind), was a secret organization that fought against both the oppressive Italian government and the occupying French under the slogan ***Morte Alla Francia l`Italia Arde*** (*Death to France, Italy cries out*). Slogans whose acronym is **MAFIA.** The legend, also with Sicilian origins, also says that the origin of the word is the cry of the mother of a girl raped by a French soldier "***Ma fia! Ma fia***", which in Sicilian dialect would mean "***my daughter! my daughter!***".

It is hard to say that without the literary writings that changed the meaning of the word "mafia" following its literary success and even more unfortunate use in the government report of 1865, its evolution, the connotations it acquired, its transformation in Italy into a synonym for the worst evil, would have been different. What is certain is that in the first decades of the last century this entity called "Mafia" (which like the state does not exist physically, it cannot be seen, heard, touched) through its various components (powerful families) controlled social life, had rules of organization, orders with the force of law and offered its members stronger protection than the state and even against the state. When the dictator Benito Mussolini visited Sicily in 1924, he was received as a guest and put under the protection of the Mafia, which angered him and made him declare war on the Mafia, the methods and means (of torture) used by the prefect Cesare Mori, to whom Mussolini gave a free hand to eliminate them, were more atrocious than those of the Mafiosi, The violent, bloody repression, sometimes without any proof[23] of guilt[24], led many Mafiosi to take refuge in the USA.

A mortal enemy of the Mafia, including the fact that in 1924 Benito Mussolini was received as a guest of the Mafia in Sicily and not as the head of state, cruel and merciless towards it, he put a surprising emphasis when he said that ***"The Mafia is not a syndicate of people with crime as its aim. Rather, it is a mental illness, along with other good qualities and defects of the Sicilian people, a phenomenon of Sicilianism too, an anti-legal degeneration of a rebellion against the rule of law"***[25]**.**

Family (sacred to Sicilians), the need to protect it against poverty and state authority and/or occupation, pride, courage and fierce repression by the authorities seem to be the root causes, the substratum of the emergence and roots of the mafia. He understood this Leonardo Sciascia, the novelist and politician, scholar and parliamentarian hopelessly in love with Sicily, author of numerous works on the Mafia who said that "*The only institution in the Sicilian consciousness that really matters is the family; it matters more as a contract or a dramatic legal bond than as a natural association based on affection. Family is the Sicilian state. The state is alien to them, just a de facto force-based entity."* . And he was complemented by Robert Kaplan when he said; *"Organized crime in Sicily is a manifestation of millennia of occupation which, with the exception of a few golden ages, has caused poverty, stifled the development of institutions and national consciousness, and demanded informal means of protection against the threat of even greater anarchy."* [26]

Aware of the evolution and the power he had acquired over time, the same L. Sciascia would say in 1964, when the Mafia had a century of existence and many murders behind it but not yet those of Judges Falcone and Borsellini: ***"Is it really possible to conceive the existence of a criminal organization so powerful that it could dominate not only half of Sicily, but the entire United States of America?"***[27]

Obviously, and if all the meanings identified by various authors of the word "mafia" over the ages are true, the word was born on Sicilian soil but has Arab parents, was located in Sicily and evolved from a term with a heroic and positive meaning, to one that entered Sicilian culture with multiple meanings but without negative connotations, to become what it is today, a common noun used to designate associations of people (in so-called "families") whose purpose is to commit serious crimes, with a certain specificity, "families" that have their own rules of organization and management (including the succession of family leadership) rules/orders with force above the law, that control activities with enormous economic power (there are many countries that have a GDP

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[22] *The Origins of the Mafia. It originated from an Arabic word and originally meant the protection of the weak and poor against foreign invasions, at https://adevarul.ro/stiri-locale/botosani/originile-mafiei-a-pornit-de-la-un-cuvant-arab-si-1873155.html*.

[23] Under this new government there is a moral certainty of your guilt, replied the famous prefect Cesare Mori to a no less famous mafia boss Don Vito, suspected of having committed 69 murders and who confessed to being the head of the Sicilian mafia after two hours of cruel torture.

[24] Mori was a scourge of God here; he swept away everything and everyone, guilty and innocent, honest and dishonest, according to his whims and his spies." (L. Sciascia, 1964)

[25] *Apud* Mike La Sorte, *op. cit.*

[26] *Ibidem*.

[27] *Ibidem*.

below that of the turnover of the largest mafia families), but (in Italy in particular) also control of political institutions and public authority, and that have a long history of crime, violence and serious offences behind them.

We should also note here that the size of the Italian mafia and its actions are unparalleled in the world. That in Italy judges (together with their family members) who have investigated and convicted mafia members (Giovanni Falcone and his family and Paolo Borsellino together with his five members of his guard), policemen, journalists, politicians have been assassinated, it is natural that Italians and non-Italians view the mafia differently, because Italians live with the mafia alongside and under the threat of the mafia, while the rest of Europeans feel and see it differently. In Italy, it is not only the economy that is being devoured by the mafia, but also social consensus and civil society, and implicitly politics, are affected, with Sonia Alfano complaining, for example, that German colleagues in the European Union's Anti-Mafia Commission, *"have tried to find obstacles to the confiscation of funds and assets because it is important for them to defend the rights of suspects".* The same Sonia Alfano said in a 2013 Euronews interview that "Unfortunately, the mafia is already in the control room when it comes to Europe. Unfortunately, the mafia has advanced knowledge of what is happening, where it is happening and who is making the decisions. They have relations with people in all the EU institutions, the European Commission, the Parliament, the Council, etc. When I talk about the mafia, I am not talking about the military wing of the mafia, the people who carry out assassinations, robberies, extortions. I'm talking about the white-collar mafia, who work in the institutions, in the public administration, in all the institutional organizations that deal with the EU all the time and who know what strings to pull."[28]

Roberto Saviano[29], Italian journalist and writer, has warned of the power of the mafia to infiltrate any society, even beyond Italy's borders. "Today," says Saviani, "the criminal organization is primarily affecting Europe. The German economy and even the English or Spanish economies, for example, are deeply infiltrated by the mafia, without the governments of these countries informing their citizens. The Mafia is currently a mortal danger for the future of our continent"[30].

Can the word "mafia" regain any of its former positive connotations? It's hard to believe that for the Italians who put the word "mafia" on the pillar of infamy, this could still happen. But it is even harder to believe that the use of the word "mafia" in any context other than to designate associations of people formed to commit crimes could be stopped, the temptation of the forbidden fruit being all the greater the more controversial the fruit, seeming to prove the proverb that anything that is good is either immoral, illegal or fattening.

However, we find it interesting to mention here that in Romanian a word whose original meaning (denotation) was that of robber has acquired in a historical context repudiated today (during the communist period) a positive connotation, that of a man who takes from the rich to give to the poor. Obviously, it's the word "outlaw" which is also trademarked.

However, it must be reaffirmed that **a criminal organization or an association of criminal organizations (of families as they are most often called) with the name Mafia did not exist even when several families (for example, the five mafia families in the USA) had, for a time, a single leadership (a capo di tutti capi), the mafia families often being in conflict with each other for supremacy and territories**. And yet, the word is also often given the value of a proper noun when used to designate entities (as a whole) that carry out mafia-type activities.

But the word **"mafia"** has other meanings and uses, including as a proper name or in the composition of proper names outside Italy.

4. Paradise called "Mafia Island"

An island (413 km^2 with a population of 40,000) on the west coast of the Indian Ocean and belonging to Tanzania, in Swahili (the majority of the 100 languages spoken in the country) is called "***Kisiwa cha Mafia***", meaning **Mafia Island**, the original meaning being a healthy place or archipelago.

Mafia Island, which is a popular tourist destination, is considered a treasure of Tanzania and is protected as a nature reserve.

[28] *Frontline in fight against mafia goes EU-wide, at https://www.euronews.com/2013/10/23/the-battle-front-in-the-fight-against-the-mafia-goes-eu-wide#vuukle-comments-243326.*

[29] Roberto Saviano (b. 1979) is a writer and journalist. In his book Gomorrah, published in 2006, he describes the activities of the criminal organization Camorra (the book's title is a play on words), which sold over 4 million copies in its first two years alone. Threatened by the Camorra, he has been under police protection since October 2006.

[30] *Frontline in fight against mafia goes EU-wide, at https://www.euronews.com/2013/10/23/the-battle-front-in-the-fight-against-the-mafia-goes-eu-wide#vuukle-comments-243326.*

5. Mafia in the world of cinematic art

Dealing with Mafia activities in art films is common in the world of cinema (dominated of course by the American one) and, as a rule, films with such a theme (and there are many such films that have become real propaganda vectors) are popular with the public and have artistic value, so that they enjoy success and not infrequently important awards. Among the best known and most awarded films, the top three (in our top three) are ***The Goodfather, Goofellas*** and ***Scarface***, while ***La piovra***, Italy's most famous TV series, is also considered the most realistic film about the activities of organized crime designated as the "Italian mafia". People learned more about the mafia from realistic films and appreciated the artistic achievements, the films helped to affirm the denotation and connotation of the word "mafia". But has the filmography it is about done any good or harm to the mafia?

On 1 January 2018 (when the UK was still with one foot, in the EU), the ***"McMafia"*** series was released in London, and the fact that it was a film about the so-called ***"Russian mafia"*** (which some authors claim is older than the ***"Italian mafia"***) makes the use of the word no less pernicious than the use of the same word as part (verb element) of a trademark. ***"Mc"***, a synonym of the word ***Mac***, means "son" in Welsh and is a commonly used prefix to Scottish and Irish names, while in Italian the letters ***"MC"*** are used to designate ***"master of ceremonies".*** This means that the title of the British film could be translated as either ***"Son of the Mafia"*** or ***"Mafia Master of Ceremonies"***, and this would mean giving the word "Mafia" a meaning as a proper name, which we do not believe is possible, **since a criminal association bearing this title did not and does not exist**. But we do not believe that the makers of ***"McMafia"*** would have chosen this title, which is admittedly original, for any other reason than its appeal, its (intended) impact on the audience.

The latest Hollywood-ian film with a "Mafia" theme is ***Mafia Mamma***, shot mostly in Rome in 2021-2022, starring Italian (Monica Bellucci among them), Australian (Toni Collette in the lead role) and American actors, and released in cinemas on 14.04.2023. And the fact that the film is an action-comedy with extreme moments of comic and/or violent scenes, at the centre of which is a woman distraught by the happenings of her life (cheating wife, mother stressed by her son's departure for university, assaulted at work by a sexist boss) in the US appointed by her grandfather (a former capo and of whose existence during his lifetime she was unaware) the head of the most important mafia family in Calabria, does not, in our opinion, make him any less innocent, according to the TUE standards in the judgment that generated our comments. And we also note here that when actress Toni Collette, cast in the lead role, read the script, she exclaimed: *"Oh, yeah! I have to do this!*", and after the film was finished he said: *"I've never had so much fun in my life (...). And it was not only the best job of my life – one of the best experiences of my personal life. It was huge for me."*

6. Mafia in music

In 1993 the band *Black Underground*, later called ***B.U.G.***, was founded in Romania. ***Mafia*** (short for "***Bucharest Underground Mafia***", their 1995 debut album was actually called "Mafia". Later the group also set up a production house which they called "***B.U.G. Mafia presents CASA***" and we do not believe that the choice of the word "mafia" in the distinctive sign under which it operates would not be the result of a deliberate connection with the famous mafia and made in consideration of the advantages pursued by the members of the group from the use of this sign.

In 2007, the same year in which the EUIPO application for the EU trademark ***"La Mafia se sienta a la mesa"*** was filed, a band called ***"Swedish House Mafia"*** was founded in Sweden and still exists today, and its name was registered as a trademark of the European Union in 2010 (the applicant and owner of the trademark being a UK company – SSA Merchandise Ltd). With a winding path, the Swedish band has been and still is a successful one, which made its members declare in 2012: "*we've exceeded our dreams and come very, very far*". A year in which, during a concert in Dublin, there were events described by the authorities as "*unacceptable, very serious, stabbings and deaths probably caused by drug use*", and the press commented that always the kind of "*dance music involved drugs (...) Today's generation tends to drink alcohol – they drink indiscriminately. And when you mix a hard drug with, large amounts of alcohol, it's time (for the rest of us) to fight back."* And yes, we don't believe there is any connection between the band name and the events that then took place, nor do we believe that if any other band name had been used, the sad events would not have taken place. The same British company (SSA Merchandise Ltd) has registered the word mark ***„House Mafia".***

7. Mafia and electronic games

In 1986 (the year the Italian TV series "La piovra" began airing in Russia), Russian Dimitri Davidov of Moscow

State University "invented" the game he called "Mafia" for teaching and research purposes[31], which spread rapidly outside schools and beyond Russia's borders (in some European countries it is known as "Palermo City"), including the United States. Essentially, the game is about a battle between the murderous bad guys (mafia) who hid by posing as honest and the good guys who had to prove their innocence and identify and eliminate the bad guys[32]. In 1997, an esteemed author of electronic platform games, Andrew Plotkin (Zarf), arguing that the mafia had less cultural resonance and that the idea of a hidden enemy who during the day seems normal is more appropriate than the werewolf, replaced the villains and the game spread as Werewolf. Subsequently, the game was the starting point for lessons and manuals for teaching body language reading, non-verbal signs and visual psychodiagnosis and for developing other games.

In 2002 the first game (known as *Mafia: The City of Lost Heaven*) for electronic platforms in the successful series called Mafia, action/adventure games with protagonists who get involved in one way or another in mafia activities, either for access and promotion, for punishment.

The Mafia II series (released in 2010), also an action game featuring a young Sicilian-American mobster and war veteran caught in a fight between mafia families in a random town and in which the word fuck is used more than 200 times, well received by the public and critics like the previous series, but it prompted Sonia Alfano (president of the Italian Association of Mafia Victims" Families and president of the European Anti-Mafia Commission, whose father, a teacher and journalist in Sicily, was killed by the Mafia in 1993) to call for the film to be banned. The response from the game's developers was that the depiction of the mafia in the game they created was no different from that in The Godfather, and not only did the game continue unabated, but in 2016 the Mafia III series was released, and in 2020 the so-called "definitive" editions of Mafia II and Mafia III were released.

8. "Mafia" in honest business

In 2013, young Indian Neha Sethia (educated and experienced in banking but passionate about cooking for friends and family) opened a pastry and confectionery shop in Mumbai (Bombay) under the name ***"Sweetish House Mafia"***, a business which, thanks to smart and effective promotion and advertising and the quality of the products, enjoyed rapid success which led her to launch the franchise network of the same name[33] in 2014, with the declared ambition to expand across India. The success was so rapid that, by her own admission, it was astonishing even for the young entrepreneur, who also added that the name given to her business attracted consumers[34]. And we note that Mumbai, India's largest city and financial capital, is home to many mafia-type organizations, the common term for their activities being ***daaku*** in Hindi and ***dacoity*** in the anglicised version. Without following the organizational model of the Italian mafia, Indian criminal syndicates are just as dangerous and violent. And it is obvious that Neha Sethi (who, by the way, did her university studies in the US), did not stop at the word "mafia" to designate her business which is proving to be successful, without making a connection with the real mafia and the power of attraction of this word.

9. The word/sign "mafia" in the composition of the mark La Mafia se sienta a la mesa

In 2000, **La Mafia Franchises S.L.** was founded in Spain, with the word **"mafia"** becoming part of the company's trade name.

On 30.11.2006 another Spanish company (established in 2001 and with last accounts filed in 2012)[35] ***"La Honorable Hermandad S.L. (Honourable Brotherhood)***, whose business was the trade in food, beverages, tobacco, car repairs and the **exploitation of trademarks**, filed with the EUIPO for registration as a trademark of the European Union in classes 25, 35 and 43, a sign consisting of a square with a black background in the centre of which is a red rose and the words La Mafia (in capital letters, in white), and in the lower part of the square, in small font and colour, the words "se sienta a la mesa", it being evident that the dominant elements are the black colour of the square, the words "La Mafia" and the red rose.

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[31] Spelet Maffias historia, anonymous, posted on>> *Epic Mafia – Historia, at https://www17.goteborg.se/ubf/polhem/webb/elevarbeten/webbdesign/2011_3/wd007/historia.html.*

[32] *Dimma Davidoff: ORIGINAL MAFIA RULES at https://www.bing.com/search?pglt=43&q=Dimma+Davidoff%3A+REGULILE+ORIGINALE+ALE+MAFIEI.*

[33] *Sweetish House Mafia Franchise – Find Revenue Sharing, Support and more (franchisebyte.com).*

[35] *LA HONORABLE HERMANDAD SL – Company report, at https://www.empresia.es/empresa/la-honorable-hermandad/.*

The sign was registered by the EUIPO (without observations and/or objections) as a trademark under no. 5510921, and was published in the Community Trade Marks Bulletin no. 24/2007, and subsequently transferred to **"La Mafia Franchises S.L."**

The first **"La Mafia"** restaurant opened in Spain in 2001. In 2014, the number of restaurants operating in the franchise network under this name was 34. After the cancellation of the trademark registration, the network continued to operate and exist under the plain trademark: ***„La Mafia se sienta a la mesa"***.

In 2022 (four years after the cancellation of the trademark registration), the number of restaurants was 50 and the owners announced that they were about to expand into Portugal with a **master franchise** (a franchise in which the master franchisee becomes a mini-franchisor himself), informing those interested about the conditions under which those interested can join their franchise network: (a) minimum investment: from €350,000, depending on the condition and size of the premises; (b) entrance fee: € 28,000 + VAT; (c) 55% royalty on sales / 4% multi-franchise; (d) minimum population: 50,000 inhabitants and (e) the contract term: 10 years, proving that the business is successful.

10. Public positioning of the "La Mafia" brand. Who is the relevant public for EU trademarks?

We shall see below that in the view of the General Court of the European Union, the relevant public on the territory of the Union is *"by definition on the territory of a Member State"* and that *"signs perceived to be contrary to public order or morality are not the same in all Member States, in particular for linguistic, historical, social or cultural reasons"* (para. 25 of the judgment of 15.03.2018). In other words, if a trademark is contrary to public order in an EU country, it must be cancelled, even if the public in other countries does not perceive it as such (contrary to public order and/or morality), and this is logical in view of the principle of the unitary trademark regime of the European Union.

From an article published on 22.02.2014 which we consider relevant to our commentary (but there are many such articles in Italy) and which belongs to journalist Nick Squires[36] we learn that Italians were dismayed, scandalized and outraged by the use in Spanish restaurants of the brand "La Mafia" and images from mafia movies, by the existence of a club ("Mafia Fidelity Club") of customers of these restaurants (estimated to be then 40.000 people) and the use of the word "mafia" as a marketing vector, given the high number of people killed by organised crime groups and other serious crimes committed by them, and asked Spaniards to imagine what their reaction would be to the opening in Italy of restaurants dedicated to ETA terrorists (which still existed at that time as a terrorist and separatist organization in Spain). The same article recalled that Senator Giuseppe Lumia, member of the Anti-Mafia Commission of the Italian Parliament, said that "the use of the word "mafia" in a trademark is scandalous and unacceptable, extremely offensive to the national image of Italy and to all those who have paid with their lives in the fight against mafia clans. The reaction of the Spanish brand owners was a pale one, in that they had no intention of offending the Italians, there are no violent images in their restaurants and that their restaurant chain provided jobs for 400 full-time employees.

In the present case, the General Court of the European Union took into account not only what in trademark law we call "the relevant public"

11. Legal dispute on the use in brands of words contrary to public order or good morals

On 23 July 2015, the Italian Republic, alleging a breach of public order and morality [(art. 7 para. 1(f) of Regulation (EC) no. 207/2009 now art. 7(1)(f) of Regulation (EU) no. 1001 of 14.06.2017 on the European Union trademark[37]] applied for the cancellation of the trademark registration for all the goods and services for which the mark had been registered.

The Trade Mark Cancellation Division of the EUIPO, in its decision of 3 March 2016, granted the application for cancellation of the mark and in so deciding found that the semantic content of the mark in dispute **<u>is deeply</u>**

[36] *Italians take a stand with "Mafia" branding in Spanish restaurants, at https://www.csmonitor.com/World/Europe/2014/0222/Italians-take-umbrage-with-Mafia-branding-in-Spanish-restaurants.*

[37] Article 7, Absolute grounds for refusal (1) (1) The registration of the following shall be refused: (...) (f) marks which are contrary to public order or morality (...). The corresponding texts of the two Regulations (37 and 42 respectively) governing the examination of absolute grounds for refusal are also almost identical in content.

offensive to any person in Europe with a normal level of sensitivity and tolerance. The message of the mark, the EUIPO found, is offensive and downplays the threat of a criminal organization such as La Mafia, and the sign as such diminishes the negative meaning that La Mafia has (*i.e.,* trivialises it), thus being offensive not only to the victims of La Mafia, but also to those who know the violent nature of this organization. The EUIPO Board of Appeal, in its decision of 27.10.2017, upheld the annulment decision adding that the EUIPO must take a strict stance against violations of basic principles and values of European society and apply the general principle that any mark which supports or benefits an organised criminal group should be rejected as contrary to public order. It also pointed out that the trademark clearly promotes in large letters the name of the mafia criminal organization, which the Italian government is fighting through specific laws and enforcement measures. But more than that, the addition of the word "sits at the table" distorts the gravity that La Mafia evokes by conveying a message of cordiality and banality, turning it into a simple gathering around a table. The EUIPO Board of Appeal also argued that the measure of invalidation could not be influenced by the fact that the word element **"mafia" was often used in literature and cinema, nor by the fact that the EUIPO had registered other European Union trademarks containing the same element, namely "mafia", which were not such as to influence the decision to invalidate the mark.**

La Mafia Franchises SL brought an action before the General Court of the European Union against the decision of the EUIPO Board of Appeal of 3 March 2016, seeking annulment of the decision of the EUIPO Board of Appeal and maintenance of the registration of Community trademark no. 5510921. In essence, the applicant argued:

(a) That the cancellation of the registration infringes art. 59(1) letter (a) of Regulation 2017/1001 (in the previous regulation, art. 52(1) lit. (a) which provides that the registration shall be cancelled if it infringes art. 7(1) letter (f) of the same Regulation;

(b) That neither the organization known as the Mafia nor its members are included in the list of terrorist persons and groups annexed to Council Common Position 2001/931/PESC of 27.12.2001 on the application of specific measures to combat terrorism referred to in the EUIPO Guidelines on the examination with a view to illustrating the prohibition of registration of European Union trademarks which are contrary to public order in accordance with art. 7(1)(f) of Regulation 207/2009;

(c) that a European Union trademark must be analysed as a whole or the reference to the verbal element "mafia" alone is not sufficient to conclude that it is perceived by the average consumer as promoting or supporting this criminal organization, the other elements of the mark suggesting rather that it is perceived as a form of parody or reference to the Godfather movies

(d) that the goods and services covered by the contested mark are not "communicating" services, or services which are intended to be used to convey a message to others, and are not registered for the purpose of insulting, shocking or harassing. On the contrary, the general public understands that the contested mark was registered **to designate a chain of restaurants**, the concept of which does not refer to a criminal organization, but to the films in the Godfather series and, in particular, to the values of family and corporatism which those films portray;

(e) a large number of European Union trademarks and Italian trademarks containing the word "mafia" have been lawfully registered and are effective, and cites in that regard two decisions of the EUIPO Board of Appeal which, in its view, are analogous to the present case, namely the decision of 13.01.2012 in Case R 1224/2011 4 concerning the application for registration of the European Union trademark ***MAFIA II*** and the decision of 7 May 2015 in Case R 2822/2014 5 concerning the application for registration of the European Union trademark ***CONTRA BANDO***.

By judgment of 15 March 2018[38] the General Court of the European Union dismissed the application of the applicant **La Mafia Franchises SL**, confirming the decisions of the Cancellation Division and the Board of Appeal of the EUIPO and reinforcing their arguments and concluding that "*the mark in question, taken as a whole, evokes a criminal organization, gives a positive overall image of that organization and therefore trivialises the serious attacks which such an organization commits against the fundamental values of that Union (...). The mark in question is* ***therefore shocking or offensive not only to the victims of this criminal organization and their families, but also to anyone in the Union who encounters this mark and who has average thresholds of sensitivity and tolerance."***

In the view of the TEU, for the purposes of examining the ground for refusal in art. 7(1)(f) of Regulation no. 207/2009, the relevant public cannot be restricted to the public directly targeted by the goods and services in respect of which registration of the trademark is sought, taking into account the fact that the signs covered by that ground for refusal will not only shock the public targeted by the goods and services covered by the sign, but

[38] Recital 47 of the judgment of the TEU of 15.03.2018 in Case T- 1/17.

also other persons who, without being interested in those goods and services, will incidentally encounter that sign in their daily lives.

The General Court concluded that "the relevant public in the territory of the Union is by definition in the territory of a Member State, and the signs likely to be perceived as contrary to public order or morality are not the same in all Member States, in particular for linguistic, historical reasons, social or cultural reasons" so that in applying the absolute ground for refusal of registration based on breach of public order, "account must be taken both of circumstances common to all the Member States of the Union and of circumstances specific to individual Member States which may influence the perception of the relevant public in those States" (recitals 28 and 29).

The EU General Court stated (in para. 25 of the Judgment) that the absolute ground for refusal of registration, *i.e.,* cancellation of the registration of a trademark (in this case, the trademark **"La Mafia"**) **on grounds of infringement of public order or accepted principles of morality** by the sign/trademark applied for and/or registered, is based **on the public interest**, *i.e.,* that the registration or use "in the territory of the Union" of signs contrary to public order or accepted principles of morality **is contrary to the public interest.**

But both the **notions of "public interest", "public order and morality" are merely evoked, presumably considering that they are well known and do not need to be explained** (as the CJEU did in its judgment of 27 February 2020 in Case C-240/18P for the word sign "Fack Ju Göhte" which was held not to be contrary to morality as a trademark);

12. General interest, public order and good morals in trademark law. Impediments in the registration and/or validation/invalidation of trademarks

In definitively annulling the trade mark ***"La Mafia se siente a la mesa" (The Mafia sits at the table)***[39] the EU Court stated (in para. 25 of the Judgment) that the absolute ground for refusal of registration, *i.e.,* for the annulment of the registration of a trade mark (in this case, the trade mark **"La Mafia"**), was based on, on the ground that the sign/trademark applied for and/or registered infringes public order or accepted principles of morality is **in the public interest**, namely that the registration or use "in the territory of the Union" of signs contrary to public order or accepted principles of morality **is contrary to the public interest.** But **"public interest", "public order and morality" are merely evoked, presumably considering that they are well known and do not need to be explained** (as the CJEU did in its judgment of 27.02.2020 in Case C-240/18P for the word sign "Fack Ju Göhte" which was held not to be contrary to morality as a trade mark).

Public order and good morals are traditional means of defending and controlling the observance and realization of "public/general interests". The two notions (public order and morality) are, in our opinion, complementary notions, the relationship between them being from part to whole, because everything that represents the field of public order also belongs (should belong!) to the field of morality, the reciprocity not being entirely valid, because the field of "morality" is much broader than that of "public order", and it is inconceivable that public order contradicts morality. The link between the two concepts is long-standing and very close, and they are not only factually but also legally inseparable. The public/general interest is what law, morality and public order defend and serve.

The notions of **"public/general interest"** and **"public order"** seem to be, like those of **„fairness"** and **"justice"**: unique and universal, so it is natural that they have no plural. Unlike the previous ones, the notion of **"good morals"** induces by its very name the idea of plural, but in this case the plural is necessary to underline the fact that we are talking about several unwritten rules that must be respected in all circumstances and that could be limited, in reality, to only one: honesty in relation to yourself and others. But if by **"good morals"** we mean a set of rules of proper conduct (and to which laws sometimes refer to emphasize the imperative character of certain rules and even the illicit character of certain acts or deeds), then **"good morals"** is confused with **morality itself**, because morality is also defined as the set of rules of conduct of people towards each other and towards the community in which they live, the violation of which is sometimes sanctioned by law.

In law, the notions of "public/general interest", "public morals" and "public order" have, according to most authors, not only the power to limit individual freedoms and rights (as in the case of an absolute refusal of registration for the express and limited reasons laid down by law), but also the quality of making possible the rectification of mistakes (as in the case of the cancellation of the registration of a trade mark on grounds of violation of public order and/or public morals). However, they also have a malevolent quality, that of justifying and/or motivating arbitrary measures and/or decisions by their mere invocation. And when they are not observed, or correctly understood and applied, or when they are abused in their name, they generate not only for those directly harmed, but also for the community as a whole, discontent and critical attitudes that can take

[39] TEU, Judgment of 15.02.2018 in Case T-1/17.

violent forms.

Used in legal life (but also in political life and administration), they take on an aura of majesty, gravity, almost divine and undeniable. They fascinate by their mere utterance, and recourse to the argument of public order or morality makes it impossible to challenge the argument in any other way than to show that the argument does not in fact concern public order or, as the case may be, morality, which is tantamount to establishing their correct content. But how can one effectively combat arguments based on public order or good morals when no one has been able to define them in a way that would be considered satisfactory and generally accepted, no one has been able to say what the rules are according to which the content of public order and good morals is determined and why these notions that should be clear and precise are so vague, so changeable? Their intangibility, to the extent correctly applied, is, however, justified in principle: if they are immaterial and essential, and if they have greater power than the written rules of law (which they remove from application if they are contrary to them), and if they enjoy such a high regard, to deny them is indeed impossible.

Metaphorically likened in doctrine to containers or frames to be filled, their contents turn out to be objectively case-by-case and qualified according to space and time, the context in which they are invoked to be applied, the subject matter and field concerned, and in which the contents have to be determined on a case-by-case basis, and this is fully valid also in trademark law.

13. What is the public/general interest in trade mark law and how does it relate to public order? Irrelevance of the "relevant public" in assessing whether a mark is contrary to public order

The notions of "public interest", "general interest" and "public order", frequently used in law, are difficult (according to most authors, even impossible) to separate and especially to define, from this point of view they resemble that of freedom (as a state of fact and of law) that everyone invokes, knows, desires and wants to take refuge in, but knowing what it is only until they have to define and explain it.

It is no less true, however, that in legal life, definitions, however desirable and useful they may be in practice, can also have perverse effects, consequences that the legislator would not have intended and did not foresee. And since "public/general interest" and "public order" are random and their content differs spatially and changes over time, defining them in anything other than a very general way could even be contrary to the practical needs of application. We believe, moreover, that the public interest and the general interest and public order are notions that the very lack of definitions and of a predetermined and unchanging content and their ambiguity make them what they are and make them so valuable in and for legal life. This makes the task of the interpreter, of the judge, extremely difficult and transforms him *de facto* into a real legislator when he has the task of identifying and applying them to concrete cases.

The general interest is at the heart of societies and laws, it is the cornerstone of good political and administrative decisions and good laws. It is in everyone's interest, it is always there and it should be achievable outside of any coercive measures.

The general interest justifies constitutional, administrative and civil rights and must be taken into account in all circumstances, while the **public interest is that part of the general interest** which **can be achieved/satisfied by the intervention of public force**, but a categorical separation of the two is neither justified nor possible. A French author, for example, in a work devoted to the general interest in various systems of law, points out that ***"the general interest is seen as a third type*** (our note - of interest) ***made up of the fusion, and not simply the aggregation, of private interests and public interests, and resulting in something that goes beyond both and satisfies both without affecting them, but enhancing each other"***[40].

Therefore, although we consider them only partially identical, **we will use the expression "public/general interest" for the purposes of this article.**

The public/general interest is determined on a case-by-case basis by judges, legislators or other authorities, and its determination always involves a value judgment whose quality depends on the degree of responsibility, the level of understanding, the information, knowledge and experience of the person called upon to make it, and his or her wisdom and good faith. And if this is the case, it means that the interpreter has exorbitant power, but also that there is no definitive "public/general interest" (which also applies to "public order" and "good morals", as we shall see below) and that we can only speak of a "public/general interest" in an aspirational sense.

General well-being, living in a state of material and spiritual comfort, the benefits generated for society and the degree of satisfaction of the community with the authority and its decisions, the level of common good are the units of measurement of public/general interest. The interest to be taken into account when a decision has to be taken cannot be limited to that of the moment, because from a more distant perspective, it might even be

[40] G.J. Guglielmi, *L'intérêt général dans les pays de common law et de droit civil*, Éditions Panthéon-Assas, 2017, p. 6.

contrary to the real interest. Of public/general interest are those actions that pursue the good of the community, but it cannot be simplified and stated that when aiming to identify and establish public/general interest, private/private interest could be ignored.

And since the "public/general interest" is (like it or not) also emotional, although it seems to us as static, important and unquestionable, and in fact it is always different in space and time to serve the interests of the user, indeed, defining, understanding and identifying or determining it is not an easy task. And we believe that in the case of ***"La Mafia"*** this is confirmed, and among the questions that arise is whether it has been correctly identified.

It is in **the general/public interest for trade marks** to have registered signs with exclusive right of use which serve to identify the commercial origin of goods and/or services, to differentiate goods and/or services of the same kind of competitors in a market, to provide sufficient information about a product or service so that the consumer is correctly and as fully informed as possible about the commercial origin and qualities of a product or service in a competitive market and can make a choice.

But although the law states that any sign capable of distinguishing goods/services of the same kind and which is capable of representation in a register for the purpose of making it possible to determine the object of protection may be registered, the same law states **that the fact that the sign is contrary to public order and/or morality is an absolute ground for refusing registration or, where appropriate, for declaring it invalid.** In other words, public order limits the right to register distinctive and representable signs as trade marks in the registers if they are contrary to public order and morality and does so in the (general) interest of consumers.

In some cases, the EU General Court has held that the general interest underlying the ground for refusing registration is to avoid the registration of signs which would be detrimental to public order and morality when used in the territory of the Union (para. 25 of the judgment of 15.03.2018 in Case T-1/17), which is a reversal of roles, because it is the function and role of public order to protect the general interest, not the other way round. It is not the public interest that is the reason for absolute refusal of registration, but the sign's conflict with public order that is such a reason. Public order serves the general interest, not the other way around.

At this point of the analysis of the general/public interest, it seems necessary to stop, but without being able to do so as much as would be worthwhile and appropriate given its importance[41] to define and/or identify the **"relevant public"** in trademark law. In fact, the relevant public consists of the group of persons interested in the goods/services bearing the trade marks. Such a public manifests itself as such in trade mark law when it participates in the evaluation in a survey. Otherwise, it is a virtual character in whose "skin" the judge puts himself to answer the question of the relevant audience. Advocate General Paolo Mengozzi considers that this is the average consumer[42], *i.e.*, we add, the person on offer (the recipient of the goods) and placed in the situation of having to choose between several goods of the same kind and who is reasonably educated and sufficiently well informed to be able to formulate a relevant opinion on the mark in connection with the product, of course, which evaluates the mark in a correct, complete, convincing manner. But the judge himself will only rarely (or rather, never) be such a character, and to ask him to judge in this way is to ask him to deduce himself, and we do not think he will ever be able to do so, because that would mean behaving abnormally. That is why we believe that the judge must be helped (it is the role of the parties and the lawyers) with sufficient evidence, explanations, correct and complete conclusions, in order to put him only in a position to judge, and not to behave like such a consumer himself. However, the judge must not assume the role of the consumer alone, nor can the judge simply declare that the relevant public must evaluate the sign/brand as the judge sees fit.

It is no less true that in order to identify the relevant public, it is necessary to take into account the goods and/or services bearing the marks, their nature, the potential consumers, the territory in which the goods are marketed, the degree of personal training and that required for a correct evaluation. For example, a physician recommending a product is more educated and knowledgeable than a patient, so the physician's assessment will be more relevant than the patient's, but the judge could not substitute himself for the doctor and decide in such a specialised field). Even in the case of marks such as those for restaurants, opera titles, business management, etc., the judge will not be able to evaluate one mark or another because it will be impossible for him to convert to an average consumer.

On the other hand, it is not and cannot be only the consumers of the product/service identified by such a

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[41] For a broader discussion see A. Livădariu, *Interpretation of the provisions of Article 7 para. (1)(b) and (c) of Regulation (EU) 2017/1001 on the European Union trade mark. Lack of distinctiveness. Descriptiveness*, article available at *https://www. juridice.ro, Interpretation of the provisions of Article 7 para. (1)(b) and (c) of Regulation (EU) 2017/1001 on the European Union trade mark. Lack of distinctiveness. Descriptiveness, at https://www.juridice.ro/671871/interpretarea-dispozitiilor-articolului-7-alin-1-lit-b-si-c-din-regulamentul-ue-2017-1001-privind-marca-uniunii-europene-lipsa-de-distinctivitate-descriptivitatea.html.*

[42] The judgment of the TEU of 12.03.2020 in Cases T-352/19 and T-353/19. Gamma-A/EUIPO – Zivju pārstrādes uzņēmumu serviss, commented by A. Livadariu on *http://blog.viorelros.eu/2020/08/02/desen-sau-model-comunitar-inregistrat-elemente-efectiv-protejate/*.

mark who are bothered by signs registered as marks and which are contrary to public order. In the case of ***"La Mafia"***, the target audience of the restaurant chain thus identified is the public that appreciates Italian food. But the sign is also visible to non-lovers of such products and even to those who do not frequent restaurants at all, so we believe that, in principle, in the case of marks contrary to public order and morality, the relevant public cannot be limited to the target audience.

It is true, however, that being temperamentally different and with different levels of training and information, their reactions to the signs will be different, so that the general interest will have to be related to the interest of the majority and not to the interest of all. But by eliminating, as happened in ***"La Mafia"***, those at the extremes, *i.e.,* ***"that part of the public that nothing shocks (...) and that can be very easily offended"***, it is quite possible that ***"reasonable people with an average level of sensitivity and tolerance"*** will be in the minority. If this is the case (we have no arguments/documents either for or against), can we then talk about satisfying the general interest by cancelling the registration of the trademark ***"La Mafia"***?

The relevant public from a territorial point of view has been determined according to art. 7(2) of Regulation 207/2009, which states that the absolute grounds for refusal "shall apply even if the grounds for refusal exist only in part of the Community".

In the case of ***"La Mafia",*** it is of course possible that the sign also containing these words and which was registered by the EUIPO in 2007 as a trade mark of the European Union and used in Spain as a registered trade mark (until 15.03.2018 and subsequently in a form which cannot be considered significantly different or less pernicious than its original form and in fact still with trade mark value, true, unregistered) for a network of restaurants with Italian specificity, emotionally affect the majority of Italians (considered the relevant audience for brand evaluation), but this has been shown not to be the case for Spaniards, who frequent these restaurants in large numbers (joining the "Mafia Fidelity Club" brings the advantage of a discount on meals and the chance to win various prizes) despite the fact that Spain is considered the second home of the Italian Mafia[43] and a mafia paradise with over 400 mafia-type organizations[44].

But if the emotional reaction were evaluated quantitatively (because until such an evaluation is made, we only have an unproven claim), it is very likely that the majority of the relevant public, including those in Italy, would (no longer) consider themselves offended by the use of the word "mafia" in registered trademarks or other distinctive signs or logos. In any event, it has not been claimed, requested or proved that a survey with relevant conclusions on these issues was carried out on the initiative of the plaintiff in the lawsuit, and we believe that since "emotional distress" (and which is a matter of good morals, not public order) was alleged, such evidence would have been relevant.

If we assess only qualitatively, then the criterion of the "common good" ("public interest") could be considered to be met by cancelling the registration of the mark ***"La Mafia"*** because repression by any means, including the invalidation of a registration of a mark contrary to public order, is justified by the need to protect the public interest, which is that there should be no such marks on the market. But did the cancellation of the ***"La Mafia"*** trademark registration result to this?

The General Court of the European Union, as is apparent from para. 26 of the judgment, appears to have referred, when assessing the trade mark ***„La Mafia"***, to what in trade mark law we ***call "the relevant public" and excluded in the assessment of the conformity/non-conformity of the mark "La Mafia" with public order and morality" both the relevant public which is not shocked by anything and the public which may very easily be offended"***, stating that the assessment must be made according to ***"the criterion of a reasonable person of average sensibility and tolerance"***. But it also added that *"for the purposes of examining the ground for refusal under art. 7(1)(f) of Regulation no. 207/2009,* ***the relevant public may not be restricted to the public directly targeted by the goods and services for which registration of the mark is sought', it being necessary to 'take into account the fact that the signs to which this ground for refusal relates will shock not only the public targeted by the goods and services covered by the sign, but also other persons who, without having an interest in those goods and service***s, ***will encounter the sign incidentally in their daily lives'*** (recital 27).

This last argument is, in our view, important, although the TEU does not give it the full and deserved relevance since it continues to refer in the following recitals of the judgment to the "relevant public" (which is limited) when assessing the impact of the mark ***"La Mafia"***. **We believe that public order does not relate only to a segment of the public**, not only to professional or specialised consumers, **but to the general public, to the**

[43] *Italian mobsters set up second residence in Spain | International | COUNTRY, available at https://elpais.com/internacional/2021-08-19/las-mafias-italianas-fijan-su-segunda-residencia-en-espana.html; and Silent invasion of Italian mobsters in Spain | Politics | COUNTRY, available at https://elpais.com/politica/2016/11/11/actualidad/1478882478_347375.html.*

[44] S*pain, a mafia paradise, at https://adevarul.ro/stiri-externe/europa/spania-paradisul-mafiilor-928092.html*. According to the post, which quotes the Spanish daily Que, "Spanish police estimate that there are around 400 active mafia groups in Spain, engaged in 40 criminal activities and belonging to 35 different nationalities."

public as a whole, because **by definition public order is the same for everyone.**

Moreover, having analysed the application of the applicant Santa Conte which was refused registration of the trade mark **"CANNABIS STORE AMSTERDAM"** by the EUIPO in a judgment of 12.12.2019, the TEU held (correctly in our view) that the relevant public was **"the general public of the Union"** and that "*since, in the trade mark application, the applicant is targeting everyday consumer goods and services intended for the general public, without distinction according to age,* ***there is no valid reason to limit the relevant public solely to the young public***"[45].

Therefore, we conclude that:

- when examining the conformity of a mark with public order, the assessment must be made by reference to the public at large (the general public) and not by reference to a specialised public or a public made up only of reasonable persons with an average level of sensitivity and tolerance. In other words, the "relevant public" made up of the consumers who constitute the target public for the goods/services is ... irrelevant in assessing the conformity of a mark with public order and good morals.
- the general interest in such cases coincides with the interest of the majority of the public and cannot be limited to the target audience and, of these, to the "average consumer".
- in assessing the public interest, account must be taken of the perverse effects of a measure because, in the present case, it was foreseeable that the declaration of invalidity of the trade mark "La Mafia" would not result in its use being abandoned in another form and that the declaration of invalidity had the effect of increasing interest in it and increasing its reputation.
- in the present case, we believe that it is rather a matter of a public interest, which is expressed (justifiably) to prohibit the use of a sign as a trade mark when this sign is considered contrary to public order.
- the cancellation of the registration of the sign did not satisfy Italy, the public interest or the general interest (invoked) since the sign continues to be used as a trade mark, even if unregistered).

14. The notion of public order in trade mark law

Public order in law (not to be confused with public order in fact, although there is a link between them) and good morals exist in legal life to make possible and protect the general interest (the common good). Frequently used without ever having been used, the concept of public order is considered difficult and even impossible to define, at least in a generally acceptable and accepted manner and/or sheltered from criticism.

Some authors, in trying to define it, quickly found it to be a futile attempt because it is only an adventure on quicksand, on thorny paths or on dangerous ridges, and discouraged, admitted not only that it cannot be defined and clarified, but also that it has the power to seduce, to entice through diversity, evolution, fantasy, to be always surprising, to encourage or discourage. Moreover, they concluded (true, at the beginning of the last century) that *"it would be illusory and inequitable for this concept of public order to be condemned to immobility by being framed in a legal definition, which cannot be other than imperfect. Today, it is unanimously accepted: the content of public order cannot be defined or exhaustively listed*[46]*.* A somewhat similar opinion has been formulated in our doctrine by Professor Bazil Oglindă who believes that *"the scientific approach must be limited to determining the content of public order".* [47]

In a 1953 paper, Philippe Malaurie reviewed 22 definitions of public order and then humorously added that he proposed one himself *"to convince the reader of the impossibility of formulating a synthetic definition of public order"*[48]. The definition proposed by Ph. Malaurie (*"public order is the proper functioning of the institutions indispensable to a collectivity"*) is not convincing, a statement that belongs to Jacques Ghestin[49] (with which we agree) without proposing another, he merely stating his support for a definition by M. Planiol (also reviewed by Ph. Malaurie) but which, in our view, only formulates the criterion for identifying the public order provision. According to M. Planiol, *"a provision is of public order as soon as it is inspired by a general interest which would be compromised if private individuals were free to prevent the application of the law"*[50], a similar definition being formulated in our doctrine by Professor Paul Vasilescu. According to the latter, *"public order is merely the expression of a general interest which may or may not be expressed explicitly by a rule, norm or principle of law"*[51].

[45] Judgment of 12.12.2019 in Case T-638/18 available at *CURIA - Documents, at https://curia.europa.eu/juris/document/document_print.jsf?docid=221872&doclang=RO.*

[46] A. Weiss, *Manuel de droit international privé*, L. Larose & L. Tenin, Paris, 1905, p. 375.

[47] B. Oglindă, *Business Law, General Contract Theory*, Universul Juridic Publishing House, Bucharest, 2012, p. 144.

[48] Ph. Malaurie, *L'ordre public et le contrat (Etude de droit civil comparé. France, Angleterre, U.R.S.S.)*. The same Ph. Malaurie also published *L'ordre public et le bonnes mœurs* in 1952 and *L'ordre public a la fin du XXe siècle* in 1996. *Apud* A. Jeauneau, *op. cit.*, p. 3.

[49] J. Ghestin, *Traité de droit civil, La formation du contract*, 3e ed., LGDJ 1993, p. 86.

[50] *Ibidem.*

[51] P. Vasilescu, *Civil Law. Obligations*, Hamangiu Publishing House, 2018, p. 333-336.

More plastic than the authors quoted above, a British judge, James Burrogh[52], 200 years ago said that *"Public policy is a very unruly horse, and when you get astride, you never know where it will carry you. It may lead you from the sound law"*[53], but his metaphor, which is frequently quoted in the doctrine and jurisprudence of common law states, has an equally beautiful rejoinder: ***"with a good rider in the saddle, the wild horse can be kept under control. Can jump over obstacles. He can leap the crooked walls and bring you down on the right side of the law"***, and the good horseman can be none other than the judge.

The metaphor of the "wild horse" also seems to us appropriate for the ***"La Mafia"*** case since the TEU considered that the existence of other marks containing the word "mafia" or of the same type (Contra Bando) is irrelevant in determining whether the mark ***"La Mafia se sienta a la mesa"*** is contrary to public order because *"decisions on the registration of a sign as a trade mark of the European Union adopted by the Boards of Appeal pursuant to Regulation no. 207/2009 are issued in the exercise of a non-discretionary power and not of a discretionary power. The legality of those decisions must therefore be assessed solely on the basis of that Regulation and not on the basis of a decision-making practice predating them"* (paragraph 49 of the judgment). However, the „unruly horse" has registered at least one mark containing the word "mafia" after the judgment of 15 March 2018. This is the ***"Coffemafia"*** trademark registered in 2020 and is no less critical in its message than ***"La Mafia se sienta a la mesa".***

In another famous judgment, also handed down in the United Kingdom in 1851, a definition of public order is formulated which seems to us the best of those we have identified. According to it ***"public order is a principle of law which holds that no one may lawfully do that which tends to harm the public or against the public good, which may be called … law order or public order in relation to the administration of law"***[54].

We also recall here that Professor Mircea Costin formulates a definition of public order with reference to its content and its evolving or changing character: *"the scope of application of public order - he says - does not always remain the same, it is* ***variable, always changing in harmony with the political, social and economic conceptions*** *of the legislator and differs from country to country, depending on the political dominance of the conception of the ruling political class in that country"*[55].

The trademark ***"Opium"*** is a good example to demonstrate the change in the content of public order, because after being initially rejected for registration as contrary to public order and morality, after a long legal battle it was admitted for registration to designate perfumes, being judged not to be contrary to French public order, because *"an abundant literature has familiarized the public with the figurative meaning of this word, which signifies the removal of real difficulties and evasion in dreams."*[56]

In law in general, and in trade mark law in particular, public order is immaterial (unlike public order in a locality which is a state of fact) and is of a regulatory nature, limiting certain rights and/or freedoms in order to protect the general interest, identified, as we have shown above, with the common good. It is a natural limitation, the aim being to prevent violence, crime, conflict, the denial of what is unacceptable and contrary to the common good. The texts of the European Union trade mark laws (there are no differences between the regulations in force at the time of registration of the trade mark and its cancellation on these aspects[57]) are clear when they provide that:

(i) The exclusive right to use a sign as a trade mark is acquired by registration (the wording of the law is different, but this is the essence of the law and we believe this should be the correct wording);

(ii) A sign may constitute a trade mark if it is capable of distinguishing the goods and services of one undertaking from those of other undertakings and if it can be represented in a register (of trade marks) in such a way as to enable the competent authorities and the public to determine clearly and precisely the subject-matter of the protection conferred on the proprietor of that trade mark;

(iii) Infringement by registration as trade marks of the rights of proprietors of earlier trade marks constitute relative grounds for refusal of registration and, where appropriate, for cancellation of registration, which only arise in the event of opposition by those proprietors of earlier trade marks or a subsequent application for registration by them;

(iv) shall **be an absolute ground for refusal of registration and shall be applied ex officio** by the authority (EUIPO in the case of EU trade marks), inter alia, if the sign is contrary to public order and accepted principles of

[52] James Burrough (1749-1837), British barrister and judge of the Court of Common Pleas and knighted was highly regarded for the common sense and language of his judgments.

[53] Way back in 1824, Burrough, J., in Richardson v. Mellish [1] said: "Public policy is a very unruly horse, and when you get on it, you never know where it will take you. It may lead you from the sound law".

[54] Reprinted in the European Encyclopedia of Law (BETA), available at *https://lawlegal.eu/egerton-v-brownlow/*, accessed 06.06.2022.

[55] M.N. Costin, C.M. Costin, *Dictionary of Civil Law from A to Z*, 2nd ed., Hamangiu Publishing House, 2007, p. 739.

[56] Paris CA, 4th Chamber, 07.05.1979, quoted in A. Bertrand, Droit des marques. Signes distinctifs – noms de domaine, 12th ed., Dalloz, 2005, p. 87.

[57] See art. 7, 37 and 52 of Regulation (EC) no. 207/26.02.2009 and art. 7, 42 and 59(a) of Regulation (EU) no. 11001/14.06.2017.

morality. The examination of this absolute ground for refusal is *ex officio*, but the declaration of invalidity is made following the filing of an application. **This means that in the absence of an application by persons entitled to make such an application, trademarks may exist on the market which are contrary to public order and accepted principles of morality** where the Office has not considered that registration should be refused.

We agree that the right to register signs as trademarks must be limited, as trade mark laws everywhere rightly do by establishing absolute and relative grounds for refusal of registration.

But we doubt that the use of the words ***"La Mafia se sienta a la mesa"*** as even dominant elements of a mark makes the mark in question contrary to public order. Because, as shown below, where we examine the issue of "good morals" as an absolute ground for refusing to register signs as trademarks, another fundamental right, that of freedom of expression, is opposed to such a possibility, and in order not to be repetitive, we develop it below.

We add here, however, that the annulment of the registration of the mark ***"La Mafia"*** by the judgment of the TEU of 15 March 2018 did not solve the problem of violation of public order through its use because it continues to be used as an unregistered mark, that its annulment only increased its notoriety, that it is not excluded that in the future it will be opposed to third parties as a well-known mark, that the use of the sign cannot be prohibited - neither in its original form nor in the form in which it is now used - so that the intended purpose has not been and cannot be achieved.

15. The notion of good morals in trademark law The "Fack Ju Göhte" mark vs. the phrase "Fuck You Goethe"

Article 7(1)(f) of Regulation (EC) no. 40 of 20 December 1993 on the Community trade mark, in force at the date of registration of the trade mark "La Mafia", Regulation (EC) no. 207 of 26 February 2009 on the Community trade mark, in force and applied at the date of the judgment of the EUIPO and the TEU in its judgment of 15.03.2018 and Regulation (EU) no. 1001/14.06.2017 on the European Union trade mark are identical in content and according to them the registration of trade marks "*which are contrary to public policy* ***or*** *to accepted principles of morality' is refused*".

The word "or" when used in a text usually has a disjunctive function to link mutually exclusive or alternative notions and this is the meaning of the word "or" in our text. This means that the legislator makes a clear distinction between them, but often in case law such a distinction is not made, they are linked by the conjunction "and", which means that the notions are considered either of the same kind, or equivalent or at least corresponding or even cumulative. And we have already expressed the opinion that there is a close link between public order and good morals, that in principle, public order cannot contradict good morals, that the field of good morals is much broader than that of public order, but we do not consider them in any way equivalent but only closely linked and complementary.

However, there is also a judgment of the CJEU[58] in which the distinction between public policy and good morals is made, admittedly briefly, but also with reference to the Opinion of Advocate General M. Bobek[59], which is also extensive on this aspect and was adopted by the Court. This is the Judgment of 27 February 2020 on the ***"Fack Ju Göhte"*** trade mark, admitted for registration by the CJEU as not being contrary to good morals, although the EUIPO and the TEU considered it contrary to good morals.

Doctrine is not much more generous in explaining the notion of "good morals", and among the authors and works identified by us in Romanian doctrine, two caught our attention.

The first is the opinion of academician Liviu Pop who defined good morals as *"the totality of the rules of good conduct in society, rules that have taken shape and permeated the consciousness of the majority of the members of society, whose observance has become obligatory, through long experience and practice, ensuring respect for social order and the common good, in a word, the protection and realization of the general interests of a given society"*[60].

The second is that of Professor Paul Vasilescu and according to him, good morals should be understood as a *"set of ethical rules that are known and shared by most members of society, as the morals of public opinion"*[61]. His Lordship, noting the crisis and confusion of values, also offers a criterion for identifying these rules, stating that *"common sense and secularised Christian values constitute the practical criterion applicable in a concrete*

[58] Judgment of the CJEU, 27.02.2020, Case C-240/18 P, *Constantin Film Produktion GmbH v. European Union Intellectual Property Office (EUIPO)*.

[59] Oral arguments of Advocate General Michal Bobek delivered on 2 July 2019(1) in Case C-240/18 P, *https://curia.europa.eu/juris/document/document.jsf;jsessionid=FBC47417A10F74AB8AC75982ACF45C45?text=anddocid=215701andpageIndex=0anddoclang=ROandmode=reqanddir=andocc=firstandpart=1andcid=3424512*.

[60] L. Pop, *op. cit.*, p. 216.

[61] P. Vasilescu, *op. cit.*, p. 334.

case to assess whether or not a particular convention is contrary to morality"[62].

Determining the good morals that have the effect of limiting rights (in this case, to register a sign as a trade mark) is, however, an even more difficult task than identifying the content of public policy, because good morals have a moral basis which can only be subjective, whereas public policy has a legal basis which is objective. However, the determination of the content of good morals can only be the work of the judge, which means that we also confer on judges a social health function of safeguarding social ethics. This implicitly means that good morals are represented by the moral concepts of judges. Uniformity of morals (as well as public order) is absolutely necessary for the cohesion of society. Determining good morals is a necessary task for the judge but *"in the absence of objectively defined morals, there is a risk of identifying good morals with the moral conception of the judiciary or with the moral concepts of the judiciary"*[63] which can do so under the legality control of the Courts of Cassation

Good morals are only the moral aspect of public order[64]. They are those moral rules which, in the interest of society (general, common, public interest), must be respected from and by one's own will. The dividing line between "public order" and "good morals" is, however, difficult to draw and if a boundary exists between them, then it is very permeable, for both categories, the content remaining vague, fluid, mutable in time and space, contextual.

Are good morals no longer among the grounds limiting the exercise of rights? The French doctrine has noted this and bases its opinion on the elimination from the Civil Code as amended in 2016[65] (massively, n.a.) of the grounds limiting the contractual freedom of good morals and which is in line with the case law of the French courts prior to this amendment[66].

And in our doctrine the academician Liviu Pop points out that ***"there is a real danger that in the future, the concept of good morals will become devoid of real content and substance and become inoperative"***[67]. Although we believe that this will not happen, we must nevertheless note that it is undeniable that there is a tendency to dilute what we call "good morals", to reduce the consistency and value of content since attitudes, actions and behaviours considered immoral a short time ago, under the pretext and increasing pressure of human rights, are now considered moral, and not even criticism of them on the basis of other fundamental rights, such as freedom of opinion, freedom of expression or the right to disagree, is not granted anymore. The CJEU's decision to grant registration of the ***"Fack Ju Göhte"*** trade mark is good evidence of this trend.

This judgment and the conclusions of Advocate General M. Bobek also have the merit of having provided arguments that we consider relevant to the criteria for distinguishing public order from good morals. In analysing these differences, it has been shown that the essential difference between the two concepts lies in the way in which they are established and therefore recognised, because whereas refusal to register a trade mark on grounds of public policy is based on an assessment made on the basis of objective criteria, refusal of registration on grounds of public policy involves the examination of subjective values. Public order, says M. Bobek, is *"the normative expression of the values and objectives defined by the relevant public authority, expresses the wishes of the public regulatory authority regarding the rules to be observed in society, and its content must derive from official normative sources and/or documents of public interest (...) it must first be created by a public authority and only then followed"*[68]. However, as M. Bobek, refers to *"the interpretation of values accepted by consensus or imposed by the majority of a society at a given time, it refers to the set of rules that aims to induce and maintain behaviour. And while public order is top-down (from authority to those in authority who are constrained in their behaviour), morality evolves from the bottom up."*[69].

We believe, however, that limiting public order to values established by law alone is not acceptable. Our doctrine considers that the extent of public order is determined by reference to the Constitution, laws and rules established by custom or case law[70].

Good morals, like public policy, is determined on a case-by-case basis, is not immutable in its content and is subjective, the interpretation given to the concept of good morals in the case of the ***"Fack Ju Göhte"*** trademark being relevant. Thus:

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[62] *Ibidem*.

[63] J. Ghestin, *op. cit.*, p. 106.

[64] *Ibidem*.

[65] By Ordinance 2016-131.

[66] G. Chantepie, M. Latina, *La réforme du droit des obligations. Commentaire théorique et pratique dans l'ordre du Code civil*, Dalloz, 2016, p. 85.

[67] L. Pop, *Treatise on Civil Law. Obligations. vol. III, Non-contractual Obligatory Legal Relations*, Universul Juridic Publishing House, Bucharest, 2020, p. 216.

[68] M. Bobek, Conclusions in Case C-240/18 P.

[69] *Ibidem*.

[70] P. Vasilescu, *Civil Law. Obligations*, Hamangiu Publishing House, Bucharest, 2018, p. 333.

(i) On 21 April 2015, the applicant Constantin Film Produktion applied to the EUIPO for registration as a trade mark of the European Union (for numerous goods and services in 13 different classes) of the word sign ***"Fack Ju Göhte"***, which is also the title of a successful film comedy (made in 2013) in Germany, followed by two more films called *"Fack Ju Göhte 2"* and *"Fack Ju Göhte 3"* in 2015 and 2017 respectively.

(ii) On 25 September 2015, the trade mark examiner, citing the sign as being contrary to accepted principles of morality and relying on art. 7(1)(f) and 7(2) of Regulation 207/2009, decided to deny the application;

(iii) The applicant's appeal to the EUIPO was dismissed by the Fifth Board of Appeal by decision of 1 December 2016, pursuant to art.s 58-64 of Regulation 207/2009;

(iv) By application to the General Court of the European Union dated 3 February 2017, the applicant sought the annulment of the Decision of the Board of Appeal and the TEU, by Judgment of 24 January 2018, rejecting the application, also held that the sign for which registration was sought was contrary to good morals;

(v) Against the judgment of the TEU of 24.01.2018, Constantin Film Produktion GmbH appealed (which was heard in adversarial proceedings with the EUIPO), and by judgment of 27.02.2020, the Court of Justice of the European Union annulled the judgment of the TEU of 24.03.2018 and the decision of the Fifth Board of Appeal of 1 December 2016, with the consequence that the sign ***"Fack Ju Göhte"*** was registered as a trade mark for all the goods and services for which registration was sought.

The CJEU held that the ground for absolute refusal of registration was only the sign's contradiction with public morality, not with public policy, so that the appeal was examined on that ground alone. The concept of good morals, the Court pointed out, *"must be interpreted in the light of **its ordinary meaning as well as of the context** in which it is generally used. However, as the Advocate General has essentially pointed out (...), this notion refers, in its ordinary sense, **to the fundamental legal values and norms to which a society adheres at a given time.** These values and norms, which **may evolve over time and vary spatially, must be determined according to the social consensus prevailing in that society at the time of assessment.** In making this determination, due account must be taken of the social context, including, where appropriate, its cultural, religious or philosophical diversities, in order to objectively assess what that society considers morally acceptable at the time."*

The fact that a sign is in bad taste is not sufficient to consider it contrary to morality, as this requires that the relevant public, made up of reasonable people with average thresholds of sensitivity and tolerance, perceive it as contrary to the fundamental moral values of society, with elements such as legislative texts, public opinion and the reactions of the relevant public to similar signs in the past being relevant in the assessment.

In the grounds of its judgment of 27.02.2020, the Court also pointed out that the phonetic similarity of the sign ***"Fack Ju Göhte"*** with the expression ***"Fuck You Goethe"*** is also not denatured in such a way as to offend or shock the public because, on the one hand, the expression "fuck you", although in its main meaning it has a sexual connotation and is marked by vulgarity, used in different contexts it expresses distrust, anger or contempt.

We note from the recitals of this CJEU judgment the arguments that the sign ***"Fack Ju Göhte"*** coincides with the titles of three successful film comedies seen by millions of viewers who were not emotionally affected by these titles and that in the examination of the sign it is not possible to disregard contextual elements likely to clarify how the relevant public perceives this sign. This argument is, mutatis mutandis, also fully valid for the trademark ***"La Mafia"*** (in the judgment of which, before the CJEU, numerous films, literature and the existence of other trademarks containing the word "mafia" were invoked) so that we do not exclude the fact that if an appeal had been lodged against the judgment of the CJEU of 15.03.2018, the registration would have been validated.

Equally interesting and relevant (also for the judgment given by the TEU on the ***"La Mafia"*** trade mark) is another argument of the CJEU in para. 56, according to which in trade mark matters, in application of art. 7(1)(f) of Regulation no. 207/2009, account must also be taken of the principle of freedom of expression, which the CJEU wrongly held did not exist in the field of trade marks (and whose applicability was recognised by the EUIPO at the hearing, the CJEU judgment notes), a principle which is formulated in art. 11 of the Charter of Fundamental Rights of the European Union and supported by recital 21 of Regulation 2424/2015, amending Regulation 207/2009, which provides that "(...) ***In addition, the provisions of this Regulation should be applied in a way that ensures full respect for fundamental rights and freedoms, in particular freedom of expression."***

We cannot fail to note here that the argument of freedom of expression as a fundamental right clashes with that of the absolute prohibition of the registration as trademarks of signs contrary to public policy and the question then arises: who should be given priority: the fundamental right of freedom of expression or the obligation to respect the public order of the signs for which registration is sought?

We believe that the answer can only be that the fundamental right is the hard core of the right and is part of public order, so that the exercise of a fundamental right (to free expression) cannot be considered a violation of public order. But in this case any sign for which registration as a trade mark is sought is an exercise of freedom of expression as a fundamental right, so its registration cannot infringe public policy. In other words, the

prohibition of registration of signs contrary to public policy as trade marks becomes unnecessary. This means that all decisions rejecting signs as trade marks on the grounds that they infringe public policy violate a fundamental right of applicants.

16. Is freedom of expression a threat to trademark laws?

The word ***"slants"*** has a negative connotation in American English and is used in a pejorative sense to discredit Asians. In 2006, the all-Asian American dance-rock band The Slants was formed in Portland, Oregon. The band has become known and appreciated not only for its music but also for its civic, anti-racism activities, raising money for research, fighting bullying, building community help centres, etc. In 2010, bandleader Simon Tam applied for trademark registration of the word ***"The Slants"*** for entertainment services, but the US Patent and Trademark Office (USPTO) rejected the application under the word that under the Lanham Act (Trademark Act of 1946) it is prohibited to register trademarks that may disparage any "*persons, living or dead, institutions, beliefs or national symbols or bring them into contempt or disrepute.*"

As Simon Shiao Tam and his band were also seeking, among other things, to mitigate/eliminate the pejorative connotation for the benefit of Asians (because there was no ban on the use of the word "The Slants" for his band), he stalled in his efforts, so a lengthy legal battle ensued. In December 2015, the U.S. Court of Appeals for the Federal Circuit declared the Lanham Act unconstitutional in part and allowed *"The Slants"* trademark to be registered, and the U.S. Supreme Court ruled on June 19, 2017, in the case known in the doctrine as Matal vs. Tam[71] that the disparagement clause in the Lanham Act violates free speech rights and that the government cannot discriminate against offensive trademarks[72]. Commenting on the decision, Professor Eugene Volokh[73] said it makes clear that *"speech that some find racially offensive is protected not only against outright prohibition, but also against lesser restrictions."*[74]

On June 18, 2014, the Trademark Trial and Appeal Board (TTAB) cancelled the six Redskins[75] marks belonging to the Washington Redskins football team's Pro-Football Inc, the reason being the disparaging connotation of the word "redskins" to Native Americans and that it may disparage Native Americans in violation of the disparagement clause of the Lanham Act. The TTAB decision was appealed on the grounds of "violation of federal case law and violation of free speech" but the appeal was dismissed by the US District Court in Alexandria.

The trademarks were registered in the 60s and 70s of the last century and have been used without dispute. In 1992, a group of seven Native Americans petitioned to cancel their registration but were unsuccessful, a cancellation decided by the USPTO in 1999 was overturned by a district court on the grounds that there was no evidence of discrediting, appeals were dismissed on formal grounds (negligence, lack of diligence on the part of the plaintiffs), and the Supreme Court refused to hear the case.

A new initiative by the National Congress of American Indians, supported this time by President Barack Obama and 50 senators, has ended in success for the plaintiffs, with the trademarks being cancelled. The club was able to continue to use its name, but in 2020, amid the unrest and anti-racism demonstrations following the police killing of African-American George Floyd, it decided to drop the use of the word "redskin" from its name.

Although the judgments in the two cases are contradictory, the conclusion that emerges is that freedom of expression is a danger to the trade mark law rule that marks contrary to public policy and morality are prohibited from registration.

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[71] Published as "MATAL, INTERIM DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE v. TAM", available at *15-1293 Matal v. Tam (06/19/2017), at https://www.supremecourt.gov/opinions/16pdf/15-1293_1o13.pdf.*

[72] L.P. Ramsey, *First Amendment protects offensive trademarks | Regulatory Review, at https://www.theregreview.org/2017/07/25/ramsey-first-amendment-protects-offensive-trademarks/.*

[73] Eugene Volokh is a mathematician, computer scientist and lawyer. He has a rich activity as a lawyer and author of legal works.

[74] *Apud* Lisa P. Ramsey.

[75] The decision is available on *USPTO TTABVUE. Proceeding Number 92046185, at https://ttabvue.uspto.gov/ttabvue/v?pno=92046185&pty=CAN&eno=199.*

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ARTIFICIAL INTELLIGENCE AND MORAL RIGHTS

Ruxandra VIȘOIU[*]

Abstract

Artificial Intelligence or AI, for short, has been a subject of great interest in the last few years. Its understanding and implementation raise many questions about how our world will look like in the future. These matters have greatly impacted the legislative field, along with the fields of technology, security education - and the list stays open. This paper aims to highlight the main key aspects of AI, its current legal framework (or, rather, lack thereof), along with a more in-depth analysis of moral rights in the field of AI.

Keywords: *artificial intelligence, technology, digital age, European Union.*

1. Introduction

Philosopher and technologist Nick Bostrom famously mentioned: *„Machine intelligence is the last invention that humanity will ever need to make*[1]". That can be seen in a positive light, because once they become „intelligent" machines will make our day-to-day life easier. Or it can be seen as a warning - once computers gain the power to think like people, would us humans be of any use in the end?

But despite the controversies and even fear that artificial intelligence brings on, this phenomenon is not slowing down in the slightest. On the contrary, the private and public sector are allocating more and more resources in order to understand and develop AI. All this gives rise to new concerns, especially when it comes to the field of law.

Artificial intelligence or AI, for short, represents the intelligence that machines can express, in contrast to the natural intelligence of humans. As its name suggests, AI does not occur by itself in nature, although it is, in the end, a byproduct of natural human intelligence.

People exhibit intelligence that is developed naturally by birth and nurtured through education. Similarly, even animals can have manifestations that we recognize as „intelligent". Some even express creativity, by producing art or musical pieces, like the paintings of Pigcasso the pig[2] and the NFTs created by Suda the elephant[3]. Some consider that even plants express intelligence or signs which we associate with intelligence, such as reacting to human affection, music or being repulsed when exposed to unpleasant words.

On the other hand, AI is the creation of machines that, in turn, are based on software and hardware created by humans. The difference is that humans only develop the machine, while the rest of the "work" is carried out further by the robot directly. Moreover, the intelligence of machines does not stagnate, but evolves over time when is "fed" with new data. Sometimes, the robot can even create its own new experiments and data to process, so it can continue growing by its own.

2. Fields where we find AI

AI can be found in many fields and their number is on the rise. For example, e-commerce is one of the most common areas where we find this technology on a daily basis. AI can generate a personalized online shopping experience based on our interests, previous shopping experiences and the clothes we currently have in our wardrobe. Also, with the help of chatbots[4] we can shop more efficiently, without interacting with unpleasant shop assistants or losing time in brick-and-mortar facilities. Even Amazon announced they will soon implement chatbots, which will be a great improvement for the clients of the online shopping giant.

The field of education also had a lot to gain from the rise of AI. During the Covid19 pandemic, online courses became the rule, not the exception, in education. This did not only include Zoom classes, but also Virtual Reality

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[1] The present work only addresses the AI in relation to copyright. But artificial intelligence is also greatly involved in other intellectual property fields, as well, such as patents (see N.R. Dominte, *Inteligența artificială versus inteligența umană*, in RRDPI no. 4/2019, pp. 89-97) and trademarks (see I. Chiriță, *Reflecții analitice despre cercetarea anteriorititilor mărcilor UE*, in RRDPI no. 3/2019, p. 115).

[2] *https://pigcasso.org*, accessed on 11.10.2022.

[3] *https://elephantartonline.com/collections/suda*, accessed on 11.10.2022.

[4] Chatsbots like MobileMonkey (*https://mobilemonkey.com/*) and Giosg (*https://www.giosg.com/*) are already used by online businesses to interact with their customers and to issue automatic responses.

(VR)[5] experiences, such as technical explorations inside spaceships or virtual surgeries for medical students. In addition to hyper-realistic experiences, AI is successfully used to make predictions in the educational field and optimize the quality of information provided to students. Once intelligent programs begin to analyse standardized tests used in education, as well as the results obtained by large samples of students, one can see possible errors more easily and make predictions for students taking such tests in the future. A big advantage of AI is that it can process large amounts of information very quickly, and tasks which would normally take teachers multiple hours of work can now be completed in minutes, with the right software program.

The creative field has also benefited greatly from the large-scale use of AI. Artificial intelligence has risen in popularity at the end of 2022 through a new internet trend, set on the border between entertainment and art: the creation of personal avatars by using a series of selfies uploaded to the Lensa mobile application[6]. These avatars were uploaded by individuals on various social media platforms, especially Facebook and Instagram. But this AI tool was also greatly criticized, firstly for legal reasons. Most of its users were not aware of the app's terms and conditions, which took over all copyright of their selfies. In other words, at the touch of a button you lost all rights over your own pictures. They could further be used for face detection, facial feature analysis, or other similar purposes. Another issue of Lensa was highlighted by the digital artist community. Because the software was extremely accessible at only 5 euros, this AI tool would rob many artists of their daily work and income. So, in the end, it seems very plausible that AI could „steal" jobs from humans in the future.

Content creation has also become much more convenient with the use of AI technology. Platforms like OpenAI's ChatGPT[7], Jasper[8] or Copysmith[9] can create articles in a matter of minutes, on any subject you choose. This is a very convenient option for businesses who do not have the budget to hire big marketing firms for content creation. One of the most popular AI platforms that emerged at the end of 2022, also useful for accessing general information, solving math problems, even writing poems, is ChatGPT, a chatbot created by OpenAI[10]. Problem solving seems to be more accessible than ever, which could potentially put many professions in jeopardy, lawyers included[11].

AI is not seen as a threat only to various professionals, but also in the field of security. The use of artificial intelligence, especially unmanned vehicles in wars and international conflicts, has been a highly controversial subject[12]. Another serious subject is data mining, which is closely linked to AI[13]. And while the environment can greatly benefit from AI and the modern technology it produces[14], these new technologies involve a large investment of resources, which could also bring harm to our planet. Not to mention the ethical aspects of AI[15] and the way it could be used to access and manipulate the human mind, including its potential criminal liability[16].

All this reflects in the legal framework of AI - or rather, lack thereof, as we will show below.

3. The existing legal framework on AI

One of the biggest problems that AI poses at present, to lawyers and other legal professionals alike, is that we still do not have a set legal framework for this new type of technology. This legal void is found at all levels – internationally, at EU and at national level, in Romania.

At an international level, the most important act at present is the UNESCO global agreement on the ethics of AI[17], which was adopted in November 2021 by the 193 Member States at their National Conference. The

[5] Kavanagh, S., Luxton-Reilly, A., Wuensche, B. and Plimmer, B., *A systematic review of virtual reality in education. Themes in Science and Technology Education*, 10 no. 2 of 2017, pp. 85-119.

[6] *https://www.cnbc.com/2022/12/07/lensa-app-turns-selfies-into-avatars-with-artificial-intelligence.html*, accessed on 19.01.2023.

[7] *https://chat.openai.com*, accessed on 19.01.2023.

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[9] *https://copysmith.ai/*, accessed on 19.01.2023.

[10] *https://openai.com/blog/chatgpt/*, accessed on 19.01.2023

[11] In USA, a robot-AI lawyer will be used for the first time for defence in court regarding a ticket. While we do not expect this kind of technology to be also used in Romania anytime soon, this is a very important step in the more generalised used of AI: *https://www.cbsnews.com/news/ai-powered-robot-lawyer-takes-its-first-court-case/*, accessed on 19.01.2023.

[12] For further details see A.-Al. Stoica, *A legal perspective on how unmanned vehicles will influence future conflicts*, Challenges of the Knowledge Society Journal 2022, pp. 426-434.

[13] See M. Lupașcu, *Text and data mining exception - technology into our lives*, Challenges of the Knowledge Society Journal 2019, pp. 905-915.

[14] See Xiang, Xiao Jun, Qiong Li, Shahnawaz Khan and Osamah Ibrahim Khalaf, *Urban water resource management for sustainable environment planning using artificial intelligence techniques*, Environmental Impact Assessment Review vol. 86 of 2021, art. no. 106515.

[15] AI has also been analysed alongside FoT or the Freedom of Thought, which also raises serious ethical issues. See McCarthy-Jones, Simon, *The Autonomous Mind: The Right to Freedom of Thought in the 21st Century*. Frontiers in Artificial Intelligence, Vol 2. Article 19, September 2019, SSRN: https://ssrn.com/abstract=3456551.

[16] For an in-depth analysis on this subject, see Maxim Dobrinoiu, *The influence of artificial intelligence on criminal liability,* Challenges of the Knowledge Society Journal 2019, pp. 48-52.

[17] *https://unesdoc.unesco.org/ark:/48223/pf0000381137*, accessed on 29.12.2022.

document is named „Recommendation on the Ethics of Artificial Intelligence" and is more similar to a white paper, than an actual agreement with set regulations. The Recommendations are set forth in a reader-friendly format, as a presentation filled with visuals. It contains quite general provisions for the member states, which is not unexpected, given the very name of the document and also its preamble: *„Recommends that Member States apply on a voluntary basis the provisions of this Recommendation by taking appropriate steps, including whatever legislative or other measures may be required, in conformity with the constitutional practice and governing structures of each State, to give effect within their jurisdictions to the principles and norms of the Recommendation in conformity with international law, including international human rights law"*.

The UNESCO agreement reminds the member states of the core values that should be kept when dealing with AI, such as respect for the human rights and fundamental freedoms, peace, diversity and inclusion, while focusing on the main fields that AI is expected to impact, like data policies, education, research and healthcare. Therefore, the Recommendations seem to have rather an educational purpose, than an actual regulatory one, by showing the world how artificial intelligence is expected to change our general way of life, as well as possible (and very general) measures that could be taken in order to make sure that its impact is safe and positive.

Going further, at a European level, there were several attempts to regulate the field of AI, but no definite results were reached until the present date. In April 2021 a proposal for a new regulation was issued „Laying down harmonized rules on artificial intelligence (artificial intelligence act) and amending certain union legislative acts" [18,] along with its annexes[19]. This was also called the Artificial Intelligence Act or AIA, for short. AIA was influenced by a previous EU document, a white paper on „Artificial Intelligence - A European approach to excellence and trust"[20]. This white paper, as its name entails, does not offer an actual legal framework for artificial intelligence, but rather explains in a more philosophical manner the directions EU and the member states should take in future legislation[21], in the context of AI advantages[22], but also its risks[23].

The paper also makes an open invitation to comments on the said proposals. The consultations were open until May 2020[24]. The Romanian state actually issued an official response[25] to AIA, by Senate dec. no. 110/2021 on the proposal for a Regulation of the European Parliament and of the Council establishing harmonized rules on artificial intelligence (artificial intelligence law) and amending certain legislative acts of the Union - COM(2021) 206 final. The Senate decision is quite concise – it shows that the EU document respects the principles of subsidiarity and proportionality, while offering a balanced approach in the field of AI and establishing a robust and flexible legal framework.

As for the content of AIA, the act starts with an explanatory memorandum, which show what AI is, how it can help society[26] and what previous steps were taken in the process of regulating AI[27]: *„Artificial Intelligence (AI) is a fast evolving family of technologies that can bring a wide array of economic and societal benefits across the entire spectrum of industries and social activities."*. After the memorandum, the document continues with

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[18] *https://eur-lex.europa.eu/resource.html?uri=cellar:e0649735-a372-11eb-9585-01aa75ed71a1.0001.02/DOC_1&format=PDF*, accessed 27.12.2022.

[19] The annexes are practically lists of items that complete certain articles from the regulations themselves -*https://eur-lex.europa.eu/resource.html?uri=cellar:e0649735-a372-11eb-9585-01aa75ed71a1.0001.02/DOC_2&format=PDF*, accessed 27.12.2022.

[20] *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0065&from=EN*, accessed 27.12.2022.

[21] *„If the EU fails to provide an EU-wide approach, there is a real risk of fragmentation in the internal market, which would undermine the objectives of trust, legal certainty and market uptake. A solid European regulatory framework for trustworthy AI will protect all European citizens and help create a frictionless internal market for the further development and uptake of AI as well as strengthening Europe's industrial basis in AI*."

[22] *„Artificial Intelligence is developing fast. It will change our lives by improving healthcare (e.g., making diagnosis more precise, enabling better prevention of diseases), increasing the efficiency of farming, contributing to climate change mitigation and adaptation, improving the efficiency of production systems through predictive maintenance, increasing the security of Europeans, and in many other ways that we can only begin to imagine*."

[23] *„The main risks related to the use of AI concern the application of rules designed to protect fundamental rights (including personal data and privacy protection and non-discrimination), as well as safety and liability-related issues*"

[24] *„The Commission invites for comments on the proposals set out in the White Paper through an open public consultation available at https://ec.europa.eu/info/consultations_en. The consultation is open for comments until 19 May 2020*."

[25] *https://www.juridice.ro/750742/senatul-romaniei-considera-ca-legea-privind-inteligenta-artificiala-stabileste-un-cadru-juridic-robust-si-flexibil.html*, accessed on 30.12.2022.

[26] *„the use of artificial intelligence can support socially and environmentally beneficial outcomes and provide key competitive advantages to companies and the European economy*".

[27] These mainly concerned previous discussions in the field of technology, which brought AI in question only sparingly, like the 2017 Conclusions of the European Council meeting regarding emerging trends, including AI (*https://www.consilium.europa.eu/media/21620/19-euco-final-conclusions-en.pdf*), the 2019 Conclusions on the Coordinated Plan on the development and use of artificial intelligence Made in Europe (*https://data.consilium.europa.eu/doc/document/ST-6177-2019-INIT/en/pdf*), the 2020 Presidency Conclusions which addressed concerns regarding AI systems (*https://www.consilium.europa.eu/media/46496/st11481-en20.pdf*), but also a report on AI and intellectual property from 2020 (*https://www.europarl.europa.eu/doceo/document/A-9-2020-0176_EN.html*) and AI on criminal matters (*https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2020/2016(INI)*). As it shows, these documents were mostly opinions and report, not mandatory directions to guide us in our path to a safer and more efficient AI system of the future.

an actual proposal. It consists of the recitals[28] and the provisions, which list main definitions (including AI systems[29]), prohibited AI practices, obligations of notification, conformity and transparency. It also establishes a European AI board and obliges the member states to each designate national authorities that will deal with AI conformity. The penalties set forth in the act for non-conformity are also very high, up to 30 Mil. Euro or 6% of a company's annual turnover[30].

When it comes to intellectual property and copyright, specifically, AIA does not provide relevant regulations[31]. And, even to this day, the general procedures for AIA and its mandatory applicability have not been finalized. We expect that various parts of this document will be updated in time, to keep up with the ever-changing technology of AI. We cannot help but see that the general tone used in the Regulations is mostly cautious, even fearful when it comes to these new technologies. Hopefully, this will change in time, given the more extensive exposure that the wide public (including our legislators) will have to AI in the coming years.

Among the more recent[32] acts in the field of AI, we should also mention the Proposal for a Directive on adapting non-contractual civil liability rules to artificial intelligence[33] and the Proposal for Revision of the Product Liability Directive[34], both issued in September 2022 by the Commission[35]. The first document should lead to harmonization of national liability rules in the field on AI, making it easier for victims of AI-related damage to receive proper compensation. And the latter aims to modernize existing rules on the liability of manufacturers for defective products.

Another relevant document for AI at EU level is the General Data Protection Regulations, GDPR for short. The European Parliament even issued a study, called „The impact of the General Data Protection Regulation (GDPR) on artificial intelligence"[36], which contains several interesting points. Although GDPR contains no actual mention of AI in its text, it does however contain legal provisions relevant to this field, including multiple referrals to automated decision-making which naturally involve AI. For example, according to art. 2 para. 1, GDPR applies to data processing which is either done manually or automatically[37]. Also, the definitions for „processing"[38] and „profiling"[39], found in art. 4 are closely linked to automation. And when it comes to general automated decision-making and profiling, based on special categories of personal data, they are only allowed under specific conditions, which become important when it comes to information provided to the data subject by the controller, when personal data is collected from them (art. 13 para. 2[40]), are not collected (art. 14 para 2[41]) and general

[28] The act lists no less than 89 paragraphs detailing the context for these regulations.

[29] *„software that is developed with one or more of the techniques and approaches listed in Annex I and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with*".

[30] The manner in which these regulations are set up reminds us greatly of GDPR and, once enforced, we expect to cause similar controversies and, most probably, difficulties in implementation within the member states.

[31] The act only mentions copyright once, when referring to an older EU resolution from 2020, and intellectual property a few more times, in connection with transparency obligations and the attributions of national competent authorities in the field of AI.

[32] There are also various older EU documents in the field of AI, for example the Report with recommendations to the Commission on Civil Law Rules on Robotics from 2017, *https://www.europarl.europa.eu/doceo/document/A-8-2017-0005_EN.html*, accessed on 27.01.2023. For a further analysis on this report see V. Roș, A. Livădariu, *Drepturile morale de autor în epoca inteligenței artificiale*, published in *Provocările dreptului de autor la 160 de ani de la prima lor reglementare legala in Romania*, Hamangiu Publishing House, Bucharest, 2022, p. 73. Also, an „honorable mention" should go to the famous CJEU dec. from 2009, Infopaq, that also seems to exclude computers from potential authors of works, because such works should „constitute the author's own intellectual creation". For details on this subject see D. Manolea, *Drepturile de autor în contextul utilizării Inteligenței Artificiale*, *https://www.universuljuridic.ro/drepturile-de-autor-in-contextul-utilizarii-inteligentei-artificiale/*, accessed on 30.12.2022.

[33] *https://commission.europa.eu/select-language?destination=/media/48917*, accessed on 30.12.2022.

[34] *https://single-market-economy.ec.europa.eu/document/3193da9a-cecb-44ad-9a9c-7b6b23220bcd_en*, accessed on 30.12.2022.

[35] At the moment when this paper is written, the proposals are still in waiting to be adopted by the European Parliament and the Council. See *https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5807*, accessed on 30.12.2022.

[36] *https://www.europarl.europa.eu/RegData/etudes/STUD/2020/641530/EPRS_STU(2020)641530_EN.pdf*, accessed on 29.12.2022.

[37] Art. 2 para. 1 of GDPR: *„This Regulation applies to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system*".

[38] Art. 4 para. (2) of GDPR: *„'processing' means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction*;"

[39] Art. 4 para. (4) of GDPR: *„ 'profiling' means any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements*"

[40] Art. 13 para. 2 of GDPR: *„In addition to the information referred to in paragraph 1, the controller shall, at the time when personal data are obtained, provide the data subject with the following further information necessary to ensure fair and transparent processing: (...) (f) the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject*."

[41] Art. 14 para. 2 of GDPR: *„In addition to the information referred to in paragraph 1, the controller shall provide the data subject with the following information necessary to ensure fair and transparent processing in respect of the data subject: (...) (g) the existence of*

right of access by the data subject (art. 15 para 1[42]).

Given the absence of regulations at EU and international level, there is no wonder that Romania also lacks national legislation in the field of AI. While there are some opinions[43] saying that AI was actually regulated in Romania by Law no. 677/2001, it is not really the case. Law no. 677/2001 for the protection of individuals regarding the processing of personal data and the free movement of such data regulated data protection before GDPR and was abolished by the new EU regulations. Just like GDPR, it had no actual mention of artificial intelligence, but mentioned the idea of „automated means" of data processing[44], which may be close, but not really the same thing.

Therefore, at present, there is no Romanian law that governs AI. And given the multiple EU initiatives mentioned above, we do not expect there to be any in the near future[45]. Although these legal initiatives are not completely finalized and prepared for implementation, they give hope that we will have European regulations in the future, which could potentially come in conflict with national law, if applicable. So probably the safest option for our legislators is to simply wait and implement EU laws in a correct and efficient manner, when they will become available.

4. Moral rights and AI

Moral rights in the field of copyright are regulated both at international level, by the Berne Convention, and at national level – including Romania, through Law no. 8/1996[46]. While the Berne Convention only refers to two moral rights in art. 6 bis para. (1), namely the right to attribution and the right to the integrity of the work[47], the Romanian legislation on copyright holds a total of five moral rights, according to art. 10 of Law no. 8/1996[48]: right to divulge a work, author's right to their name, right to attribution, right to integrity and the right to retract a work.

But even if their number differs, the essence of moral rights stays the same, both at national and international level: they are closely connected to the author, even more than general economic rights[49]. And according to Romanian law [art. 11 para. (1) of Law no. 8/1996], this link is so profound that one cannot renounce moral rights or transfer them freely. Some of them even survive the author's death, being passed on to their heirs, according to art. 11 para. (2) of Law no. 8/1996.

Because moral rights are very personal and linked to the author so profoundly, AI tools pose big challenges to their existence. Who is the holder of moral rights for art created by a computer, will it be the machine itself? Or maybe the people who created the machine? Alternatively, can moral rights disappear completely when it comes to AI?

The matter of moral rights and AI has not been analysed in depth by the legal doctrine, to this day. But

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automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject."

[42] Art. 15 para. 1 of GDPR: *„The data subject shall have the right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data and the following information: (...) (h) the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject*."

[43] See the online article *Did you know that Artificial Intelligence has been regulated in Romania for 19 years?*, at *https://legalup.ro/inteligenta-artificiala-romania/*, accessed on 29.12.2022. We cannot help but notice the title was written rather in a *clickbait* manner, to attract page visitors, rather than being legally accurate.

[44] See art. 2 para (1), art. 3 point b), art. 13 para (1) point c) of Law no. 677/2001.

[45] On a separate note, the ELSA student association issued a press release in September 2021 with an open letter to the Romanian Parliament, offering a potential draft for an upcoming law on AI in Romania (*https://www.juridice.ro/748946/elsa-bucharest-lanseaza-o-scrisoare-deschisa-pentru-reglementarea-inteligentei-artificiale-in-romania.html*, accessed on 30.12.2022). The project is interesting, but we would rather see it as an act of civic involvement, rather than an actual legislation initiative that will be taken seriously by the Romanian legislative body (*https://www.juridice.ro/wp-content/uploads/2021/09/PROPUNERE-LEGISLATIVA-Romanti-Ada.pdf*, accessed on 30.12.2022).

[46] Romanian legislation also containts referrals to moral rights in the Civil Code. For more details on this subject see L. Cătuna, *Drept Civil. Proprietatea intelectuală*, C.H. Beck Publishing House, Bucharest, 2013, p. 71.

[47] Art. 6 bis para. (1) of the Berne Convention: *„Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.*"

[48] Art. 10 of Law no. 8/1996: *„The author of a work has the following moral rights: a) the right to decide if, in what way and when the work will be brought to public knowledge; b) the right to claim recognition of the authorship of the work; c) the right to decide under which name the work will be brought to public knowledge; d) the right to claim respect for the integrity of the work and to oppose any modification, as well as any touch to the work, if it damages its honor or reputation; e) the right to withdraw the work, compensating, if necessary, the holders of the rights of use, prejudiced by exercising the withdrawal*."

[49] For more details about the legal regime or moral rights, see See V. Roș, *Dreptul proprietății intelectuale*, vol. 1, C.H. Beck Publishing House, Bucharest, 2016, pp. 315-323.

when it comes to copyright and who holds these rights, in what concerns the economic side, this has been discussed in detail and even contested in court. The Romanian local courts do not have a solid jurisprudence on the matter, but when it comes to international jurisdictions, the situation is quite different.

In 2020, the Beijing Intellectual Property Court from China was called to decide in *Gao Yang v. Youku* if AI generators are protected by copyright[50]. The plaintiff had attached a camera to a flying balloon and that camera took automatic pictures in midair, which were later selected for further processing. The court decided that the photographic works were protected by copyright, because some human intervention still existed in this case[51]. So, until machines reach such a level that humans are no longer needed in their operations, the copyright system will not be altered.

In another court case from China, *Shenzhen Tencent v. Shanghai Yingxun*[52], it was decided in 2019 that an article written with the help of AI technology is also protected by copyright legislation. The defendant, Shanghai Yingxun, published on their website an article developed with the help of AI tools belonging to the plaintiff, Tencent. The publishing was done without Tencent's permission and without giving credit to Tencent. The court decided that a copyright infringement had occurred and Tencent should be compensated accordingly. The reasoning behind this decision mentioned that the written work was not done completely autonomously by AI and some human activity still existed behind it[53].

However, the perspective of Chinese courts is somehow different from the one expressed in US jurisprudence. In 2018, an application was submitted to the US Copyright Office for the work „A Recent Entrance to Paradise", with „Creativity Machine" listed as the author. The Copyright Office rejected the registration[54] and the decision was confirmed by the Review Board of the Office in 2022[55], decision which is in line with previous decisions of the US Supreme Court when it comes to creations that do not involve a human factor[56].

The U.S. decisions are also in line with the general national and international rules found in the field of copyright, which expressly show that copyrightable creations are the result of human activity and creativity[57]. For example, art. 112-1 of the French Intellectual Property Code shows that a „work of the mind, regardless of its kind, form of expression, merit or purpose" is subject to copyright protection. Also, art. 3 para. (1) of the Romanian Law no. 8/1996 on copyright clearly states that a copyrightable work can only have „a natural person or natural persons" as authors, solution which is also supported by the legal doctrine[58]. Therefore, a work created by a machine cannot be protected. This does not mean legislators are not open to changes[59] to some extent, following the general introduction of AI in our day-to-day lives.

So, in the end, who owns the copyright to AI creations? Will it be the IT specialists that developed the machine? Or will we admit that AI tools have a "life of their own" and can make copyright claims successfully?

Although we do not now have a clear legal framework to give us a clear answer to this question, there seems to be general consensus that rights to AI products cannot be held by the machine that created them. The main reason is that intellectual property and related creativity rights are specific to human beings, not robots. Therefore, the software program cannot be a holder of copyright.

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[50] The court case was discussed in a WIPO report: *https://www.wipo.int/export/sites/www/about-ip/en/artificial_intelligence/conversation_ip_ai/pdf/ms_china_1_en.pdf*, accessed on 22.01.2022.

[51] *„Even if the factor of AI is involved, as long as the factors of human intervention are not completely ruled out, then the essence of the legal issues will not change fundamentally. Until the day comes that the technology evolves to the extent machines and systems, including AI, can completely be immune from human factors and operate independently, there is no necessity to adjust the existing copyright legal system"*.

[52] *https://www.wipo.int/export/sites/www/about-ip/en/artificial_intelligence/conversation_ip_ai/pdf/ms_china_1_en.pdf*, accessed on 22.01.2022.

[53] The conclusion of WIPO for both these cases from 2019 and, 202o, respectively, was that *„AI has not yet developed to a level where it is truly free from human involvement (...) Thus, it is still quite possible to adapt the current legal copyright framework to the needs of copyright protection for those AI generated products. As for the copyright protection for those autonomous generated products of AI without any human intervention (...) It is still a bit early to draw conclusions."*

[54] *https://www.taylorwessing.com/en/insights-and-events/insights/2022/06/flash-ip*, accessed on 22.01.2022

[55] *„Thaler must either provide evidence that the Work is the product of human authorship or convince the Office to depart from a century of copyright jurisprudence. He has done neither." https://www.copyright.gov/rulings-filings/review-board/docs/a-recent-entrance-to-paradise.pdf*, accessed on 22.01.2022.

[56] The decisions cited by the US Copyright Office did not involve AI tools, we are yet to see jurisprudence on this matter. But mentioned *Naruto v. Slater*, a case where copyright protection was denied for photos taken by a monkey and *Kelley v. Chicago Park Dist*, where protection was denied for the design of a garden, which was supposedly done directly by natural forces, not a human.

[58] See V. Roș, *op. cit*., p. 160.

[59] Some countries introduced public consultations in the field of copyright and AI, the most relevant and recent one being the results published by the UK Intellectual Property Office. In short, it was considered that UK law does not need to change and remove copyright protection for computer-generated works without a human author and neither does patent law need to change, as to allow patent protection for AI inventions. *https://www.gov.uk/government/consultations/artificial-intelligence-and-ip-copyright-and-patents*, accessed on 22.01.2022.

As for the person behind an AI software, they cannot be the holder of copyright, either. The IT specialists are humans and can potentially be authors. But they are not the real creators of the AI product, because their robots are. The IT specialists are not the creators of the final work, so they cannot be considered authors by law. Otherwise, we would have IT programmers without any inspiration or creative calling, being considered authors for millions of digital art pieces, NFTs and stories that their own AI tools have created. And, simply put, that is not the way that intellectual property works.

Therefore, we seem to be moving towards a middle-ground solution, where the product of AI tools, be it music, video or text, will be mostly found in open-source format, free for all users of the respective platform. One of the most popular AI platforms at present, ChatGPT has done exactly that: it „opened its doors" to users, free of charge. Also, we do not exclude the possibility of pre-paid software, like the avatar generator Lensa, which creates art that is free to use based on an initial payment plan. Even if the software is subject to licensing, that does not mean its developers can ask their users for more money in order to use the work, because it cannot be copyrightable in that way. Neither does the user become the copyright holder of the work. In other words, we will not have title holders over the creation in a „classical" way, this involving not only the patrimonial rights of the author, but especially the moral rights, that could only belong to a natural person.

As for the matter of moral right themselves, we consider the situation quite similar to patrimonial rights and even more straight-forward, to some degree. What we can rule out from the very beginning is the possibility of a machine holding moral rights over a work. Simply put, a computer could never invoke their right to attribution when it comes to an NFT they created. Or the right to integrity, if the article they composed is then altered by a human who publishes it online. Firstly, because despite the incredible advance of technology, we cannot imagine a computer being „touched" in their pride and dignity, human emotions at the core of moral rights themselves. Secondly, all sentiment aside, we have determined that a machine cannot even hold patrimonial rights, so general copyright over a work, because it is not an actually creative human being as the law demands. So neither can it hold moral rights over said work, because they are even more personal and specific to humans.

But what about the creator of the AI tool, could a software engineer hold moral rights when their invention produces works of art or literature? Here, again, we must refer to the general consensus on copyright and apply it *mutatis mutandis* in the very personal field of moral rights. While a computer program is considered creative work and subject to copyright, according to both national and EU regulations[60], these provisions do not automatically extend to „secondary" work produced by the program itself. In other words, an IT programmer will be deemed as author for the code they write, given their expertise in the field and the creative mind behind that work. But this IT specialist will not automatically also become a painter[61] or a writer[62], respectively.

Furthermore, when it comes to the person who actually uses the AI program to create artwork, they are even less eligible to be moral rights holders over the product of artificial intelligence. At a first glance, it might appear that the AI user has a certain degree of control over the result of the work. For example, they can get an avatar of their face from Lensa AI[63] by uploading selfies that they took in certain angles and light, so they would own copyright over the pictures. Or they could ask ChatGPT[64] to create an AI story with certain elements that they imagined with their own mind and the computer will comply. But in none of these cases is the user the actual author of the resulting work. They will only hold moral right and copyright, for that matter, if they design the avatar themselves in Photoshop or they write their own story, with originality and creativity. Otherwise, they are simply the users of an AI computer program, not creators in the legal sense.

Therefore, there is no other solution than to leave moral rights for the moment in a somewhat „legal void", where no human, even less a machine, can hold such rights over the work created by AI. This work could be considered *open source*, a creation to which access is free and therefore cannot be copyrighted, because any user can access the program and use it to create new products.

There are also opinions in legal doctrine[65] that the entity with artificial intelligence could also hold intellectual property rights, without being considered an author in the legal sense. But we cannot agree with that opinion, because it would mean combining various legal institutions and going outside their own legal boundaries, which we do not see as plausible at the moment.

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[60] See Directive 2009/24/EC on the legal protection of computer programs.

[61] As in the case of the Midjourney platform which creates digital art *https://www.midjourney.com/*, accessed on 29.12.2022.

[62] As in the case of Jasper AI, which can create blog articles *https://www.jasper.ai/*, accessed on 29.12.2022.

[63] *https://prisma-ai.com/lensa*, accessed on 29.12.2022.

[64] *https://openai.com/blog/chatgpt/*, accessed on 29.12.2022.

[65] See E.G. Olteanu, *Inteligența artificială, „ultima frontieră" pentru dreptul de autor*, published in *Provocările dreptului de autor la 160 de ani de la prima lor reglementare legală în România*, Hamangiu Publishing House, Bucharest, 2022, p. 129.

5. Conclusions

Although the subject of AI is still highly controversial, there is no doubt that this technology will continue developing and is definitely here to stay. That is the reason why we should all strive to understand it better, even if we work in the technology field, law or we are just normal citizens who start to find artificial intelligence more and more in their daily lives.

After a better understanding of AI technology by the general public, the next step would be to recognize that artificial intelligence really is the future and it creates opportunities for us all. It is a useful aid in our personal and professional activity, not an „enemy" that will steal our jobs and change our lives for the worst. Robots can considerably improve our lives, as well as our work, but they cannot fully execute human tasks - at least, not at the moment[66]. So we can safely assume that humans are and will continue to be needed in our society, not only as beneficiaries of work done by robots, but also as doers and creators.

That is where intellectual property and, more specifically, moral rights hold such a definitive role. They remind us that, at the end of the day, only humans are blessed with creative powers by a higher being and only they can exercise patrimonial, but most importantly, non-patrimonial rights in the field of copyright. That is why we strongly require better regulations on AI - a clear legal framework that help this technology develop at a faster pace and in a safe environment, in harmony with the human mind, not working against it.

Although the conclusion that robots cannot hold and exercise moral rights is quite straight forward, the subject remains open to debate. Laws and the perception of humans change in time, just like technology does. And what today seems impossible, could be the new normal of tomorrow. So who can say that the next generation of robots will not be more „human" than ever, along with the respective privileges? Only time will tell.

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ISSUES AND ACHIEVEMENTS REGARDING THE STRATEGY OF INCREASING THE PROCESS OF ROMANIA'S SUSTAINABLE DEVELOPMENT STRATEGY

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Abstract

In the last years local development has undeniably become one of the dominant elements for productivity growth strategy employment, human welfare, entrepreneurship promotion, obtaining human capital and income increase. Assuring sustainable development for a specific region is a complex process in the measure in which this process is subjected to some factors which cannot be controlled by a local, regional, or national administration. The entire post-revolution and post-accession experience, cumulate with good policy making transferred by Romania to European Union, proves that private public partnership is a viable solution for successfully solving some communitarian problems, public interests starting with social services and complex social-economic development projects including infrastructure projects.

The present paper focuses on sustainable development and the specific objectives that Romania intends to achieve in order to reach a new model of development that is capable of generating high value added, is interested in knowledge and innovation, and aims to improve the quality of life in harmony with the natural environment.

The paper also analyses the process of local development that Romania started in 2000 with the financial support of United Nations Development Programme - "Romania within the framework of Local Agenda 21" and continued within Regional Operational Programme 2007-2013 and now,2020-2030 Sustainable development strategy.

Keywords: *local communities, environment, PPP, sustainable development, European Union, Regional Operational Programme, 2030 Agenda.*

1. Introduction

Romania, as a member of the United Nations (UN) and the European Union (EU), has adopted the 2030 Agenda and its 17 Sustainable Development Goals. The 2030 Agenda was adopted at the United Nations Sustainable Development Summit though UN General Assembly resolution A/RES/70/1. The European Council endorsed this Agenda in "A Sustainable European Future: The EU Response to the 2030 Agenda for Sustainable Development" on 20 June 2017. The Council's document represents the political document to which the member states have committed themselves, setting the direction EU member states should follow in their task of implementing the 2030 Agenda for Sustainable Development. Romania's Sustainable Development Strategy 2030 (hereafter referred to as the "Strategy") defines Romania's national framework for implementing the 2030 Agenda for Sustainable Development, providing a roadmap for achieving the 17 SDGs. This strategy promotes the sustainable development of Romania by focusing on Sustainable Development's three dimensions: economic, social, and environmental. This strategy is citizen-centered and focuses on innovation, optimism, resilience, and the belief that the role of the state is to serve the needs of each citizen in a fair, efficient, and balanced manner, all within a clean environment. This Strategy is based on reports drawn up by government ministries and other state institutions, studies conducted under the auspices of the Romanian Academy, and other scientific and academic bodies. This strategy used the information made available by European institutions and the UN as well as suggestions and recommendations resulting from public consultations with the business community, universities, national research and development institutions, NGOs, and representatives of civil society. This strategy also took into consideration the contributions of individual experts.

Current policies cannot anymore focus mainly on their short - term impact but they have also to be more forward looking as well as more consistent between each other's. Economical development is a must in the terms of a powerful and accelerated process of globalization which has surrounded the entire world. Therefore, local

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authorities must find good strategies in order to improve the production of goods and services. In the process of sustainable development management effectiveness of protected areas is an important indicator of how well protected areas are conserving biodiversity. This is critical as most nations use protected areas as a cornerstone of biodiversity conservation. The introduction of the concept of sustainable development in recent policy-making has been a major turning point for our societies over the last two decades. Given the complexity of the concept of sustainable development, my intention in writing this paper was measuring what counts for the well-being of both present and future generations. I was inspired in treating this matter by the importance of the global need to identify the most suitable solutions and strategies in order to maintain life on this planet, by promoting human well-being through managing natural resources without hurting biodiversity. Decisions human made that influence biodiversity affect the well- being of themselves and other. We only have one planet it's not like we have a spare one in the backyard! In the past decades there was written a lot of specialized literature regarding conservation and sustainable use of diversity of species, habitats and ecosystems on the planet. Therefore, I have related my paper to some of them in order to improve my study on sustainable development through conserving environment and socioeconomic development. Official statistics are well equipped because of both the commitment to impartiality and the diversity of the available expertise to provide the robust statistical tools – and in particular statistical indicators – which are required to adequately assess the implementation of current policies. Even if the current set of EU sustainable development indicators is still largely imperfect, a proactive approach like the one followed by Eurostat has increased the profile of official statistics and may help to shape future policies on the basis of a more rigorous assessment of the current situation.

2. Sustainable development. Definition. The EU Strategy for Sustainable Development (SDS)

Sustainable development has been defined in many ways, but the most frequently quoted definition is from *Our Common Future*, also known as the Brundtland Report[1]:

"Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:

- *the concept of **needs**, in particular the essential needs of the world's poor, to which overriding priority should be given; and*
- *the idea of **limitations** imposed by the state of technology and social organization on the environment's ability to meet present and future needs."*

Issues and concerns specific to Romania

The goal of Romania's first sustainable development strategy from 1999 was to promote the continuous improvement and preservation of the well-being of the population in correlation with the requirements of a sensible use of natural resources and the conservation of the ecosystem. This strategy was based on the premise that the benefits of economic development should outweigh its costs, including those relating to the conservation and the improvement of the environment. The country's accession to the European Union in 2007 led to a change of Romania's national priorities, which resulted in the National Sustainable Development Strategy of Romania – Horizons 2013-2020-2030. Adopted by the Romanian Government on 12 November 2008, the Strategy sought to reduce the socio-economic gap vis-à-vis the member states of the European Union. To achieve sustainable development in Romania, and, by extension, to meet the goals of the 2030 Agenda, together with the EU's commitments regarding the 2030 Agenda, this Strategy is built around the citizen and the needs of future generations. Romania's Sustainable Development Strategy is based on the premise that sustainable development requires a mindset which, once adopted by the citizen, will help create a more equitable society defined by: balance and solidarity, and the ability to cope with the changes brought about by current global, regional and national challenges, including a declining population. The state's concern for its citizens, and the citizens' respect for public institutions, for their peers, for moral values, and for cultural and ethnic diversity will lead to a sustainable society.

A series of aspects of the implementation of sustainable development principles are not featured by the Strategy for Sustainable Development of the European Union: problems that have been overcome by the countries at the core of the EU many decades ago and thus are no longer object of priority concerns. In Romania's case, certain indicators (*e.g.*, the structure of property in agriculture, access to drinking water and sewage

[1] World Commission on Environment and Development (WCED). *Our common future.* Oxford: Oxford University Press, 1987 p. 43.

networks, energy efficiency and resource consumption per value unit of final product, the quality of professional training, etc.) are still only slightly over the average level of developing countries. This section is dedicated to clarify such problems that must be solved in parallel and simultaneously with the effort to meet the norms and standards of the European Union.

Meeting the objectives of the Romanian National Strategy for Sustainable Development could be affected negatively by the interference of internal and external factors. Some of them can be foreseen, although their impact is difficult to evaluate and predicted quantitatively or placed in time.

However, prospecting the causes that could generate such issues and the solutions to diminish their effects is absolutely necessary. The following can be regarded as main endogenous risk factors:

- incoherence and inconsistence in economic policies caused by political instability and/or by ignoring the principles of sustainable development, independently of the composition of the parliamentary majority or the doctrines of political parties;
- delays in the implementation of an improved decision-making system and failure to induce responsibility within the public institutions for the results of the policies promoted by them, failure to improve the efficiency of impact assessment and of the use of monitoring and evaluation techniques;
- formalist, inefficient cooperation of public institutions with the private sector (patronates), professional associations and social partners in the elaboration and implementation of public policies and the measures for increasing competitiveness based on the rise of labour productivity and the productivity of resources, or the promotion of export activities to insure macroeconomic equilibrium;
- clientelist selection of priorities in the allocation of public funds away from projects with potential for major, long-term, positive socio-economic impact and positive, neutral or at most minimal impact on the environment, based on competent evaluation of the report between financial effort and effects, on medium-long term;
- delaying efforts for a substantial increase of administrative capacity, of the potential to generate projects eligible for financing from the point of view of economic, social and economic efficiency, and to execute such projects within established terms through feasibility studies; delaying such measures could reduce the degree of access to EU funds and the possibility to cover the current account deficit;
- inconsistency and limited efficiency of policies oriented towards the continuation of the dis-inflation process, which could have a serious negative effect on macroeconomic equilibriums and sustainable economic growth;
- the lack of capacity to anticipate extreme weather phenomena resulting from climate change (prolonged periods of drought, floods) and to take measures to limit their potential effects on agriculture and on food prices;
- the tendency for increase of consumer debt and of imports for current consumption;
- the increase of income decoupled from productivity growth as a result of populist policies exercised during pre-electoral periods;
- delaying the implementation of adequate measures to reduce energy intensity significantly and to tap alternative sources of oil and gas supply, which could put under risk economic activities and private consumption;
- inefficient use of public funds destined to primary and continued human resource formation and to stimulate R&D activities which represent key areas for sustainable development. Among the external risk factors to be taken into account are:
- the amplification of upward trends in oil, natural gas and uranium prices, that can generate serious effects on inflation and energy security;
- uncertainties regarding foreign investors on emerging markets that could be caused mainly by the increase of the foreign deficit and the unpredictability of the fiscal policy, with negative effects on the volume and quality of investment in the productive sectors of the economy, and on the coverage from this source of the current account deficit;
- increasing the cost of foreign financing as an effect of the possible decrease of the country rating, which may have undesirable effects on the exchange rate of the national currency and on the inflation rate; Regarding the precise identification of risk factors and for the management of crisis events, we recommend:
    - the formation of a roster of risk evaluators and specialists in crisis management to be inserted in decision support structures;

  - the development, through foresight exercises, of instruments for the prevention, management and dilution of crisis effects.
- integrating, on the basis of professional competency, of Romanian specialists in EU expert networks for crisis management;
- preparing contingence plans and portfolios of solutions in anticipation of system vulnerabilities and their potential effects in crisis situations.

3. Sustainable growth: structural change and macroeconomic balance

The current strategy starts with the premises that the achievement of accelerated growth in the long run in all three essential components (economic, social and environmental) is not just one of options possible, but the essential condition for the gradual reduction of the gaps between the levels of quality of life in Romania and the EU within the shortest possible timeframe, and for the insurance of real cohesion at national and EU levels.

Entering the common market of the European Union, the improvement of the business environment and of 53 the conditions for competition, the consolidation of the private sector and its contribution to the formation of the gross domestic product, the rise of the rate and quality of investment are encouraging factors that favor the continuation of growth. Annual GDP growth rate of 5.6-5.8% between 2007-2013, of 4.8-5% between 2015-2020 and 3.8-4.3% in the 2021-2030 period constitute feasible operational targets, close to the estimated GDP levels for each period.

Ensuring long-term performance for the Romanian economy imposes, in consequence, the adoption and implementation of active, coherent policies and of effective instruments that shall allow substantial improvements in the administration and valorisation of current potential in certain key domains that determine sustainable development in conditions of market competition. Without substituting the existing development programmes of Romania, the current Strategy proposes a focalized vision towards attaining long-term objectives that transcend current timeframes through the perspective of sustainability principles stipulated by the Directives of the European Union and the main tendencies observed at the global level.

Ensuring the sustainability of energy and material resource consumption in the long run, based on the realistic evaluation of the support capacity of natural capital. It follows that there is significant potential for the reduction of energy consumption, mainly through the rise of energy efficiency in the manufacturing and service sectors, and the reduction of the considerable technical losses in the residential sector. According to the national Programmes regarding energy efficiency, it is foreseen that primary energy intensity could be reduced by 2020 at 0.26 TOE/1000 Euro GDP relative to 2013 (0 .34 TOE / 1000 Euro of GDP). It is foreseen that relevant primary and secondary EU legislation will evolve towards setting more ambitious objectives and more strict regulations, in conformity with the Lisbon Agenda.

From the analysis of the evolution of the Romanian manufacturing industry in recent years, it results that in energy- and materials intensive sectors (steel industry, oil refinement, chemicals, building materials – typically polluting industries which provide around 25% of total production) resource productivity is in decline as a result of increased intermediary consumption. Compared to the year 2000, the total resource consumption in the steel industry increased by 48% while value added decreased by 2.6%. In the oil industry, a 12.4% increase in value added demanded a 50% increase in resource consumption. In 2005, total resource productivity in the steel industry was of only 0.18, in the downstream oil industries of 0.34, and of 0.55 over the entire manufacturing industry. Similar examples of decreasing resource productivity relative to value added can be found in agriculture and forestry. In these cases, also, it can be assumed that significant improvements can be obtained within a reasonable timeframe by promoting policies to stimulate technological modernization and the increase of the share of products with high processing levels destined both to local consumption and for export. Perfecting, in a first stage, a series of voluntary agreements with the patronates (as it is already in practice in some EU countries) and adopting regulation that will shift some of the labour tax burden on the consumption of material resources and energy, could motivate economic actors to take measures for the increase of resource productivity, which would result in a positive impact on costs, competitiveness and the sustainability of resource use. Taking into account a considerable future increase in the import of primary energy and materials resources, it is necessary to elaborate a specialized strategy for the diversification of supply sources as well as for ensuring their security through long-term agreements.

The gradual modernization of the macro-structure of the economy in correspondence with social and environmental needs The increase of services share in the formation of the Gross Domestic Product from 48.8% in 2006 to 58-60% in 2013 and 70% in 2020 (the current average level of EU-25) and the qualitative upgrade of services, will also determine the increase of economic efficiency and of competitiveness in the other sectors of the economy, with positive social effects on the vertical mobility of the workforce and of the level of qualification and compensation in domains such as R&D, financial services, computer science, management training, consultancy and expertise, etc. This will contribute directly to the growth of total productivity of resources used by the economy as a whole, considering that the services sector shows a typically higher ration of gross value added over intermediary consumption, then those typical for agriculture, manufacturing or building. The adjustment of inter-sartorial structures will take pace particularly through the stimulation of priority development of those sub-structures that realize high value 55 added with lower resource consumption, especially through the use of renewable or recycled resources. In industry, the accent will fall on the endowment with technologies of high and medium complexity and on the introduction in own production of technologies with a high synergy that could bring a significant contribution to the growth of the volume and value concentration of exports. Eco-efficiency and the use of the best available technologies (BAT) will become, in a higher measure, essential criteria in investment decisions, especially for public procurement. The most profound changes will probably take place in rural areas through the replacement of archaic structure, of the production practices and the appearance of the Romanian village, while preserving its local identity and specific culture. The development of the organic agro-industry, engaging local communities in activities of environmental rehabilitation and conservation, their direct partnership in the preservation of monuments and historic and cultural sights, ensuring access to basic social and community services, the reduction and elimination of poverty, the improvement of communications and of market relations, will contribute to the gradual relief of urban-rural disparities in the quality of life. Considering the demand for development preserving regional profiles, of the need for optimum absorption of co-financing resources from EU sources and of the need to attract supplementary investment particularly for the modernization infrastructure for the provision of urban services, for the support of agriculture activities and for transport, increased effort is critical for the creation and permanent update of a portfolio of viable projects accompanied by professional pre-feasibility studies, that benefit from the active support from all decision factors and the local communities.

4. Raising labor productivity and the occupation rate

The level of labour productivity over the entire economy (GDP/employed person) as well as at sector and enterprise levels (gross value added/employee) is still vastly inferior in Romania compared to EU levels. The relatively low level of Romanian wages, particularly in the lower end of the scale, is explained precisely by this productivity gap reflected, in approximately the same rapport, in the quality of employment and the volume of taxable income. The slow renewal of the technology base, the low quality of infrastructure, chronic under-financing, the weak contribution of local R&D, the low performance of products and services offered on the market, the insufficient capacity for adaptation to the global market, were the main causes that hinder not just labour productivity but also the productivity of resources in monetary terms. Although in recent years the rhythm of labour productivity growth in Romania, especially in the processing and building industries, has been higher than the average EU rate, the difference of levels remains very high. Since resource productivity (the productivity of resources in monetary terms) and labour productivity are the main factors of efficiency and competitiveness and, implicitly, of the sustainability of economic and social development, significant administrative and financial efforts must be undertaken to remedy the present situation and attain the current benchmark of the EU. the urgency of such measures 56 is underscored by the unfavourable demographic developments, worsening in the case of Romania. In the same time, it is necessary to improve the rate of occupation of the potentially active population that, between 2002 and 2006 was of 57.9% only in Romania compared to the EU-27 average of 63.1% for the same period. Through investment in human capital, an occupation rate of over 62% is estimated for 2013, with the tendency of constant improvement for the following periods (up to 64-65% in 2020).

5. Improving the quality of micro and macroeconomic management

In the following period, a qualitative improvement of economic management will be necessary at all levels - from regional to enterprise level, to insure the efficient, complete use of capital resources available and to attract new, supplementary financing sources for investment in the endowment with modern technology, in the formation and superior qualification of the labour force, in scientific research, in technological development and innovation. In as much as the sustainable growth of the gross domestic product is determined by the evolution of value added achieved by economic agents, the extension of effective management is crucial for all key points of activity in each unit producing goods and services: administrative, technical, technological, financier, logistic, commercial, and the administration of human resources. In this respect, the establishment of specific performance criteria for public sector managers is essential, along with encouraging the application of exacting standards in the private sector through engaging the responsibility of stockholders and administration councils in monitoring management performance in conformity with the minimum standards established for the increase of value added, competitiveness and profit. It is also envisaged to re-evaluate the policies for the amortization of physical assets in correlation with technological progress in each domain of activity, in order to prevent technical depreciation of the capital that typically generates major consumption of energy, materials and labour resources, with negative effects on competitiveness. The implementation of multi-annual, medium-term budgets as standard practice for firms is necessary to ensure the existence of a long-term vision regarding the development perspective and the formulation of efficient investment policies, and the adaptation of the production volume and structure to anticipated market trends.

6. The government is promoting public-private partnerships (PPPs)

Is a new channel for attracting foreign investments to Romania, which last year reached a post-crisis high of EUR 4 billion. The new PPP law comes roughly seven years after the private sector and public authorities struggled with different, flawed legislation.

Investors are waiting for the publication of the implementation rules for the new PPP Law no. 233/2016, which was approved at the end of 2016. Legal experts said that the new rules should promote functional partnerships between public bodies and private players, and it might take additional time for the authorities to learn the ropes when dealing with such initiatives. Representatives of foreign investors in Romania suggested that pilot PPP projects should be launched first. The government has not yet announced any such projects.

The new legislation can accommodate various PPP structures without overregulation and provides clear separation from the scope of the new concession and public acquisitions legislation. Going deeper into the provisions that interest investors, the new PPP law includes two structures for project development.

There are PPPs of a purely contractual nature, where the PPP agreement is concluded between the public partner, the private partner and the project company, which is wholly owned by the private partner. And there are the PPPs of an institutional nature that involve cooperation between the private and public partner within the project company, which is held jointly by the public and private sector, and becomes party to the PPP agreement after its registration.

Although the current center-left government claims that major PPP projects will be financed from Romania’s planned wealth fund, it is still too early to say if this initiative is feasible considering that the fund is still in the design stage. Public authorities aim to turn the Sovereign Fund for Development and Investments (FSDI) into the main financing engine for the construction of roads, hospitals and industrial assets. The fund should reach EUR 10 billion in size, according to recent statements by policymakers.

Legal experts say the new law is more versatile because it provides more financing mechanisms for public and private partners involved in such projects.

Under the new law, the investment costs of the project can be funded entirely by the private partner, or by both partners. For the public partner, the source of funding is, however, limited to EU grants consisting of post-accession non-reimbursable funds and the related national contribution. The public partner may also choose to provide contingent mechanisms, for example guarantees to the project lenders, or to grant various rights to the project company, such as the right to collect user payments, as well as concession, superficies or use rights over the assets used for the project.

Foreign investors are waiting for the application norms of the new PPP law before starting to think about projects that could be developed in partnership with the state. However, the state will have to provide clear

guarantees that it will fully comply with the requirements of such contracts, as financial risks could emerge, for instance in the case of projects that run for decades.

Madeline Alexander, chair of AmCham Romania's EU funds, public procurement and PPP committee, said that the application norms of the new law should allow the local authorities to use PPPs for local infrastructure development as well as to expand on the regulatory framework concerning treatment and management of PPP fiscal risks.

AmCham Romania represents over 400 American, international and Romanian companies that have invested over USD 20 billion and created around 250,000 jobs locally.

Meanwhile, French investors have identified several public sector infrastructure sectors, including roads and hospitals, as fields in which PPPs could work.

However, PPP is not a wonder solution for solving the problem of necessity of great investments. In Romania the most often problem in public and private area is deficitary legislation who doesn't officially sustain the fundamentation of PPP. Another fundamental proposal in what regards local development aims the establishment of an interior rulment at local level. In the organization and function of all Institution that leads to good preparation activity and local development implementation projects. Most of the times projects are blocked in their way of organizing as financing application leading to limit situation like: a heavy analysis of documentation to send for note, transmitting in useful time some essential information. In conclusion we can synthesize two directions for development local communities. The first one is writing financing European and national projects and the second is creating necessary important elements like: local development strategies well elaborated, structured and prioritized, qualified staff for writing project implementation and elaborating development strategies.

7. Conclusions

Current developments are in many respects not sustainable because limits on the carrying capacity of the earth are being exceeded and social and economic capital is under pressure. Although it has been stated repeatedly that change is necessary, results are limited. The recent progress regarding climate policy shows that states are capable of converting the necessary political will into rigorous policy interventions, which combine leadership, vision and concrete measures. The Sustainable development strategy should contribute to further change to avoid irreparable damage and to create a future of prosperity, equity and well-being.

The Sustainable Development Strategy deals in an integrated way with economic, environmental and social issues and lists the following seven key challenges:

- Climate change and clean energy;
- Sustainable transport;
- Sustainable consumption and production;
- Conservation and management of natural resources;
- Public health;
- Social inclusion, demography and migration;
- Global poverty.

Local authorities must elaborate overarching strategy in order to set out how we can meet the needs of present generations without compromising the ability of future generations to meet their needs. The next programming step should be to develop a strategy, to examine the country context, various stakeholders and their interests, and, among other factors, the nature of potential interventions.to help ensure that resources dedicated to the program achieve the mission`s stated objectives. Defining a strategy involves developing an approach that can maximize impact on democratic development. The Sustainable Development Strategy constitutes a long-term vision and an overarching policy framework providing guidance for all members of EU policies and including a global dimension, with a time frame of up to 2050. By tackling long-term trends, it serves as an early warning instrument and a policy driver to bring about necessary reform and short-term policy action. There should make full use of balanced Impact Assessments in policy making at national level. The four focus areas relating to long-term goals in some crucial areas like: shift to a low-carbon and low-input economy; protection of biodiversity, air, water and other natural resources; strengthening the social dimension; and the international responsibility dimension of the SDS are broadly welcomed.

The local authority must give higher priority to tackling current unsustainable trends in the use of natural resources and the loss of biodiversity. Better integration of biodiversity considerations into other policy areas such as climate change, transport, agriculture and fishery are crucial, as well as considering better the value of ecosystem services. Also, climate financing is central to combating climate change, and a significant increase in additional public and financial flows is needed in order to assist developing process.

The social dimension should be better highlighted through improving labour market policies, social and education systems. The economic crisis has exacerbated inequalities and risks. With current and expected job losses, unemployment is clearly one of the biggest concerns. The hardest hit are young people, low-skilled workers and those who have been unemployed for a long time. A balanced approach to combining flexibility and security together with comprehensive active inclusion strategies and integration activities is not only crucial to support all those affected by the crisis, including the most vulnerable, but also to limit losses in human capital and to preserve future growth potential. It is vital to carry on improving the labour market policies, to review social system and further develop the education system to meet the challenges in all regions. Job creation efforts should strengthen the ability of workers to adapt to changing market conditions and prepare workers to benefit from new investments in the areas of green technology and green jobs.

Sustainable development should be seen in a global context. Many of the challenges can only be solved in international cooperation. The people of the developing world are hardest hit by the effects of climate change and land degradation. The loss of biodiversity will affect both the developing and developed world, the poorest being the most severely affected. Sustainably managing ecosystems and strengthening biodiversity policies is a basis for food security and an integral part of the fight against poverty and hunger. The global demand for natural resources is increasing, and this affects the developing countries even more than the developed world.

The strategy of local communities for sustainable development could focus on the European Union’s long-term goals in the following areas in coordination with other cross-cutting strategies:

- contributing to a rapid shift to a safe and sustainable low-carbon and low-input economy, based on energy and resource-efficient technologies and shifts towards sustainable consumption behaviour, including sustainable food patterns, and fostering energy security and adaptation to climate change;
- intensifying efforts for the protection of biodiversity, air, water and other natural resources and food security, and more focus on integration of biodiversity concerns into policy areas;
- with potential negative impact on biodiversity such as parts of the common agricultural policy, the common fisheries policy and transport policy;
- promoting social inclusion and integration, including demographic and migration aspects, and improving protection against health threats;
- strengthening the international dimension and intensifying efforts to combat global poverty, including through fair and green growth, and addressing population growth and its impact in terms of increased pressure on natural resources;
- in economic terms, it is necessary to ensure long-term economic growth that benefits the country’s citizens. The economy of a country is often measured in figures that do not take into account the potential of each citizen. The transformation of the economy into a sustainable and competitive one requires a new approach, based on innovation, optimism, and citizen resilience. This approach should create an entrepreneurial culture in which each citizen is able to fulfil his/ her potential in both material and aspirational terms. In social terms, it is necessary to create a cohesive society able to benefit from improvements in education and health care systems, a reduction in gender inequality, and the urban-rural divide. This will result in the promotion of a more open society, in which citizens feel appreciated and supported. To achieve this, it is necessary to develop the resilience of the public to enable citizens to realize their dreams within an equitable institutional framework. To ensure the sustainable development at the community level, the state needs to provide an enabling environment to boost the potential of each citizen by addressing issues of health care, education, and labour fairness. The aim is to achieve the highest possible standards of living for all citizens. Boosting social capital – the fostering of a civic spirit based on trust between citizens – will unlock the potential of Romania’s citizens, enabling them to realize their potential. Environmental awareness has risen significantly in recent years. Protecting our environment, be it natural or human-made, is the responsibility of everyone, given the reciprocal impacts between humans and the environment. This recognition presents an opportunity for citizens to come together in a noble pursuit by raising awareness of this responsibility. The creation of a sustainable human-made

environment can only be achieved by cultivating a sense of belonging and community. This will help diminish feelings of loneliness – a risk factor which limits the individual's potential and, by extension, the functioning of one's community.

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INTELLIGENT SYSTEM FOR AUTONOMOUS MICROGRID COOPERATION

Adina-Georgeta CREȚAN*

Abstract

The purpose of this paper is to provide support to autonomous microgrids that cannot perform a large contract alone. To fulfil a higher external request, the microgrid managers are obliged to outsource parts of their contracts even to competing microgrids. Inside these business exchanges, each microgrid prefers to maintain their decision autonomy. To model this business interaction, we introduce an intelligent system to manage simultaneous negotiations among autonomous microgrids. The proposed smart system helps the microgrids inside the collaborative network to grow their efficiency and the competitiveness of their market. Furthermore, conserving the interoperability inside the dynamic business environment is hard to realize. In this regard, this paper tackles interoperability issues by proposing negotiation activities as the key solution to settle these problems. Negotiation is the mutual resolution acceptable for all microgrids within the collaborative network. This paper outlines therein a negotiation approach in which intelligent negotiation agents evaluate and change offers and counteroffers. Moreover, the negotiation process is based on a communication protocol among the intelligent agents. The proposed intelligent system for autonomous microgrids cooperation has the potential to synchronize multiple negotiations that occur at the same time in which many partners can participate who can be the initiators of negotiations or guests in the respective negotiations.

Keywords: *Negotiation, microgrid, intelligent agents, collaborative network, dynamic environment.*

1. Introduction

This paper describes how microgrids participate in parallel negotiations and the way in which the negotiation processes are managed. In this regard, this paper introduces an intelligent system for coordinating simultaneous negotiations that take place in a B2B interaction inside a dynamic environment. With respect to this, it is described a scenario of distributed autonomous microgrids. The microgrids manage in an autonomous manner their contracts, programs, and resources.

When an external demand reaches a microgrid, the manager analyses the acceptance of the new task considering the current program and the availability of resources. After the manager accepts the new task, he can decide to perform it locally or to partially outsource it. If the manager agrees to outsource a job, he begins a negotiation inside the collaborative system with the selected microgrids. The initiator microgrid manager can divide the work into slots, notifying the microgrid partners about outsourcing demands for different slots. If the negotiation results in an agreement, a contract is settled between the outsourcer and insourcer microgrid. The proposed collaborative intelligent system is able to support the negotiation processes maintaining the autonomy of the microgrids. The objective of the negotiation process is to achieve a common agreement between the parties to support possible collaborations.

In this regard, many research works[1] propose a framework that incorporates smart components capable of mediating agents participating in negotiations to reach an agreement by deducting mutually acceptable proposals. By comparison to these papers that can limit the autonomy of the negotiation partners, this paper introduces an intelligent system to manage simultaneous negotiations in a dynamic environment, maintaining the autonomy of the participants. The following sections describe the related work, the collaborative intelligent system architecture, the coordination services that manage different negotiations and the final considerations of this paper.

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2. Related Work

Automated negotiations have been the subject of many research papers. In this respect, Fujita[2] proposes automated agents that can estimate the opponents' strategies based on the past negotiations. Caillere *et al.*[3] develop a protocol and rules which help the agents to coordinate their interactions and to reach an agreement.

Other negotiation research approaches tackle the issue related to the design of a negotiation environment, considering two directions: i) the first in which the intelligent agents replace humans in negotiations; and ii) the second direction in which the intelligent software agents assist human user providing a negotiation support. Considering the first direction, Lin and Kraus[4] propose a generic environment where automated agents can proficiently negotiate with human negotiators. Regarding the second direction, several research papers propose a collaborative solution based on a service-oriented architecture which helps inter-organizational information processing in distributed workflows, as in (Badica *et al.*, 2011) and (Penders *et al.*, 2010).

Reference (Arefifar *et al.*, 2012) presents a clustering approach of the distribution system into a set of virtual microgrids with optimized self-adequacy. In the same direction, the authors in (Saleh *et al.*, 2015) highlight the advantages of multiple microgrids clustering in improving their stability, supply availability and resilience during blackouts.

Compared with these works, where the coordination of negotiations is handled at protocol level, this research splits the negotiation process into three discrete processes: *decision-making process*, *coordination process* and *communication process*, allowing, therefore, to be integrated in any multi-agent system or directly as a support in a human interaction negotiation system (Coutinho *et al.*, 2016).

3. Intelligent negotiation system architecture

In the following, we will present the stages of a negotiation and the main dimensions that characterize the mechanisms used during the negotiation process.

A negotiation process is usually composed of two major stages:

i) pre-negotiation (or negotiation planning) - reports to discussions preceding formal negotiations and often includes procedural questions: Who will be involved? Where and when will negotiations take place? How will they be structured? What will be the object of negotiation? The answers to these questions will be values for the dimensions defined above, such as the participant or time. Before answering other questions, new possible dimensions and values must be defined.

ii) Negotiation - refers to the interactions regarding the exchange of proposals and counterpoints formulated starting from the negotiation strategies.

Considering the division of the negotiation process in these two stages, three main dimensions must be taken into account: i) the information handled, the relative dimension of the data that define the framework and the content of the negotiation, (ii) the negotiation protocols, the relative dimension of the messages (Language, content, sequences, number of participants) exchanged between participants, (iii) reasoning or negotiation strategies, relative dimension of modelling the participants involved in negotiation they use to meet their objectives.

In the first stages of negotiation planning, negotiators must determine their goals, foresee what they want to achieve and prepare for the negotiation process. Depending on their goals, the parties will bring together in the complete lists all the information and data that help them define what is negotiated and in what way it is negotiated. Often negotiators change and/or negotiate before the list of issues to discuss. The consultation between the negotiators, before the real negotiation, allows them to agree on the information lists that define the object of the negotiation by attributes to be discussed, as well as on other characteristics of the negotiation such as the location, time and duration of the session, the parties involved in the negotiation and the techniques to be followed if the negotiation fails. The purpose of the negotiation planning phase is not to try to solve the problem, but to obtain information that will allow a clearer image of the real negotiating problems. This image is the basis of choosing the strategy to be used in negotiation by each participant involved. All this preliminary

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[2] K. Fujita, *Automated Negotiating Agent with Strategy Adaptation for Multi-times Negotiations*, chapter in Recent Advances in Agent-based Complex Automated Negotiation, Studies in Computational Intelligence, vol. 638, pp 21-37, 2016.

[3] R. Caillere, S. Arib, S. Aknine, and C. Berdier, *A Multiagent Multilateral Negotiation Protocol for Joint Decision-Making*, chapter in Recent Advances in Agent-based Complex Automated Negotiation, Studies in Computational Intelligence, vol. 638, pp 71 - 88, 2016.

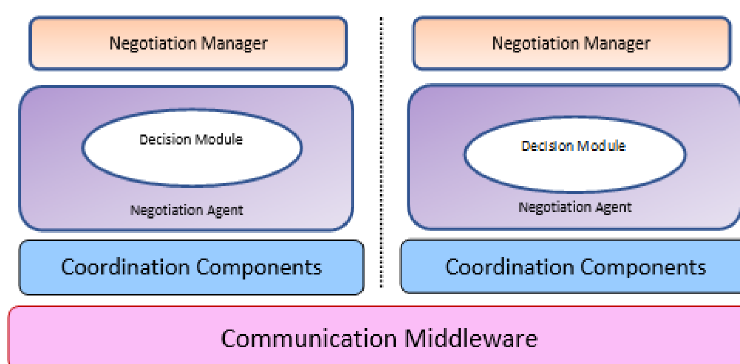
[4] R. Lin and S. Kraus, *Can Automated Agents Proficiently Negotiate with Humans*, Communic. of the ACM, vol. 53/1, pp. 78-88, 2010.

exchange is identified in the economic approaches of negotiation as a conversation by structures. One of these structures, called negotiation object, contains the attributes that one of the participants considers to negotiate. In some cases, only one attribute (for example-price) is negotiated, but in other cases several attributes must be negotiated, such as the time required to fulfill an order, the quality of the products, etc. Before starting the negotiation, a participant fixes not only the attributes of the object but also tries to be very precise in playing these measurable objectives. By fixing the possible values for the negotiating attributes, a participant soon identifies a lot of negotiation objects than a single object. Depending on the values fixed for attributes, the set includes: i) maximum an object - the best possible result, ii) at least one object - the least acceptable result, iii) a target object - a fixed result.

After making the decision regarding the object of the negotiation, the negotiators must give priority to their goals and evaluate the possible differences between them. The negotiators must realize what their goals and positions are and must identify the desires and fears that are the basis of these goals. They must also identify what are the most important questions and if the different attributes on which they negotiate are related or independent. Because negotiation objects typically involve more than one attribute, it is useful for negotiators to provide different ways to classify attributes. Thus, they can identify the attributes that they consider the most important, to be more flexible in negotiating the attributes that they consider less important. Thus, the analysis of the values for this dimension provides the participants a better understanding of the dynamics and the development of the negotiation and allows them to provide which are the best negotiation strategies that can be used immediately.

To implement the proposed approach concerning the division of the negotiating process into three distinct processes (*i.e.*, decision-making process, coordination process and communication process), it has been proposed an architecture structured in four main layers: Negotiation Manager, Negotiation Agent, Coordination Negotiation Components and Communication Middleware.

Fig. 1 The architecture of the intelligent negotiation system



A first layer, Negotiation Manager manages all business decisions regarding the creation of offers, acceptance or rejection of offers, invitation of another partner to participate in the negotiation process etc.

The Negotiation Agent, the second layer, has the role of assisting the Negotiation Manager in making decisions regarding the negotiations at a global level (*i.e.*, negotiations with various participants on different jobs) and at a specific level (*i.e.*, negotiations on the same job with various participants). During a negotiation, the Negotiation Agent handles one or more Negotiation Objects, one Negotiation Framework, as well as a negotiation state represented as a graph structure.

The third layer, Coordination Components, manages the constraints of the coordination process among various concurrent negotiations.

Communication Middleware is the fourth layer, shared by all negotiation participants, ensuring, thus, the communication process.

4. Coordination Negotiation Components

Each Coordination Component models a specific negotiation step or strategy (*i.e.*, selection of negotiation participants, outsourcing or insourcing of a job etc.). In this respect, various Coordination Negotiation

Components have been proposed (Cretan *et al.*, 2012): *Outsrc* (resp. *Insrc*), for outsourcing (resp. insourcing) jobs by exchanging offers among partners known from the beginning of negotiation; *Block* component for assuring that a task is entirely subcontracted by the single participant; *Split* component handles the propagation of constraints among several slots, negotiated in parallel and issued from the split of a single job; *Broker* component deals with the automatic selection of possible participants in the beginning of the negotiation; *SwapIn* (resp. *SwapOut*) components implement a coordination mechanism between two ongoing negotiations to facilitate an exchange between their two tasks; *Transp* component implements a coordination mechanism between two ongoing negotiations in order to facilitate the common transport of their two tasks. These Coordination Components can evaluate the received offers checking whether these are valid and, further, able to reply with new offers constructed based on their particular coordination constraints. At this level, interoperability is sustained by developing a generic coordination framework for the negotiation participants.

The advantages of the proposed negotiation architecture consist of:

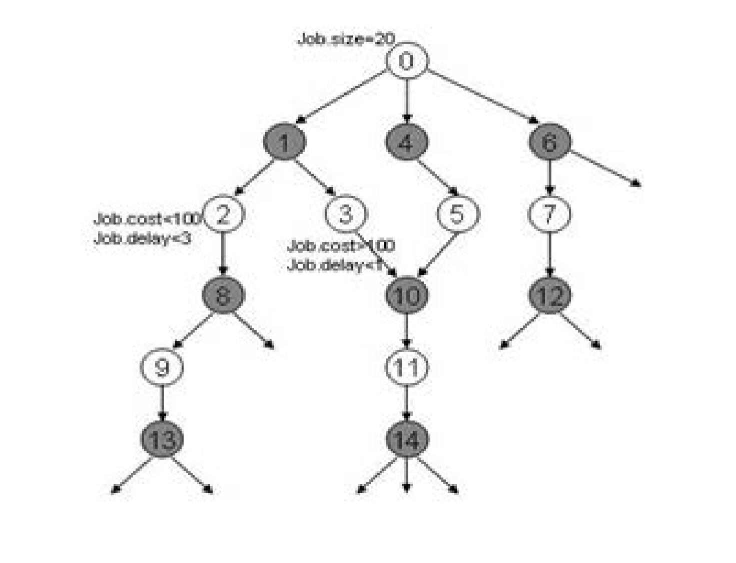
- allowing a precise identification of the coordination objects;
- managing the dependencies among the existing negotiations within the manufacturing environment;
- ensuring the coordination of concurrent negotiations at the Negotiation Components level.

5. Negotiation Communication Approach

A negotiation process is modelled using Xplore, a middleware infrastructure for negotiation components (Andreoli and Castellani, 2001). At the Xplore Middleware level, a negotiation is modelled as a collaborative construction of a negotiation graph among the negotiation participants. Each component has its own (partial) copy of the negotiation graph and expresses negotiation decisions manipulating that copy (Brandl *et al.*,2003). For instance, a proposal made by one of participants (*e.g.*, MG1) that initiated the negotiation is represented in the graph copy visible by the Outsrc component, and the proposals made by potential partners (*e.g.*, MG2 and MG3, called guests in the sequel) are represented in the graph copies visible through their Insrc components. In this way, the evolution of a negotiation in terms of proposals and counter-proposals is modelled by a bicolored graph in which white nodes, representing negotiation contexts, and black nodes, representing decision points with multiple alternatives. Each context (white) node contains a parameter and a set of attributes with associated values. Parameter is the task to be negotiated (Negotiation Object), which is described in a time moment by a set of attributes that have to be negotiated depending on the specific information about the state of the negotiation at that node.

For example, the unique parameter of the negotiation is a delivery job and an attribute can be the cost that can assume a range of possible values. Different branches of negotiation can be created in the negotiation graph, at the initiative either of the initiator or the guests, to explore alternatives (*e.g.*, cost under 100 Euros or over 100 Euros), as shown in Fig. 2. The partners may then create new branches specifying different distribution times (*e.g.*, cost over 100 Euros and distribution time is less than 1 day, or under 100 Euros and the distribution time is less than 3 days). The interaction that specifies the distribution time would occur in the context of one or the other branch created by the interaction concerning the cost.

Fig.2. Example of Negotiation Graph



In accordance with our approach wherein the negotiation process is distributed among the partners of the alliance, the middleware Xplore builds the negotiation graphs, in the same manner, for each of the participants. Therefore, each negotiation partner makes decisions and acts on its own copy of the Xplore graph. Consequently, only the initiating participant has a global view of the negotiation graph, whereas the guests have a partial view corresponding to the propositions sent to each of them by the initiator.

In this context, the purpose of middleware Xplore is to ensure, for each participant, a graphical image of negotiation and synchronize the image with the other partners involved in that negotiation. At the middleware level, this synchronization is modelled by using six operations, called verbs, of the Xplore protocol. The Connect verb allows to dynamically involve a new component instance in a negotiation. The Open and Assert verbs allow a component instance to build the negotiation graph, by creating and populating context nodes with information about the negotiation state at these nodes. The Request verb allows component instances to express their information needs on some given aspects of the negotiation in order to proceed in the negotiation. The Ready and the Quit verbs allow a component instance to declare, respectively, that it is "ready to sign" in the state of a given negotiation context, or, on the contrary, that it wishes to give up the negotiation at that state (but it may pursue the negotiation in other branches) (Cretan *et al*., 2018).

5.1. Algorithm to construct the graph Xplore

In order to describe the graph construction algorithm, we consider the following notations:

Negotiation Object represents the description of the negotiated task. The description refers to the set of possible values for each negotiable attribute indicating the properties of the job. This first description of the task is made by Manager. He also establishes the preferences and dependencies among the attributes.

Negotiation Context represents all data that can be extracted starting from a white node (instantiated attributes, required attributes, and the position of node in the graph structure).

Possible Negotiation Context represents the context resulting of union of two or more white nodes. This context can be considered as attached to a virtual node (*i.e.*, a node that is not present for the moment in the structure of the graph).

Issue Set represents the set of attributes proposed to be negotiated in a negotiation cycle.

Partial_NO_Set represents the set of existing negotiation contexts in which all the attributes of an Issue Set are instantiated.

Proposals_Set represents the set of existing negotiation contexts in which all the attributes of an Issue Set are not instantiated.

Possible_NO_Set represents the set of possible negotiation contexts in which all the attributes of an Issue Set are instantiated.

Possible_Proposals_Set represents the set of possible negotiation contexts in which all the attributes of an Issue Set are not instantiated.

- *OpenWN(n, pni):*

```
Graph.open(n,nb)
New negotiation context N1
  Where N1.nodes =n
If n is a white node
  For every nw parent of nb
    Collect negotiation context(nw) in N1
  If inconsistencies in N1
            Quit(n)
     Else
        If all attributes are instantiated
     Insert the N1 in Partial_NO_Set
   Else
     Insert the N1 in Proposals_Set
     Generate FindObject(N1)
   FindObject(NC)
  For every node n in CN.nodes:
            Create an empty list L(n) of nodes;
            For every white node nw in Graph:
              If first common_ancestor(n, nw) is White Node:
                    Insert nw in L(n);
     Create a list L of nodes where L = ∩n∈N1.nodes L(n);
     For every nw in L:
          New negotiation context CNew;
          CNew.nodes = CN.nodes + nw;
          Collect negotiation context (nw) and CN in Cnew;
          Check content consistency;
            If no inconsistencies in Cnew:
              If all attributes are instantiated:
                Insert the CNew in Possible_NO_Set;
              Else:
                Insert the CNew in Possible_Proposals_Set;
                Generate FindObject(CNew).
```

- *Assert(n,p,i,t):*

```
    Graph.assert(n,p,i,t);
     If i in n.NC:
       Check consistency;
       If inconsistency with the new value t of the attribute i:
Quit(n)
         For every NC in Partial_NO_Set, Proposals_Set, Possible_NO_Set, Possible_Proposals_Set:
  If n∈NC.nodes:
    Delete(NC);
Exit();
       If all attributes are instantiated:
Insert NC in Partial_NO_Set;
For every NC in Proposals_Set, Possible_NO_Set, Possible_Proposals_Set:
   If  n∈NC.nodes:
     Delete(NC);
         Else:
   For every NC in Proposals_Set, Possible_NO_Set, Possible_Proposals_Set:
If n∈NC.nodes:
  Update NC with asserted t;
  Check consistency;
```

```
If inconsistency in NC:
  Delete(NC);
  Exit();
If NC in Possible_Proposals_Set and all attributes are instantiated:
        Move NC in Possible_NO_Set.
```

- *Request(n,p,i):*

```
If attribute i not in Issues_Set
   Insert i in Issues_Set;
If Negotiation Object doesn't contain constraints or possible values for attribute i
     Ask higher authority (e.g.: manager);
```

6. Final considerations

This paper describes the implementation of the negotiation coordination model via a three-layered architecture: Negotiation Agent, Coordination Components and Communication Middleware.

This structure is in line with the proposed approach of splitting the negotiation process into three discrete processes: decision-making process, coordination process and communication process.

The communication process is managed by the middleware layer that defines the generic mechanisms of communication and synchronization among several agents. At the middleware level, communication is based on the Xplore protocol that enables the management of the concurrent negotiations where, at any moment, participants can choose to simultaneously negotiate in several negotiation states.

The coordination process is managed by the coordination components layer.

The main feature of this approach is the fact that the coordination process is fully distributed on several coordination modules allowing to be defined several specialized components that can be used in any negotiation. This distribution of coordination constraints also allowed the components to run simultaneously, which enhanced the efficiency of the system, making it capable of evaluating several negotiations offers at the same time.

The decision-making process is provided by the Negotiation Agent layer that models the support mechanisms for the interaction processes within the collaborative manufacturing environment, mainly, for creating offers and making decisions in a negotiation. This layer manages the decisions that can be made on the negotiation strategy for evaluating and generating offers and on the protocol for sending the offers to the other agents. The goal at this level is to allow the human user to intervene in the decision-making process. We can thus separate the decision-making process from agents, which reinforces the generic applicability of the proposed negotiation system.

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TAX AUDITS ON THE USA LABOUR MARKET

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Abstract

We find evidence that tax audits can lead to adverse employment outcomes among workers who are audited. We also show that these effects are exacerbated when workers are less educated or when they live in states with higher taxes than average. In the United States, tax audits are a regular occurrence. Tax audits are carried out by the Internal Revenue Service (IRS) to verify that all taxes due have been paid.

As a business owner or an individual, taxes are an essential part of your financial obligations. It is important to understand the significance of taxes and their impact on your bottom line. Tax rewards can provide significant benefits to your business, but they are often overlooked or underutilized. It is essential to understand how taxes work and how they can impact your business or financial well-being. Tax audits are one of the ways the government ensures compliance with tax regulations. As a business owner, taxes are an unavoidable part of your operations. At some point, you may be audited by the government to ensure compliance with tax laws. This can be a daunting prospect for many, as the consequences of not being prepared can be severe. In this article, I will provide a comprehensive guide on navigating tax audits for optimal labour market outcomes. In this article, I will explore the benefits of tax rewards and provide tips for ensuring compliance and maximizing labour market outcomes. In this article, I will explore the impact of tax audits on labour market outcomes and provide strategies for minimizing risk and maximizing rewards.

Keywords: *tax, audit, tax audit, taxpayer, labour market.*

1. Introduction: Understanding Tax Audits: What are they and why do they matter?

A tax audit is an examination of a taxpayer's financial information and tax returns to ensure compliance with tax laws. Tax audits can be conducted by the federal or state government, depending on the jurisdiction. The primary goal of a tax audit is to ensure that taxpayers accurately report their income and deductions.

Tax audits matter because they can result in significant financial penalties for taxpayers who do not comply with tax laws. Depending on the severity of the noncompliance, taxpayers can be subject to fines, interest charges, and even criminal charges. Additionally, tax audits can be time-consuming and stressful for taxpayers, affecting their ability to focus on their businesses or other financial obligations.

A tax audit is an examination of your business's financial records by the government to ensure that you have accurately reported your income and expenses. Tax audits can be triggered by a variety of factors, such as discrepancies in your tax return or random selection by the government. Tax audits matter because they can result in penalties, fines, and even criminal charges if you are found to have committed tax fraud.

A tax audit can be a stressful experience for any business owner, especially if you are not prepared. However, being prepared can make all the difference in the outcome of the audit. By understanding what a tax audit is and why it matters, you can take the necessary steps to ensure that your business is in compliance with tax laws.

A tax audit is an examination of a company's financial records, tax returns, and other related documents to ensure compliance with tax laws and regulations. Tax audits are conducted by government agencies such as the Internal Revenue Service (IRS) to identify potential discrepancies or errors in tax filings. Tax audits matter because they can result in significant financial penalties and legal consequences for non-compliance. Additionally, tax audits can be time-consuming and can divert resources away from other important business activities.

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2. Types of Tax Audits: A Comprehensive Overview[1]

There are several types of tax audits, and understanding them can help you prepare for an audit and ensure compliance with tax regulations.

- Correspondence Audit: This is the least severe type of audit and involves the IRS sending a letter to the taxpayer requesting additional information or clarification on specific items on the tax return.
- Office Audit: An office audit is more severe than a correspondence audit and requires the taxpayer to visit an IRS office to provide additional information or documentation.
- Field Audit: This type of audit is the most severe and involves the IRS conducting an audit at the taxpayer's place of business or home.

There[2] are several types of tax audits, each with its own unique characteristics. The most common types of tax audits are correspondence audits, office audits, and field audits. A correspondence audit is conducted through the mail and is typically used for simple tax issues, such as missing or incorrect information on a tax return. An office audit is conducted in person at a government office and is typically used for more complex tax issues, such as deductions and credits. A field audit is conducted in person at your business location and is typically used for the most complex tax issues, such as tax fraud[3].

It is important to understand the different types of tax audits so that you can prepare accordingly[4]. For example, if you are facing a field audit, you may need to provide more detailed documentation of your financial records than if you were facing a correspondence audit.

There[5] are several types of tax audits[6], each with its own unique requirements and procedures. The most common types of tax audits include correspondence audits, office audits, and field audits.

Correspondence audits are the least invasive type of tax audit and are conducted via mail. Office audits are more comprehensive and require the business owner to visit the auditor's office to review financial records and answer questions. Field audits are the most invasive type of tax audit and involve an auditor visiting the business owner's office to conduct an on-site audit.

3. Preparing for a Tax Audit: What You Need to Know

Preparing for a tax audit can help reduce stress and ensure compliance with tax regulations. Here are some tips to help you prepare for a tax audit:

- Gather all relevant financial documents: This includes receipts, bank statements, and other financial records used to prepare your tax return.
- Organize your documents: Ensure that all financial documents are organized and easily accessible.
- Review your tax return: Review your tax return to identify any errors or omissions that may trigger a tax audit.
- Be prepared to answer questions: During a tax audit, the IRS may ask questions related to your financial information. Be prepared to answer these questions accurately and honestly7.
- Consider hiring a tax professional: A tax professional can help you prepare for a tax audit and represent you before the IRS.

Preparing for a tax audit can be a time-consuming process, but it is essential for minimizing risk and maximizing rewards. The first step in preparing for a tax audit is to gather all of your financial records, including bank statements, receipts, and invoices. You should also review your tax returns to ensure that they are accurate and complete.

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Another important step in preparing for a tax audit is to hire a tax professional. A tax professional can help you navigate the audit process and ensure that you are in compliance with tax laws. They can also help you identify potential deductions and credits that you may have missed on your tax returns.

Preparing for a tax audit is crucial to ensuring compliance and minimizing the risk of penalties or legal consequences. The first step in preparing for a tax audit is to gather all relevant financial records, including tax returns, invoices, and receipts.

Next, business owners should review their financial records to identify any discrepancies or errors that may raise red flags during an audit. It's also important to ensure that all financial records are organized and easily accessible to the auditor.

Finally, business owners should prepare themselves for the audit by familiarizing themselves with the audit process and what to expect during the audit. This includes understanding the types of questions that may be asked and the types of documents that may be requested.

4. Maximizing Tax Rewards: Tips for Navigating Tax Audits Successfully[8]

Navigating a tax audit successfully can result in significant tax rewards. Here are some tips to help you navigate a tax audit successfully[9]:

- Be honest and transparent: Honesty and transparency are essential during a tax audit. Provide accurate information and documentation to the IRS, and do not attempt to hide or conceal any financial information10.
- Respond promptly to IRS requests: Respond promptly to any requests from the IRS for additional information or documentation. Failure to respond promptly can result in additional penalties or fines.
- Know your rights: Understand your rights as a taxpayer and the options available to you if you disagree with the IRS's findings.
- Consider negotiating a settlement: The IRS may be willing to negotiate a settlement to resolve any tax issues. Consider hiring a tax professional to help you negotiate a settlement.

Navigating a tax audit successfully requires a combination of preparation and strategy. Here are some tips for maximizing tax rewards and minimizing risk during a tax audit:

- Be honest and transparent: It is important to be honest and transparent with the government during a tax audit. If you make a mistake on your tax returns, be upfront about it and provide the necessary documentation to support your claims.
- Keep detailed records: Keeping detailed records of your financial transactions can help you provide accurate information to the government during a tax audit.
- Respond promptly: Responding promptly to requests from the government can help you avoid penalties and fines.

Hire a tax professional: A tax professional can provide valuable guidance and support during a tax audit.

Navigating a tax audit successfully requires careful planning and preparation. One of the most important tips for maximizing tax rewards is to work with a qualified tax professional who can provide guidance and support throughout the audit process.

Another tip for navigating tax audits successfully is to be honest and transparent with the auditor. This includes providing accurate financial records and answering questions truthfully and to the best of your knowledge.

It's also important to be proactive during the audit process by addressing any issues or concerns raised by the auditor promptly. This can help to minimize the risk of penalties and legal consequences and may even result in increased tax rewards.

5. The Impact of Tax Audits on Labour Market Outcomes

Tax audits can have a significant impact on labour market outcomes[11]. For businesses, tax audits can result in financial penalties, which can affect their ability to hire new employees or invest in new equipment or

[8] M.G. Allingham, A. Sandmo, *Income Tax Evasion: A Theoretical Analysis*, Journal of Public Economics, 1972, 1: 323-38.
[9] C. Bazart, M. Pickhardt, *Fighting Income Tax Evasion with Positive Rewards*, Public Finance Review, 2011, 39: 124-49.
[10] S. Dhami, A. Al-Nowaihi, *Optimal taxation in the presence of tax evasion: Expected utility versus prospect theory*. Journal of Economic Behavior & Organization, 2010, 75: 313-37.
[11] C.A. Pissarides, *Equilibrium in the Labor Market with Search Frictions*, American Economic Review, 2011, 101: 1092-105.

technologies. Additionally, tax audits can be time-consuming, affecting the productivity of business owners and employees[12].

For individuals, tax audits can result in financial hardship, affecting their ability to seek employment or invest in their career development. Additionally, the stress and anxiety associated with tax audits can affect individuals' mental health, leading to reduced productivity and job satisfaction.

Tax audits can have a significant impact on labour market outcomes. For example, if a business is found to have committed tax fraud, it can damage their reputation and make it difficult to attract and retain top talent. On the other hand, if a business is able to navigate a tax audit successfully and demonstrate compliance with tax laws, it can enhance their reputation and make them a more attractive employer[13].

It is important to understand the potential impact of tax audits on labour market outcomes so that you can take the necessary steps to minimize risk and maximize rewards[14].

Tax audits can have a significant impact on labour market outcomes. Non-compliance with tax laws and regulations can lead to financial penalties and legal consequences, which can result in reduced profitability and even bankruptcy for small businesses.

Additionally, tax audits can divert resources away from other important business activities, such as hiring and training employees. This can result in reduced productivity and lower labour market outcomes.

6. Tax Audit Best Practices[15]: Examples from Successful CompaniesTax Audit Best Practices: Examples from Successful Companies

Successful companies understand the importance of tax compliance and have implemented best practices to ensure compliance with tax regulations[16]. Here are some examples of tax audit best practices from successful companies:

- Maintain accurate financial records: Accurate financial records are essential for tax compliance. Successful companies maintain accurate financial records throughout the year, reducing the likelihood of errors or omissions on their tax returns.
- Regularly review tax returns: Successful companies regularly review their tax returns to identify any errors or omissions that may trigger a tax audit. This allows them to correct any mistakes before filing their tax returns.
- Hire a tax professional: Successful companies hire tax professionals to help them navigate tax audits and ensure compliance with tax regulations.
- Establish a tax committee: Successful companies establish a tax committee responsible for overseeing tax compliance and ensuring that the company is meeting its tax obligations.

There are many examples of successful companies[17] that have navigated tax audits successfully. For example, Apple Inc. was able to navigate a $14.5 billion tax bill from the European Union by demonstrating compliance with tax laws. Another example is Microsoft, which was able to navigate a tax audit by providing detailed documentation of their financial records[18].

The key takeaway from these examples is that preparation and strategy are essential for navigating tax audits successfully[19]. By keeping detailed records, being honest and transparent, and hiring a tax professional, you can position your business for success during a tax audit.

Successful companies understand the importance of tax compliance and have implemented best practices to ensure compliance and maximize tax rewards. One of the best practices for tax compliance is to maintain accurate financial records and to review them regularly for errors and discrepancies.

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[12] G. Economides, A. Philippopoulos, A. Rizos, *Optimal tax policy under tax evasion*, International Tax and Public Finance, 2020, 27: 339-62.

[13] P.M. Gomes, *Fiscal Policy and the Labour Market: The Effect of Public Sector Employment and Wages*, IZA Discussion Papers, 2010, no. 5321. Bonn: Institute for the Study of Labor (IZA).

[14] L.P. Feld, B.S. Frey, B. Torgler, *Rewarding Honest Taxpayers?* in Managing and Maintaining Compliance, 2006, Edited by H. Elffers and P. V. und Wim Huisman. Den Haag: Boom Legal Publishers, pp. 45-61.

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[16] A.A. Liu, *Tax evasion and optimal environmental taxes*, Journal of Environmental Economics and Management, 2013, 66: 656-70.

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[18] B.U. Wigger, *Optimal Taxation in the Presence of Black Markets*, Journal of Economics, 2002, 75: 239-54.

[19] J. Mirrlees, *An exploration in the theory of optimum income taxation*, The Review of Economic Studies, 1971, 38: 175-208.

Another best practice for tax compliance is to work with a qualified tax professional who can provide guidance and support throughout the audit process. Successful companies also conduct regular internal audits to identify potential compliance issues and to address them proactively.

7. Common Tax Audit Mistakes to Avoid

Avoiding common tax audit mistakes can help reduce the likelihood of a tax audit and ensure compliance with tax regulations. Here are some common tax audit mistakes to avoid[20]:

- Failing to report all income: Failing to report all income can trigger a tax audit and result in significant financial penalties[21];
- Claiming excessive deductions: Claiming excessive deductions can also trigger a tax audit and result in financial penalties;
- Failing to keep accurate financial records: Failing to keep accurate financial records can result in errors or omissions on your tax return, triggering a tax audit;
- Failing to respond promptly to IRS requests: Failing to respond promptly to IRS requests for additional information or documentation can result in additional penalties or fines[22].

There are several common tax audit mistakes that businesses should avoid. One of the most common mistakes is failing to keep detailed records of financial transactions. Another common mistake is failing to respond promptly to requests from the government. Other mistakes include failing to hire a tax professional and being dishonest with the government.

By avoiding these common tax audit mistakes, you can minimize risk and maximize rewards during a tax audit[23].

There are several common tax audit mistakes that business owners should avoid to ensure compliance and maximize tax rewards. One of the most common mistakes is failing to maintain accurate financial records, which can result in errors and discrepancies that may raise red flags during an audit.

Another common mistake is failing to respond to audit requests promptly. This can result in penalties and legal consequences and can even lead to a more invasive audit.

8. The Role of Professional Services in Tax Audits[24]

Professional services can play a significant role in tax audits, helping taxpayers navigate tax regulations and ensure compliance. Here are some ways professional services can help during a tax audit:

- Preparing for a tax audit: Professional services can help taxpayers prepare for a tax audit by reviewing their financial records, identifying any potential tax issues, and developing a plan to address any issues.
- Representing taxpayers before the IRS: Professional services can represent taxpayers before the IRS, ensuring that taxpayers' rights are protected and that their interests are represented.
- Negotiating settlements: Professional services can help taxpayers negotiate settlements with the IRS to resolve any tax issues.

Professional services, such as accounting firms and law firms, can play a valuable role in tax audits. These firms can provide guidance and support during the audit process, including helping businesses prepare for the audit, representing businesses during the audit, and helping businesses navigate the appeals process if necessary.

If you are facing a tax audit, it is important to consider the role of professional services in the process. By hiring a tax professional, you can position your business for success during a tax audit.

Professional services, such as tax lawyers and accountants, can play a crucial role in ensuring compliance and maximizing tax rewards. These professionals have the knowledge and experience to navigate the complex tax landscape and to provide guidance and support throughout the audit process.

Additionally, professional services can help to identify potential compliance issues proactively and to address them before they become a problem.

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[20] K.J. Crocker, J. Slemrod, *Corporate tax evasion with agency costs*, Journal of Public Economics, 2005, 89: 1593-610.

[21] H. Cremer, F. Gahvari, *Tax evasion and the optimum general income tax*, Journal of Public Economics, 1996, 60: 235-49.

[22] B. Kastlunger, S. Muehlbacher, E. Kirchler, L. Mittone, *What Goes Around Comes Around? Experimental Evidence of the Effect of Rewards on Tax Compliance*, Public Finance Review, 2011, 39: 150-67.

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9. Conclusions: Key Takeaways for Maximizing Tax Rewards and Labour Market Outcomes

Tax audits can be stressful and time-consuming, but they are an essential part of ensuring tax compliance. Understanding tax audits, preparing for them, and navigating them successfully can result in significant tax rewards and labour market outcomes. Remember to maintain accurate financial records, respond promptly to IRS requests, and consider hiring professional services to help you navigate tax audits. By following these tips, you can ensure compliance with tax regulations and maximize your tax rewards and labour market outcomes.

Tax audits can have a significant impact on labour market outcomes. By understanding what a tax audit is, preparing for the audit, and navigating the audit successfully, you can minimize risk and maximize rewards. Key takeaways for maximizing tax rewards and labour market outcomes include being honest and transparent, keeping detailed records, responding promptly to requests from the government, and hiring a tax professional. By following these strategies, you can position your business for success during a tax audit and enhance your reputation as a responsible and compliant employer.

In conclusion, tax rewards can provide significant benefits to businesses, but they require careful planning and preparation to ensure compliance and maximize labour market outcomes. Business owners should understand the types of tax audits, prepare for audits proactively, and work with qualified professionals to navigate the audit process successfully. By implementing best practices for tax compliance and avoiding common tax audit mistakes, business owners can minimize the risk of penalties and legal consequences and maximize tax rewards. Remember, compliance is key to unlocking the benefits of tax rewards and improving labour market outcomes.

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URBAN POPULATION DYNAMICS IN USA AND THE ECONOMICS

Valentin Gabriel CRISTEA*

Abstract

Long-term population trends meditate socioeconomic transformations likely better than other territorial factors and/or socioeconomic processes.

The political, economic, and cultural factors have affected long-term urbanization and the underlying population dynamics.

As the world continues to evolve, there has been a significant shift from rural to urban areas, which has resulted in the growth of urbanization. In the United States of America, urbanization has been on the rise since the early 20th century, with millions of people moving to urban areas every year. This trend has continued in recent years, with many cities experiencing rapid growth. In this article, we will explore the impact of rapid urbanization on the USA's population dynamics.

As someone who has lived in both rural and urban areas, I have always been fascinated by the growth of urbanization. As cities and metropolitan regions continue to expand, it's important to understand the economic and social implications of this phenomenon. In this article, we will take a deep dive into USA's urbanization trends, exploring the definition and perspectives of urbanization, the economic implications of urban growth, population growth and urbanization, metropolitan regions and their characteristics, and the impact of urbanization on employment opportunities, social services, and the environment.

As the world continues to experience rapid population growth, urbanization becomes a crucial topic in understanding global economic development. Urbanization has the potential to bring about economic growth and development, but it also poses challenges to the environment and social services. In this article, I will explore the definition and perspectives of urbanization, its economic implications, the characteristics of metropolitan regions, and the impact of urbanization on employment opportunities, social services, and the environment.

Keywords: *metropolitan, population, world urbanization perspectives, metropolitan region, urban.*

1. Introduction: Understanding Urbanization: Definition and Perspectives

Urbanization refers to the movement of people from rural areas to urban areas, resulting in the growth of a city or town. Urbanization is a global phenomenon, with the proportion of the world's population living in urban areas increasing from 30% in 1950 to 55% in 2018, and projected to reach 68% by 2050 (United Nations, 2018). However, there are different perspectives on what constitutes urbanization.

From a demographic perspective, urbanization is determined by the size and density of the population in a given area. The United Nations defines urban areas as "places with a population of at least 5,000 people and a density of more than 400 persons per square kilometer" (United Nations, 2018). However, some scholars argue that this definition is too narrow and that urbanization should be defined based on the social and economic characteristics of the population.

From an economic perspective, urbanization is seen as a driver of economic growth and development. The concentration of people in urban areas can lead to economies of scale, increased productivity, and innovation. However, urbanization can also lead to inequality, as some people may not have access to the benefits of urbanization.

Urbanization can be defined as the process of people moving from rural areas to urban areas. This movement is driven by a variety of factors, including economic opportunities, access to social services, and improved quality of life. Urbanization can be viewed from different perspectives, including economic, social, and environmental.

From an economic perspective, urbanization can lead to increased productivity, job creation, and economic growth. This is because urban areas tend to have better infrastructure, more resources, and a larger market for goods and services. From a social perspective, urbanization can improve access to social services such as

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education, healthcare, and housing. However, it can also lead to social inequalities, such as income inequality and limited access to resources for marginalized communities. From an environmental perspective, urbanization can lead to increased pollution and environmental degradation.

Urbanization[1] can be defined as the process by which people move from rural areas to urban areas, resulting in the growth and expansion of urban areas. According to the United Nations, 55% of the world's population lives in urban areas, and this number is expected to increase to 68% by 2050. There are several perspectives on urbanization, including the urbanization of poverty, the urbanization of affluence, and the urbanization of entire societies.

The urbanization of poverty refers to the concentration of poverty in urban areas, which often leads to issues such as crime, unemployment, and poor living conditions. On the other hand, the urbanization of affluence refers to the concentration of wealth in urban areas, which can lead to gentrification and displacement of low-income residents. The urbanization of entire societies refers to the transformation of a rural society into an urban one, which can lead to rapid economic growth and development.

2. The Economic Implications of Urban Growth[2]

Urban growth[3] has significant economic implications, both positive and negative. On the positive side, urban areas tend to be centers of economic activity, with higher levels of productivity and innovation. This is due to the concentration of people and resources, which allows for greater collaboration and specialization. Urban areas also tend to attract investment and create jobs, which can contribute to overall economic growth.

However, urban growth[4] also has negative economic implications, such as increased income inequality and environmental degradation. As urban areas become more prosperous, the cost of living tends to increase, which can make it difficult for low-income residents to afford basic necessities. Additionally, the concentration of people and resources can lead to environmental problems such as air pollution, water pollution, and urban sprawl. Urbanization[5] can have significant economic implications, both positive and negative. On the one hand, urbanization can lead to increased productivity, job creation, and economic growth. Urban areas tend to have better infrastructure, more resources, and a larger market for goods and services. This can attract businesses and entrepreneurs, leading to increased investment and economic activity.

However, urbanization[6] can also result in economic challenges, such as income inequality and limited access to resources for marginalized communities. The cost of living in urban areas is often higher than in rural areas, making it difficult for low-income families to afford basic necessities such as housing, food, and healthcare. This can lead to social and economic disparities, which can have long-term consequences for the affected communities. Urban growth has significant economic implications, both positive and negative. On the positive side, urbanization can lead to increased economic growth[7] and development. The concentration of people[8] in urban areas can lead to increased productivity, innovation, and entrepreneurship. Urban areas also tend to have better infrastructure and access to markets, which can facilitate economic growth.

However, urbanization can also lead to negative economic impacts. The concentration of people in urban areas can lead to congestion, which can lead to increased transportation costs and reduced productivity. Urbanization can also lead to environmental degradation, as cities tend to be major sources of pollution and greenhouse gas emissions.

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3. Population Growth and Urbanization[9]

Population growth[10] is one of the major drivers of urbanization. As the world's population continues to grow, the demand for urban living spaces increases. This demand is particularly high in developing countries, where rapid population growth and urbanization are occurring simultaneously.

Population growth and urbanization[11] pose significant challenges to infrastructure and social services. Urban areas need to be able to provide adequate housing, transportation, and social services such as healthcare and education to meet the needs of their growing population. Failure to provide these services can result in social unrest and political instability.

One of the primary drivers of urbanization is population growth. As the population increases, there is a greater demand for resources and services, which can lead to the development of new urban areas. In the United States, population growth has been on the rise in recent years, with many cities experiencing rapid growth. This has resulted in increased pressure on urban infrastructure and services, including transportation, healthcare, and housing.

Population growth can also have negative consequences, such as environmental degradation and resource depletion. As more people move to urban areas, there is a greater demand for resources such as water, food, and energy. This can lead to resource depletion and increased pollution, which can have long-term environmental consequences.

Population growth[12] is one of the key drivers of urbanization. As the population of a region grows, there is a greater demand for housing, transportation, and social services, which can lead to the expansion of urban areas. This can have both positive and negative effects on the population.

On the positive side, urbanization can lead to increased access to education, healthcare, and other social services. Additionally, urban areas tend to have higher levels of cultural diversity and social mobility, which can provide opportunities for personal and professional growth. However, urbanization can also lead to overcrowding, traffic congestion, and a lack of affordable housing, which can negatively impact the quality of life for residents.

4. Metropolitan Regions: Definition and Characteristics

Metropolitan regions are areas that include a central city and its surrounding suburbs and towns. These regions are characterized by their high population density and interconnectedness. Metropolitan regions are important drivers of economic growth and development, as they provide access to a large labour market and a wide range of goods and services.

Metropolitan regions face unique challenges related to urbanization. The concentration of people in these regions can lead to congestion and increased transportation costs. Metropolitan regions also tend to be centers of inequality, as some neighborhoods may have better access to social services and economic opportunities than others. Metropolitan regions are defined as areas that include a central urban core and its surrounding suburban and rural areas. These regions are often defined by population density, economic activity, and social and cultural characteristics. In the United States, metropolitan regions are home to the majority of the population and are significant drivers of economic growth and development.

Metropolitan regions[13] tend to have higher levels of economic activity and job creation than non-metropolitan areas. They also tend to have better access to social services such as healthcare, education, and public transportation. However, metropolitan regions can also experience social and economic disparities, such as income inequality and limited access to resources for marginalized communities.

Metropolitan regions are defined as areas that include a central city and its surrounding suburbs and exurbs. These regions are characterized by high population density, economic interdependence, and a shared

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[9] T. Saitoh, J.E. Cohen, *Environmental variability and density dependence in the temporal Taylor's law*, Ecological Modelling, 2018, 387: 134-43.

[10] A. Giometto, M. Formentin, A. Rinaldo, J.E. Cohen, A. Maritan, *Sample and population exponents of generalized Taylor's law*, Proceedings of the National Academy of Sciences, 2015, *USA* 112: 7755-60.

[11] M. Xu, J.E. Cohen, *Spatial and temporal autocorrelations affect Taylor's law for US county populations: Descriptive and predictive models*, 2021, PLoS ONE 16: e0245062.

[12] J.E. Cohen, *Stochastic population dynamics in a Markovian environment implies Taylor's power law of fluctuation scaling*, Theoretical Population Biology, 2014, 93: 30-37.

[13] A. Rogers, *Introduction to Multiregional Mathematical Demography*, 1975, New York: Wiley.

sense of identity. Metropolitan regions are often centers of economic activity, with large numbers of businesses and industries located within their boundaries.

Metropolitan regions can be further classified into three categories: primary, secondary, and tertiary. Primary metropolitan regions are the largest and most economically powerful, with populations of over 5 million. Secondary metropolitan regions have populations between 1 and 5 million, while tertiary metropolitan regions have populations between 250,000 and 1 million.

5. Urbanization[14] and Economic Development

Urbanization can be a significant driver of economic development. The concentration of people in urban areas can lead to economies of scale, increased productivity, and innovation. Urban areas also tend to have better infrastructure and access to markets, which can facilitate economic growth.

However, urbanization[15] can also lead to inequality, as some people may not have access to the benefits of urbanization. In developing countries, rapid urbanization can lead to informal settlements and slums, where people live in poverty and lack access to basic services such as sanitation and healthcare.

Urbanization can have significant implications for economic development. As more people move to urban areas, there is a greater demand for goods and services, which can lead to increased economic activity and job creation. Urban areas tend to have better infrastructure, more resources, and a larger market for goods and services, which can attract businesses and entrepreneurs.

However, urbanization[16] can also lead to social and economic disparities, such as income inequality and limited access to resources for marginalized communities. The cost of living in urban areas is often higher than in rural areas, making it difficult for low-income families to afford basic necessities such as housing, food, and healthcare. This can lead to social and economic disparities, which can have long-term consequences for the affected communities.

Urbanization can have a significant impact on economic development. As urban areas grow, they tend to become centers of economic activity, attracting investment and creating jobs. This can lead to increased economic growth and development, as businesses and industries take advantage of the resources and opportunities available in urban areas.

However, urbanization can also lead to economic inequality, as low-income residents may be unable to afford the high cost of living in urban areas. Additionally, urbanization can lead to environmental problems such as air pollution and water pollution, which can have negative economic consequences.

6. Urbanization and Employment Opportunities

Urbanization can create employment opportunities for people, particularly in the service sector. As cities grow, so do their economies, leading to increased demand for goods and services. Urban areas also tend to be centers of innovation and entrepreneurship, leading to the creation of new jobs.

However, urbanization can also lead to unemployment and underemployment. As cities grow, so does the competition for jobs, particularly in the formal sector. Urbanization can also lead to the displacement of people from their traditional livelihoods, particularly in rural areas.

Urbanization can lead to increased job creation and employment opportunities. Urban areas tend to have more businesses and industries, which can create more job opportunities for local residents. Additionally, urban areas tend to have better access to education and training opportunities, which can help residents develop new skills and advance in their careers.

However, urbanization can also lead to job displacement and unemployment. As more people move to urban areas, there is increased competition for jobs, which can make it difficult for certain groups to find employment. Additionally, some industries may move out of urban areas due to rising costs, which can lead to job losses and economic challenges.

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[14] M. Carlucci, C. Ferrara, K. Rontos, I. Zambon, L. Salvati, *The long breadth of cities: Revisiting worldwide urbanization patterns*, 1950-2030, Applied Economics, 2020, 52: 4162-74.

[15] Z. Eisler, I. Bartos, J. Kertész, *Fluctuation scaling in complex systems: Taylor's law and beyond*, Advances in Physics, 2008, 57: 89-142.

[16] J.E. Cohen, M. Xu, *Random sampling of skewed distributions implies Taylor's power law of fluctuation scaling*, Proceedings of the National Academy of Sciences, 2015, *USA* 112: 7749-54.

Urbanization can also have a significant impact on employment opportunities. As urban areas grow, they tend to create more jobs, particularly in the service and manufacturing sectors. This can provide opportunities for both skilled and unskilled workers, as businesses and industries seek to take advantage of the resources and opportunities available in urban areas.

However, urbanization can also lead to job displacement, particularly in the agricultural sector. As rural areas become less populated, there may be fewer opportunities for agricultural work, leading to job losses and economic hardship for rural communities.

7. Urbanization and Social Services

Urbanization[17] can lead to improved access to social services such as healthcare and education. Urban areas tend to have better infrastructure and access to resources, leading to improved quality of life for residents. Urban areas also tend to be centers of innovation and technology, leading to improvements in social services.

However, urbanization can also lead to inequality in access to social services. Some **neighborhoods** may have better access to healthcare and education than others, leading to disparities in outcomes. Urbanization can also lead to the displacement of people from their traditional social networks and support systems, leading to social isolation and mental health issues.

Urbanization[18] can improve access to social services such as healthcare, education, and housing. Urban areas tend to have more resources and better infrastructure, which can lead to improved access to social services. Additionally, urban areas tend to have more diverse populations, which can lead to increased cultural exchange and social integration.

However, urbanization[19] can also lead to social disparities, such as income inequality and limited access to resources for marginalized communities. The cost of living in urban areas is often higher than in rural areas, making it difficult for low-income families to afford basic necessities such as housing, food, and healthcare. This can lead to social and economic disparities, which can have long-term consequences for the affected communities.

Urbanization[20] can also have a significant impact on social services. As urban areas grow[21], they tend to have more access to education, healthcare, and other social services. This can provide opportunities for personal and professional growth, as well as increased access to resources and support.

However, urbanization can also lead to social inequality, particularly if low-income residents are unable to afford the high cost of living in urban areas. Additionally, urbanization can lead to a lack of affordable housing, which can make it difficult for low-income residents to find suitable living arrangements.

8. Urbanization and Environmental Impact[22]

Urbanization has significant environmental impacts, particularly in terms of greenhouse gas emissions and pollution. As cities grow, so does the demand for energy and resources, leading to increased carbon emissions and pollution. Urbanization can also lead to deforestation and land degradation, as cities expand into surrounding natural areas.

However, urbanization can also lead to improvements in environmental sustainability. As cities grow, so does the demand for renewable energy and sustainable transportation options. Urban areas also tend to be centers of innovation and technology, leading to the development of new solutions to environmental challenges.

Urbanization can have significant environmental impacts, including increased pollution and environmental degradation. As more people move to urban areas, there is a greater demand for resources such as water, food,

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[17] S. Dey, A. Joshi, *Stability via asynchrony in Drosophila metapopulations with low migration rates*, Science, 2006, 312: 434-36.

[18] G. Egidi, L. Salvati, S. Vinci, *The long way to tipperary: City size and worldwide urban population trends*, 1950-2030, Sustainable Cities and Society, 2020, 60: 102148.

[19] A. Naccarato, F. Benassi, *World population densities: Convergence, stability, or divergence? Mathematical Population Studies,* 2022, 29: 17-30, M.E. Newman, *Power laws, Pareto distributions and Zipf's law*, Contemporary Physics, 2005, 46: 323-51.

[20] J.E. Cohen, M. Xu, H. Brunborg, *Taylor's law applies to spatial variation in a human population*, Genus, 2013a, 69: 25- 60.

[21] J.E. Cohen, M. Xu, W.S.F. Schuster, *Stochastic multiplicative population growth predicts and interprets Taylor's power law of fluctuation scaling*, Proceedings of the Royal Society, 2013b, 280: 20122955.

[22] L. Chelleri, T. Schuetze, L. Salvati, *Integrating resilience with urban sustainability in neglected neighborhoods: Challenges and opportunities of transitioning to decentralized water management in Mexico City*, Habitat International, 2015, 48: 122-30.

and energy. This can lead to resource depletion and increased pollution, which can have long-term environmental consequences.

Additionally, urbanization[23] can lead to the destruction of natural habitats and biodiversity. As urban areas expand, natural habitats are often destroyed to make way for new development. This can lead to the loss of important ecosystems and biodiversity, which can have significant environmental consequences.

Urbanization can also have a significant impact on the environment. As urban areas grow, they tend to create more pollution, particularly in the form of air pollution and water pollution. Additionally, urbanization can lead to urban sprawl, which can have negative environmental consequences such as habitat destruction and loss of biodiversity.

However, urbanization can also lead to positive environmental outcomes, particularly if cities invest in green infrastructure and sustainable development practices. By promoting public transportation, green spaces, and renewable energy, cities can reduce their environmental impact and create a more sustainable future.

9. Conclusions: The Future of Urbanization and Economics

Urbanization is a complex and multifaceted phenomenon with significant economic implications. While urbanization can lead to economic growth and development, it also poses challenges to the environment and social services. As the world's population continues to grow, urbanization will become an increasingly important topic in understanding global economic development.

To ensure that urbanization[24] leads to sustainable economic growth and development, policymakers need to focus on creating inclusive and equitable cities. This includes investing in infrastructure and social services to meet the needs of a growing population, promoting entrepreneurship and innovation, and ensuring that all residents have access to economic opportunities and social services. By taking a holistic approach to urbanization, we can ensure that cities are engines of economic growth and development, while also protecting the environment and promoting social equity.

The growth of urbanization has significant implications for the future of the United States' population dynamics. While urbanization can lead to improved economic growth and access to social services, it can also lead to social and economic disparities and environmental degradation. As the population continues to grow, it is important to consider the long-term impacts of urbanization on the environment, the economy, and social equity.

To address these challenges, policymakers must focus on promoting sustainable and equitable urban development. This includes investing in sustainable infrastructure, promoting social and economic inclusion, and protecting natural habitats and biodiversity. By taking a comprehensive approach to urbanization, we can ensure that our cities and metropolitan regions are sustainable, equitable, and prosperous for all.

In conclusion, urbanization has significant economic and social implications, both positive and negative. As population growth and economic development continue to shape our cities and metropolitan regions, it’s important to consider the impact of urbanization on employment opportunities, social services, and the environment. By investing in sustainable development practices and promoting social equity, we can create a more prosperous and sustainable future for all.

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ECONOMIC IMPACT OF THE CORONAVIRUS CRISIS ON THE CONSTRUCTION SECTOR IN ROMANIA

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Abstract

The construction sector has been marked in the recent years by unforeseen events that have changed the plans of many companies in this sector. This paper examines the evolution of this sector before, during and after the SARS-COV2 pandemic. The aim of this paper is to highlight how construction companies have managed their business with the threat of the pandemic crisis. The method used is a comparative analysis from 2015 to 2022 inclusively, so that we can observe the stage of development of firms operating in the construction sector precursor to the pandemic, and the effects it has had. For the period 2019-2022, we have also analyzed the impact of the increase in the minimum wage and of the tax facilities for construction employees on the development of the construction industry. Among the indicators analyzed are the gross value added of the construction sector, the volume of construction work by structural elements, net investment, and construction cost growth. The study highlights the extent to which the construction sector has been affected by the pandemic crisis, but also the factors that could lead to the development of this sector.

Keywords: *construction, pandemic, gross value added of the construction sector, net investment, tax breaks.*

1. Introduction

Construction is a very important technical branch in the Romanian economy, dealing with the design, execution, maintenance and operation of various structures or infrastructure works. In recent years, an impediment to the development of the economy has been the pandemic crisis. Some firms have survived by finding ways to manage their business in accordance with the regulations in force, while others have been on the verge of bankruptcy. This study aims to highlight the indispensability of this sector in the structure of the Romanian economy, through a macroeconomic analysis based on four indicators, namely the gross value added of the construction sector, the volume of construction works by structural elements, net investment, and the growth of construction costs. The study is based on statistical information provided by the National Commission for Strategy and Forecasting and the National Institute of Statistics.

In this article, we have analysed the construction sector in terms of the tax facilities it benefits from, but also in terms of how it contributes to an important macroeconomic indicator, the Gross Domestic Product, with the threat of the economic crisis due to the COVID-19 virus.

The objectives of this paper are to show to what extent the pandemic has affected the dynamics of the construction sector and which areas of the country have been most affected, as well as how net investment influences the construction sector. Thus, we divided the paper into three divisions. In the first part, we analysed indicators specific to the construction sector in the pre-crisis period 2015-2019. In the second part of the paper, we presented the development of these indicators in the two years of the pandemic, 2020-2021, and finally we exposed the post-crisis phase, the year 2022, with the repercussions of the pandemic and the energy crisis generated by the conflict in Ukraine. Half of the period analysed (years 2019-2022) was influenced by the introduction of incentives for the construction sector through GEO no. 114/2018. The analysis carried out shows the extent to which these mitigated the negative effects of the COVID-19 pandemic.

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The novelty of this paper stems from the fact that it focuses on a macroeconomic analysis differentiated over three sub-periods and aims to illustrate how construction firms operate under the impact of the pandemic crisis.

2. Literature review

The COVID-19 pandemic has had an unexpected impact on the construction sector, as during the period of restrictions the sector has seen increases for small-scale building completions, repairs, renovations and even extensions to individual buildings. Thus, in 2020 compared to 2019, construction volume increased by 16%. The top construction category was engineering construction, which increased by 18.5% compared to 2019. With an annual increase of 17.8%, residential buildings ranked second. Finally, non-residential construction increased by 11%[1].

To comply with the restrictions imposed by authorities, the real estate market had to postpone some projects and come back with a new investment strategy. With the advent of the pandemic crisis, raw material prices have risen, fuel prices have also risen substantially, and these factors have led to higher prices for final projects and obviously to renegotiation of contracts.

In terms of complying with the restrictions in place, for the office area it was more challenging as employees had to keep a minimum distance of 2 meters, a limitation of a certain number of people in one room was imposed, which led to teleworking and therefore increased costs. On the other hand, the balance was evened out by individual households, which increased the demand for building materials, for which various warehouses, logistic spaces were built to store materials until delivery to the customer. Since the workers in the households worked in small groups in the open air, they were able, with minimal protective measures, to carry out their work much better. In addition, since most companies came with the possibility to work 'from home', many people decided to build a new space in which to work, away from large human agglomerations, or to extend their existing space.

The impact of the pandemic crisis on the construction sector is analysed in numerous articles published in specialist magazines such as *Agenda Construcțiilor & Fereastra*[2], *Arena construcțiilor*[3]. The authors explain how construction volumes involved during the pandemic, what measures the authorities imposed and how companies managed the whole situation to comply with the restrictions, but still be able to operate without endangering the lives of their employees.

The incentive measures in the field of the wage of workers in the construction sector introduced by the Romanian Government through GEO no. 114/2018[4] entering into force on 01.01.2019 affected half of the period analysed (years 2019-2022) and were spread over all 3 periods concerned (pre - in - post pandemic). From 01.01.2023, GEO no. 168/2022[5], as can be seen in Table 1 modified some of the provisions of GEO no. 114/2018. The application of this government ordinance has reduced the number of those who benefit from tax facilities. One of the reasons for this is the significant reduction in the range in which the salaries that benefit from the facilities can be included. The second cause is the limitation of the tax relief to income obtained under an individual employment contract, eliminating the possibility of granting income from other contractual forms (management contracts, apprenticeships, internships, etc.).

Table 1. Tax facilities in the field of construction sector payroll

APLICATION PERIOD	01.01.2019 – 31.12.2022	01.01.2023 – 31.12.2028
CONDITIONS FOR GRANTING FACILITIES	• The employer derives at least 80% of its turnover from construction activities, whose CAEN codes are listed in the Fiscal Code.	• The employer derives at least 80% of its turnover from construction activities, whose CAEN codes are listed in the Fiscal Code. • The gross salary is between **4,000 RON** and **10,000** RON per month.

[1] *https://www2.deloitte.com/ro/ro/pages/real-estate/articles/constructiile-au-sfidat-pandemia-evolutie-de-exceptie-in-2020.html*, accessed on 16 March 2023.
[2] *https://www.agendaconstructiilor.ro/files/*, accessed on 20 March 2023.
[3] *https://arenaconstruct.ro/*, accessed 20 March 2023.
[4] *https://static.anaf.ro/static/10/Anaf/legislatie/OUG_114_2018.pdf*, accessed on 16 March 2023.
[5] *https://static.anaf.ro/static/10/Anaf/legislatie/OUG_168_2022.pdf*, accessed on 16 March 2023.

	• The gross salary is between **3,000** RON and **30,000** RON per month.	• Only wages earned under an individual employment contract are covered.
TAX RELIEF		
• Payroll tax	0 instead of 10%	0 instead of 10%
Employee's contribution to social health insurance	0 instead of 10%	0 instead of 10%
• Employee's social security contribution	21,25% instead of 25%	21,25% instead of 25%

Source: GEO no. 114/2018 and GEO no. 168/2022

According to an article published by the Federation of Employers of Construction Companies (FPSC)[6] in *Revista Construcțiilor* no. 194/August 2022, these measures have helped to increase production and the number of new jobs. In November 2021, the FPSC conducted a survey of 293 managers of construction companies that benefited from the tax facilities introduced by GEO no. 114/2018. They stated that the main positive effect of GEO no. 114/2018 was the "stabilization" of the existing workforce and therefore a reduction in the number of departures abroad (77%), an increase in turnover (56%) and an increase in the number of employees, without affecting competitiveness (55%). Respondents considered that the elimination of tax facilities would have the following effects on companies: a reduction in the number of employees (75.3%), difficulties in continuing contracts (67.8%) and a reduction in activity (58.3%).

3. Methodology and database

The research hypotheses of this study are whether the pandemic has significantly influenced the dynamics of the construction sector and which regions have been more affected, as well as to what extent net investment stimulates the development of this sector.

The method used in the study is a macroeconomic analysis broken down into three sub-periods, based on four relevant macroeconomic indicators, namely the gross value added of the construction sector, the volume of construction works by structural elements (new construction works, capital repair works, maintenance, and current repair works), net investment and construction cost growth. The period analysed is eight years, from 2015 to 2022.

This period is divided into three frameworks, depending on the factor that led to the change in the way the business is managed, the COVID-19 pandemic. Thus, in the first part, the ante-covid period, we presented the dynamics of construction firms through their contribution to GDP in the period 2015-2019. For the years 2020 and 2021, we have analysed the impact of the pandemic crisis on this sector, both in terms of works carried out and in terms of costs. In the last part, the post-crisis period, we have exposed the oscillations of the construction sector from the perspective of the four indicators mentioned above, as well as the solutions agreed by the Romanian state to remedy the effects left by this crisis.

The whole analysis is based on statistical information provided by the National Commission for Strategy and Forecasting and the National Institute of Statistics.

4. Economic analysis of the construction sector

4.1. Analysis of the construction sector precursor to the pandemic crisis

A first indicator by which we analyse the evolution of the construction sector in the pre-crisis period (2015 - 2019) is the contribution of this sector to the formation of gross domestic product (Chart 1). We have chosen for analysis the seasonally and working-day adjusted series.

As it can be seen in Chart 1, the gross value added (GVA) of the construction sector fluctuated quite a bit from quarter to quarter over the period 2015-2019. In annual values and compared to the previous year, the

[6] *https://www.revistaconstructiilor.eu/index.php/2022/08/01/fpsc-impactul-majorarii-salariului-minim-si-facilitatilor-fiscale-acordate-angajatilor-asupra-activitatii-din-constructii/*, accessed on 20 March 2023.

GVA increased in 2016 by 8%, in 2017 by only 1%, and in the following two years the increase was spectacular (28% in 2018 and 16% in 2019).

Chart 1. Quarterly gross value added of the construction sector between 2015 and 2019

(Million RON in current prices)

Source: graphic representation of the authors, according to data on the website https://insse.ro/cms/ro/content/produsul-intern-brut, accessed on 20 March 2023

There was also an upward trend in the volume of construction works completed between 2015 and 2019 (Table 2), but this time the annual growth rates were quite close, ranging between 5.30% and 6.50%.

Table 2. Volume of construction works by structural elements - percentage changes from previous year

	2015	2016	2017	2018	2019
Construction - total	6.20%	5.30%	5.80%	6.20%	6.50%
New construction works	5.20%	5.70%	6.30%	6.80%	7.10%
Capital repair works	12.30%	5.50%	5.70%	6.00%	6.20%
Current maintenance and repair works	5.80%	4.00%	4.50%	4.70%	5.00%

Source: https://insse.ro/cms/ro/tags/comunicat-constructii-locuinte-trimestrial. accessed on 20 March 2023

Before the Covid-19 pandemic, the cost of construction had relatively low annual increases, as shown in Table 3.

Table 3. Cost increase in construction - percentage changes from previous year

Indicator	2015	2016	2017	2018	2019
The rising cost of construction	0%	1.5%	2%	2.5%	2.3%

Source: https://cnp.ro/wp-content/uploads/2021/07/prognoza_2015_2019_varianta_toamna_2015.pdf, accessed on 20 March 2023

The increase in the gross value added of the construction sector in 2016 compared to 2015 is correlated with the increase in the cost of construction (1.5%) and the increase in the number of completed works by 5.30%. In terms of structural elements, the volume of current maintenance and repair works increased the least, by only 4%, while the number of new constructions increased by 5.70%.

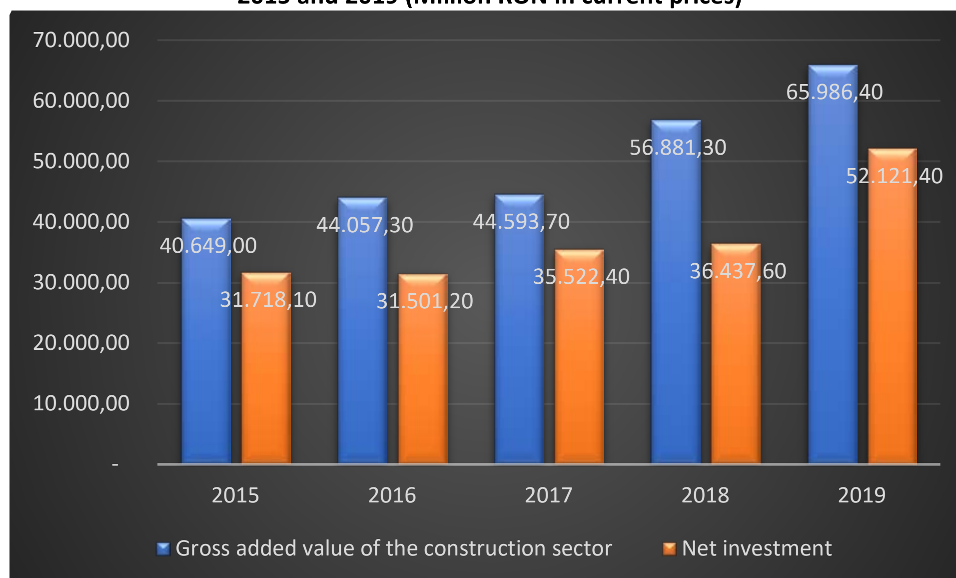
In 2017, the second quarter saw a decrease in the contribution of the construction sector to GDP formation, by around 5% compared to the same period of the previous year, with the other three quarters seeing slight increases in the indicator. The year 2017 was characterized by an increase in the volume of completed constructions, both in total and by construction category. However, the sector's contribution to GDP formation increased by only 1% compared to the 2016 level, very little if we take into account that in 2017 Romania had the highest economic growth in recent years, of 7.0%. This gap between the evolution of construction and that of the economy was due to the reduced capacity of companies in the sector to undertake works, due to the lack of financial and human resources.

In 2018, the situation started changing, with increases compared to 2017 in all the indicators analysed. Thus, the GDP in construction increases from 44,593.70 million RON to 56,881.30 million RON, the volume of construction works increases by 6.20% and the average cost of construction by 2.5%. However, the sector is not operating at full potential.

Together with the implementation of measures in favor of employment in construction introduced by GEO no. 114/2018, the contribution of this sector to GDP formation is experiencing a significant increase in each quarter of 2019 compared to the similar quarter of 2018. Overall, the contribution of the construction sector to GDP formation increases in 2019 compared to 2018 by 9,105.10 million RON, representing approximately 16%. In terms of the volume of completed works by structural elements, in 2019 compared to the previous year there were 7.10% more new construction works, 6.20% more capital repair works and 5% more current works and repairs. Overall, 6.50% more construction was completed in 2019 compared to 2018. The third quarter of 2019 recorded the highest quarterly contribution to GDP in the period 2015-2019, namely 17,965.90 million RON, as can be seen in Chart number 1.

Chart 2 shows the link between the net investment allocated by the Romanian state and the contribution of the construction sector to GDP. Except for 2016, the increase in the contribution of construction to GDP formation is directly proportional to the net investment allocated to this sector. Thus, in 2017, 35,522.40 million RON were invested in the construction sector, 4,021.20 million RON more than the budget allocated in 2016, which also led to an increase in the number of dwellings compared to the previous year. The highest investment volume was in 2019, with an increase of 43.04% (in absolute value 15,683.80 million RON in current prices) compared to 2018.

Chart 2. Relationship between net investment and gross value added of the construction sector between 2015 and 2019 (Million RON in current prices)

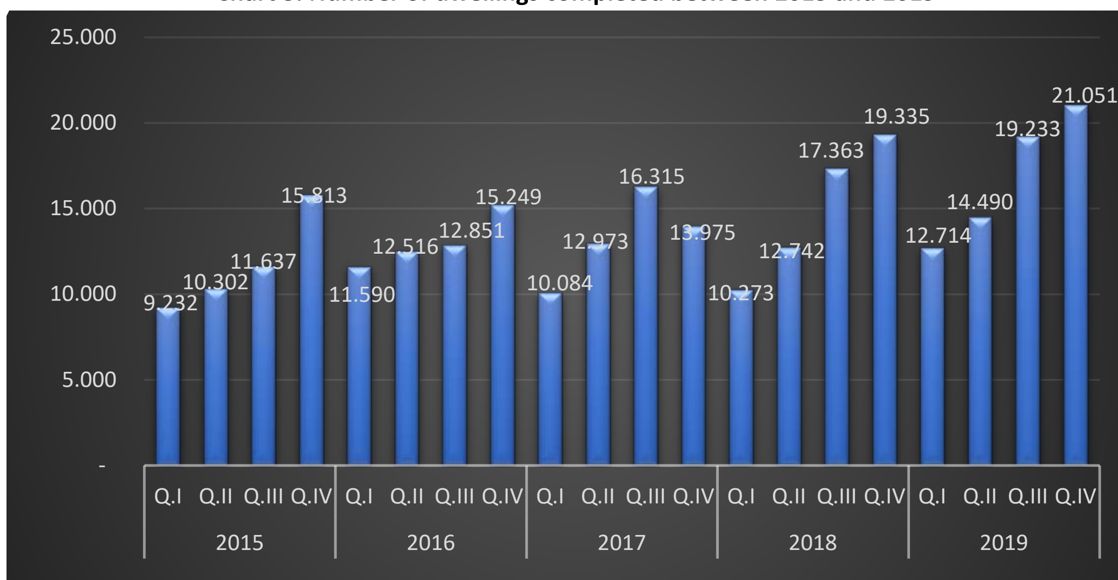


Source: graphic representation of the authors, according to data on the website https://insse.ro/cms/ro/tags/comunicat-investitii-economia-nationala, accessed on 20 March 2023

Chart 3 reflects the fluctuations in the volume of dwellings built in each quarter from 2015 to 2019. In 2016, the volume of dwellings completed increased compared to 2015 by 5.222. The increase in the number of

dwellings occurred in all development regions, with one exception: the South-West Oltenia area, where there was a decrease of 58 dwellings.

Chart 3. Number of dwellings completed between 2015 and 2019



Source: graphic representation of the authors, according to data on the website https://cnp.ro/wp-content/uploads/2021/07/prognoza_2015_2019_varianta_toamna_2015.pdf, accessed on 20 March 2023

In 2017, the areas where fewer dwellings were completed compared to the previous period were the North-East area (down by 844), South-West Oltenia (down by 37) and the Bucharest-Ilfov part (489 fewer dwellings were completed).

In 2018 and 2019, the number of completed dwellings increased at a faster pace than in previous years, with the peak of the period under review being reached in the fourth quarter of 2019, when 21,051 dwellings were completed, most of them in the North-West of the country and in Bucharest-Ilfov. The tax facilities that came into force from 01.01.2019 through the application of GEO no. 114/2018 had multiple positive effects on production, turnover and employment, with an impact on budget revenues, not only in the construction sector itself, but also in construction-related activities, manufacturing of building materials.

In conclusion, the pre-pandemic period predicted an upswing in this sector, as year after year the volume of construction increased, even though costs also rose, and the contribution to GDP increased directly in proportion to the volume of work completed.

4.2. Analysis of the construction sector during the pandemic period

With the arrival of the pandemic crisis, the government has imposed many restrictions, the result of which was home work, which in fact brought major costs for all companies in Romania. Since March 2020 the crisis has affected most sectors of the economy, leading to the bankruptcy of many companies.

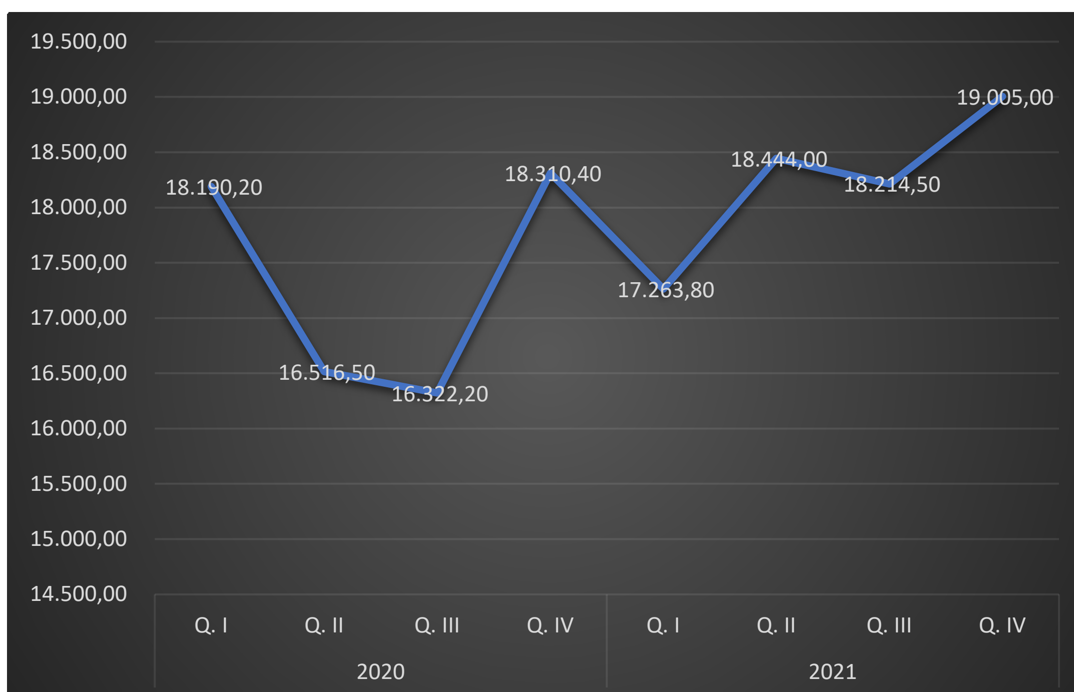
Table no. 3 shows how the volume of completed construction works evolved in the years of the Covid-19 pandemic, respectively 2020 and 2021, and Graph no. 4 shows the contribution of construction to GDP formation in the same period.

Table 3. Volume of construction works by structural elements - percentage changes from previous year

	2020	**2021**
Construction - total	15.90%	-0.60%
New construction works	9.30%	5.90%
Capital repair works	46%	-22.60%
Current maintenance and repair works	24.40%	-7.90%

Source: https://insse.ro/cms/ro/tags/comunicat-constructii-locuinte-trimestrial, accessed on 20 March 2023

Chart 4. Quarterly gross value added of the construction sector in 2020 and 2021 (Million RON in current prices)



Source: graphic representation of the authors, according to data on the website https://insse.ro/cms/ro/content/produsul-intern-brut, accessed on 20 March 2023

In the first quarter of 2020, construction contributed with 18,190.20 million RON to GDP formation. In the second and third quarters of 2020, the contribution of the construction sector to GDP formation decreased, due to compliance with the limits imposed by the Romanian state for the safety of employees. Compared to the same period of the previous year, the contribution of construction to GDP followed a decrease of 2.1% and 9.15% respectively in these two quarters. In the fourth quarter, the situation improves, and the contribution of this sector is 7.94% higher than in the fourth quarter of the previous year. In addition, in 2020 compared to 2019 new construction work increased by 9.30%. the number of capital repair works increased by 46% and the number of maintenance and current repair works increased by 24.4%.

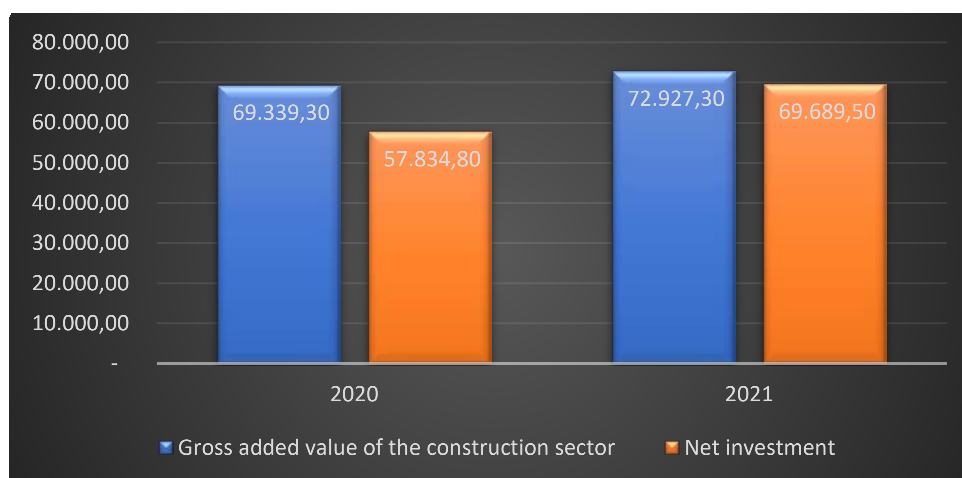
In the first quarter of 2021, a slight decrease of 5.09% in the contribution of construction to GDP is observed compared to the same period of the previous year, with the indicator showing higher values in the second, third and fourth quarters than in similar quarters of 2020.

Although the contribution of construction to GDP increased in 2021 compared to 2020 by 5.17%. the volume of completed works decreased by 0.6%. By structural elements, the decreases recorded were 22.60% for capital repair works and 7.90% for maintenance and current repair works. Only the volume of new construction works increased by 5.90% in 2021 compared to the previous year. Also worth noting is the 12.1% increase in construction cost in 2021 compared to the previous year, whereas in the period 2015-2020 annual increases in this cost ranged from 0% to 2.5%[7]. The crisis generated by the Covid-19 pandemic has led to an increase in all prices, including those for construction materials and works.

Graph no. 5 shows the link between the construction sector's contribution to GDP formation and net investment during the Covid-19 crisis.

[7] *https://cnp.ro/wp-content/uploads/2021/07/Prognoza_preliminara_toamna_rectificare_bugetara_2020_2021.pdf*, accessed on 20 March 2023.

Chart 5. Relationship between net investments and gross value added of the construction sector in 2020 and 2021 (Million RON in current prices)

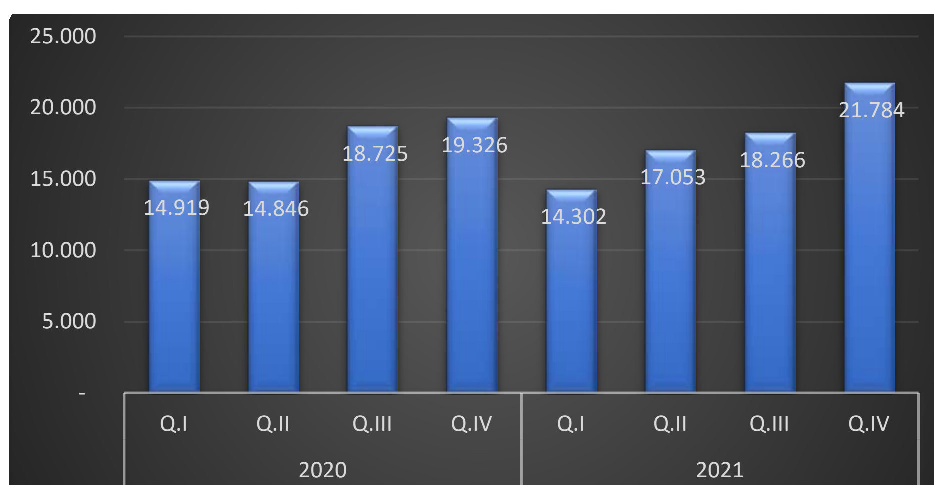


Source: graphic representation of the authors, according to data on the website https://insse.ro/cms/ro/tags/comunicat-investitii-economia-nationala, accessed on 20 March 2023

Compared to 2019, net investments in 2020 increased by about 11% reaching 57,834.80 million RON. It can be seen that the investment factor has a strong impact on the construction sector, because the more the investment budget allocated increases, the more the value of construction increases and therefore the more constructions are carried out. The increase in the volume of completed constructions in the second year of the pandemic compared to the first is due to the fact that the state made net investments in new construction works amounting to 69,689.5 million RON, 20% more than in the previous year.

As can be seen in Chart no. 6, 2020 comes with a substantial increase in the number of completed housing units compared to the previous year, namely by 15.90%. In 2020, the most dwellings were built in Bucharest-Ilfov, with 5.941 more than the previous year. The least were built in the North-West region of the country, where 2.983 fewer constructions were completed than in the previous year.

Chart 6. Number of dwellings completed in 2020 and 2021



Source: graphic representation of the authors, according to data on the website https://cnp.ro/wp-content/uploads/2021/07/Prognoza_preliminara_toamna_rectificare_bugetara_2020_2021.pdf, accessed on 20 March 2023

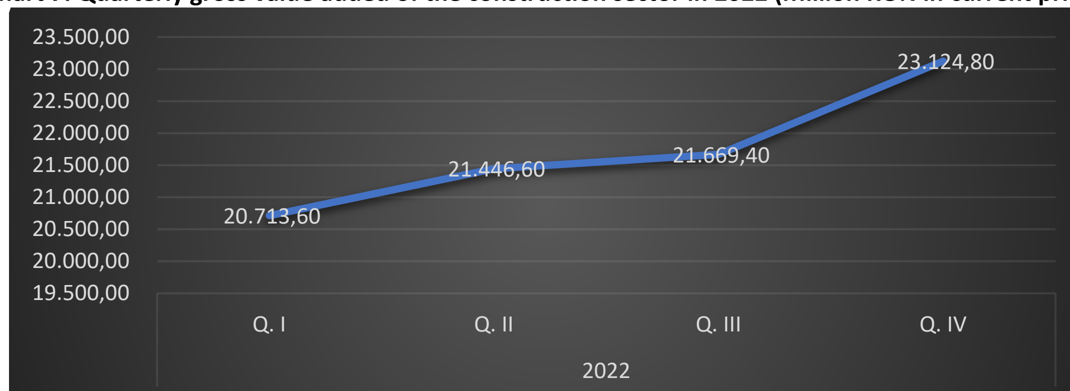
The lowest number of dwellings completed during the pandemic period was recorded in the first quarter of 2021, after that the indicator followed an upward trend. In 2021, the total volume of dwellings recorded an increase of 3.589 dwellings compared to the previous year, with most completed in the Bucharest-Ilfov region

(22.010) and the fewest in the center of the country, where only 8.431 dwellings were completed. In the pandemic period, most completed dwellings were completed in the fourth quarter of 2021, and as regions, most buildings were completed in Bucharest-Ilfov (7.549) and the fewest in the North-East region of the country (2.299).

4.3. Analysis of the construction sector in the post-covid period

The last part of this study concerns the analysis of the construction sector after the pandemic crisis period, namely 2022. Thus, in Chart no. 7 we have shown the contribution the sector has made to GDP formation for each quarter of this year.

Chart 7. Quarterly gross value added of the construction sector in 2022 (Million RON in current prices)

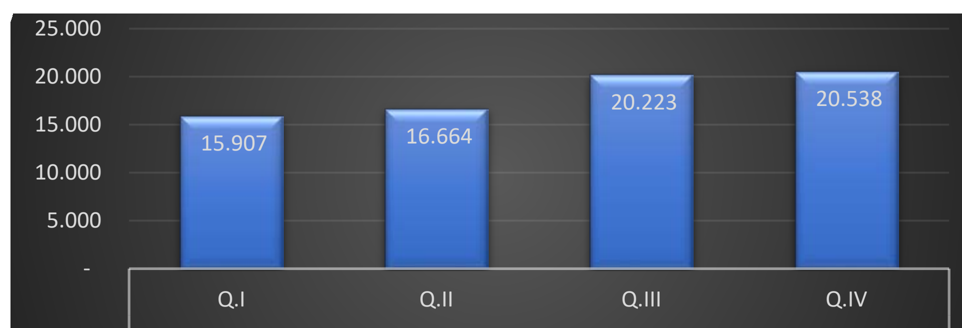


Source: graphic representation of the authors, according to data on the website https://insse.ro/cms/ro/content/produsul-intern-brut, accessed on 20 March 2023

The year 2022 announces a favorable period for the construction sector, as already in the first quarter this sector's contribution to GDP was higher than the fourth quarter of the previous year by about 9%. In 2022, construction contributed to GDP formation with the amount of 86,954.40 million RON, up by 19.23% compared to the previous year, with the largest increase recorded in the fourth quarter, namely 21.68% compared to the same period of the previous year. Due to the pandemic and the war in Ukraine, the price of fuel increased, which led to higher construction spending. Thus, the annual average cost increase in construction was 20.2% (8.1 p.p. higher than in 2021) at a leu/euro exchange rate of 4.94.

In 2022, the number of completed dwellings (73.332) followed an upward trend, with most buildings completed in the fourth quarter (Chart 8). Compared to the previous year, there was an increase both in total (7.40%) and by structural elements: new construction work increased by 3.20%. capital repair work by 20% and maintenance and current repair work by 15.30%. This year, 1.927 more dwellings were built than in the previous year, most of them in the Bucharest-Ilfov area (21.328) and the fewest in the South-West Oltenia region (only 3.724).

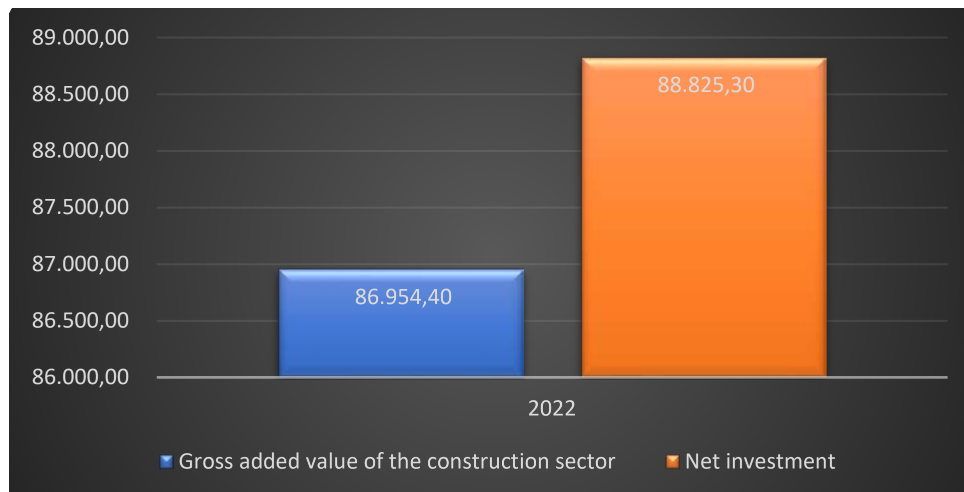
Chart 8. Number of dwellings completed in 2022



Source: graphic representation of the authors, according to data on the website https://cnp.ro/wp-content/uploads/2022/10/Prognoza-de-TOAMNA-2022-2026.pdf, accessed on 20 March 2023

Chart 9 shows that in 2022, the Romanian state invested 88,825.30 million RON in construction, 27.46% more than in 2021. The year 2022 is the only year in the entire period analysed when the value of net investments exceeded the value added in construction.

Chart 9. The relationship between net investment and gross value added of the construction sector in 2022 (Million RON in current prices)



Source: graphic representation of the authors, according to data on the website https://insse.ro/cms/ro/tags/comunicat-investitii-economia-nationala, accessed on 20 March 2023

5. Conclusions and recommendations

This case study has answered two working hypotheses: whether the pandemic has significantly influenced the dynamics of the construction sector and which regions have been more affected, but also to what extent net investments stimulate the development of this sector.

In response to the first hypothesis, we observed that the construction sector was not as strongly impacted as other sectors; on the contrary, it managed to align itself with the imposed restrictions and to grow by constructing more buildings compared to the 2015-2019 period. In the period preceding the pandemic, most new construction works were carried out in Bucharest-Ilfov (56,741 works), the North-West area (48,173 works) and the North-East area (40,144 works) of the country, predominantly in 2019, the first year of the application of the tax facilities on construction workers' salaries. The least developed area was the South-West Oltenia area, with the fewest works being built in 2017. During the pandemic period, the situation was similar, with most new construction works in Bucharest-Ilfov (42,483 works) and the fewest in the South-West Oltenia area (only 6,224 works). During the pandemic, the construction sector was among the few that recorded an increase in gross value added. As for the post-pandemic period, in 2022 Bucharest-Ilfov remained the area with the most works, although their volume decreased by 3.1% compared to 2021. The South-West Oltenia area still has the fewest works (3,724), but their number increased by 14.23% compared to the previous year. According to the data published by INS, in January 2023 compared to January 2022, the volume of construction works increased, as a working-day and seasonally adjusted series, by 7.2%[8]. It remains to be seen what will happen for the rest of the year and what influence the decrease of the applicability of the tax facilities provided for by GEO no. 168/2022 and applied from 01.01.2023 will have. To answer the second hypothesis, we have analysed the correlation between the contribution of construction to GDP formation and net state investment in this sector by means of graphs. We found that the two indicators oscillate directly proportionally (if investment increases, the number of buildings-built increases, and if investment decreases, construction decreases or stagnates). In all three periods analysed, the investment budget allocated to construction increased, with the largest volume being allocated in 2022, namely 88,825.30 million RON at current prices. In conclusion, the volume of investments is an important and indispensable factor for the development of this sector.

[8] *https://insse.ro/cms/sites/default/files/com_presa/com_pdf/indici_constr1r23.pdf*, accessed on 20 March 2023.

Therefore, the study shows that the construction sector had an increasing trend throughout the period under analysis, with a faster growth rate at the end of the period. Although it was hampered by the pandemic crisis with all the measures that were impose, this sector managed to develop and contribute with an increasing share from year to year to the formation of GDP. We consider that an important role in this regard had the tax facilities and the increased minimum wage introduced by GEO no. 114/2018 for employees in the construction sector. After 2019, construction was one of the few sectors where the average number of employees increased, even during the pandemic. In 2019, the average number of employees in construction increased by 5.5% (compared to an increase of 1.9% in the economy as a whole), and in 2020 it increased by 2.9% (compared to a decrease of 1.9% in the economy as a whole).

According to Eurostat, in 2021, Romania was the country with the second highest share of gross value added (GVA) generated by the construction sector in total GVA (7.3%), after Finland (7.7%), well above the EU average of between 5% and 6% over the period 2010-2021.[9] Based on this observation, we will complement the research carried out in this paper with an analysis of the economic impact of the pandemic on the construction sector at European level, in order to see whether the growth trend in Romania was also recorded in the other Member States and what the pace of this growth has been. The study will also highlight measures taken by Member State governments to develop a sustainable construction sector, such as subsidizing clean or low-energy processes in construction, penalties for polluting companies (*e.g.,* carbon tax) or research and development tax incentives.

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[9] *https://ec.europa.eu/eurostat/cache/digpub/housing/bloc-3a.html?lang=en*, accessed on 20 March 2023.

PORTRAIT OF THE ROMANIAN LEADER

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Abstract

Leadership, an unquestionable quality of those who succeed in being followed and especially pursued implies a series of common attributes but not necessarily a standard pattern of manifestation, which is exercised differently depending on the personality of the leader, on circumstances and last but not least on the specificity of the involved community.

Based on this hypothesis, the objective of this research is to create a portrait of the leaders of organizations in Romania according to age, gender, seniority and education.

This objective led to the selection of an empirical research method, based on the qualitative and quantitative analysis of the answers obtained by questioning a sample of 22 managers and decision-makers from companies operating in Romania. The questionnaire used as a working tool[1] *was developed by researchers in this field, and it includes 45 essential questions for the analysis and classification of the respondents into a certain leadership model. The answers were collected using the Google Forms platform and detailed, interpreted and summarized using SPSS and Excel (Microsoft Office).*

The processed results outline a leader strongly influenced by his culture and social position, who prefers to make spontaneous decisions in the face of events that arise. Moreover, the Romanian leader is not aware of his abilities and assumes that the people under his coordination are inefficient, constantly needing a push.

Certainly, the results of the present study can be improved by considering an alternative research method, by interviewing a larger sample and by going deeper into this topic.

Keywords: *leadership styles, leader, manager, entrepreneur, questionnaire.*

1. Introduction

Throughout the ages, managers, regardless of the size of the entity or the geographic area in which they have operated, have faced complex and often novel problems. In the absence of generally valid prescriptions or a track record of solutions, they have had to look for new ways of tackling challenges, which have the necessary skills to overcome difficult situations. Leaders, innovators with the skills to overcome difficult situations effectively, play a decisive role in such situations. This is why it is necessary to distinguish the major differences between a leader and a manager. As defined by the five functions of management identified by the French engineer Henri Fayol as early as 1916, but still considered relevant today[2], a leader plans, organizes, commands, directs and controls activities within an organization. They create control, help maintain an orderly business strategy. On the other hand, the leader is oriented towards the individual, towards forming close relationships with them and aims to develop an environment conducive to growth. A leader inspires, trains, improves the team, the people around them and has the ability to achieve surprising positive results.

Thus, although there is no unanimously accepted definition, most leadership experts identify a number of common leadership skills: communicativeness, vision, a strong set of values and openness to the new.

Whether we are talking about Gica Hagi, Nadia Comaneci, Steve Jobs, Bill Gates, Napoleon Bonaparte, Princess Diana or Mahatma Ghandi, the world's most popular and watched leaders had completely different skills and character traits, but also similar qualities that made people listen, follow and respect them. In these

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[1] Questionnaire developed by B. Avolio and B. Bass, published by Mind Garden, Inc., *www.mindgarden.com*.

[2] V. Van Vliet, *Five Functions of Management (Fayol*), Retrieved from ToolsHero: *https://www.toolshero.com/management/five-functions-of-management/*, last time consulted on 10.03.2023.

circumstances, the answer to the question "What are the traits of a successful leader and how can they be identified and acquired?" has not yet found its final form, but the question is still of interest from both a theoretical and practical perspective.

What is certain is that the leader is a role model for his or her teams and can be distinguished on the basis of the results he or she achieves in the organization, even if he or she is not identified in the organization chart and is not necessarily a person at the top of the leadership pyramid.

Globally, there are dedicated platforms and questionnaires that help to paint a portrait of the area leader. For Romania, however, there are not many studies or details on the styles approached by local managers or entrepreneurs. In this respect, this paper identifies, with the help of the case study, which are the general traits of Romanian managers, which leadership style they predominantly adopt and which other details should be analyzed in depth.

2. Conceptual clarifications

2.1. Theoretical perspectives

In all definitions and research on leadership and what it entails, the distinction between a manager, executive or boss and a leader is very important. The latter has the ability to train and coordinate people with ease so that the level of satisfaction, contentment and success is equal between leader and team member.

In the search for great leaders, a number of researchers and psychologists have first defined the notion of leadership so that it is clear and easy to spot. Among the most popular definitions are those developed by Bernard Bass, John McCormack and Jacques Clement. Thus, the key words they use repeatedly in their definition of leadership are: *talent, ability, results, inspiration, achieved goals, responsibility, discipline, management, competence.*

In addition to definitions of the concept, the literature identifies the two major leadership styles - autocratic and democratic, clearly differentiates their characteristics and divides decision-making into directive and participative.

Most of the definitions and studies on this concept are relatively new, having been developed after 1840[3]. Early analyses focused on the innate traits of those being analyzed, so that it could be determined why they might be leaders, and in the early part of the 20th century, studies focused on personality traits and characteristics of leaders. The first identified leadership styles, still recognized today by their popularity (**authoritarian, democratic and laissez-faire**), were introduced into the literature in 1939 by psychologists Kurt Lewin, Ronald Lippitt and Ralph K. White[4].

Later, in 1948, after a series of studies and empirical research, researcher Ralph Stodgill[5] established that "a leader is formed in one social relationship and that people who are leaders in that situation are not automatically leaders in another situation" (for example, a manager who has formed as a good leader for the team he leads in one company may not be as good in another). Therefore, the original model based on leader traits was matched to the type of situation in which the leader operates.

The aim of research undertaken up to the 1950s[6] on this specific title was to identify behavioral, mental, social and practical traits that define an effective leader. From a practical point of view, once this template had been identified, these traits could be sought or replicated within an organization so that it could function better. But this empirical approach has not been perpetuated, and today psychometric methods and models are used, in the form of tests and questionnaires, to help assess personality traits, which are then developed over the course of each subject's work.

A review of the literature has led to a broadening of the view of leadership styles, which are summarised in Table 1.

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[3] G. Ekvall, J. Arvonen,, *Change-Centered Leadership: An Extension of the Two-Dimensional Model*, Scandinavian Journal of Management, Elsevier, vol. 7(1), 1991, pp. 17-26.

[4] K. Lewin, R. Lippitt, R.K. White, *Patterns of Aggressive Behavior in Experimentally Created "Social Climates",* The Journal of Social Psychology, Bulletin of the Society for the Psychological Study of Social Issues, 10, 1939, pp. 269-299.

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[6] S. Benmira, M. Agboola, *Evolution of leadership theory*, BMJ Leader, 2021;5:3-5, available online at *http://dx.doi.org/10.1136/leader-2020-000296*, last time consulted on 10.03.2023.

Table 1 Leadership styles identified based on literature review

Transformational leadership	**Strategic leadership**	**Democratic leadership**
- help in emergency or critical situations; - aim to transform and improve the functions and capabilities of team members and organizations by motivating and encouraging them.	- adopted by those with a well-defined mission and a clear vision; - aim to get the best out of people or situations and aim for long-term results.	- focus on the employee, make them feel valued.
Transactional leadership	**Autocratic leadership**	**Bureaucratic leadership (the clerk)**
- preferred by those working in sales and on commission; - predominantly based on the concept of action and reward.	- works best and is often encountered at executive level; - team members' opinions are not taken into account when making a decision - they expect others to adhere to their decisions, which is not sustainable in the long term.	- they put others first; - are based on strict adherence to the rules.
Laissez-faire leadership	**Leadership though mentoring**	**Maternal or paternal leadership**
- suitable for creative, arts-related areas of activity; - decision-making authority rests with team members (least intrusive) - improves team creativity and productivity.	- coach-like leader (inspires and helps teams to evolve); - develops strategies that emphasize the success of team members. While this is similar to strategic and democratic leadership styles. the focus here is more on the individual.	Mostly found in family businesses
Charismatic leadership	**Interpersonal leadership**	**Inclusive leadership**
- practical in situations where leaders are looking to motivate and coach their team.	- focuses on building and maintaining relationships within the team to ensure efficiency.	- aims both to maintain relationships within the organization and to listen carefully to all opinions.

Source: *personal adaptation based on the literature cited in the bibliography*

2.2. Empirical perspectives

Although the concept is relatively new in empirical research, studies on leadership demonstrate theoretical advances made decades ago, and sediment or dismantle certain theories. In the following we describe a number of empirical research methods and analyses their results and their impact on theoretical assumptions about leadership.

Given the complexity of the topic and the plethora of studies to date, papers published over the last seven years at a global level have been chosen and reviewed. They are based on similar hypotheses, identifying leadership models in different organizations or cultures, with a focus on the three most common styles - transformational, transactional and laissez-faire. The findings of the studies converge in a common direction: transformational leadership has potential, is the most analyzed, desired and often shows close correlations with the other two styles in this category.

Table 2 Relevant empirical studies on leadership in the last 7 years

Crt No.	Author name	Year	Location of the research (country/company/organisation)	Scope	Obtained results
1	- Flávia Monize Barbosa - Lillian do Nascimento Gambi - Mateus Cecilio Gerolamo[7]	2015	**- Brazil,** online - December 2014 - March 2015 - 47 managers	- ***the correlation betwee***n two groups of variables: ***leadership styles and quality management principles***	- ***transformational and transactional styles are positively correlated with quality management principles***; - the data indicate a higher correlation for the transformational style.
2	Massad Awdah Alatawi [8]	2017	- Southern California, **USA** - 14 organisations, 365 employees	***- the relationship between transformational leadership and the intention to change the workplace,*** useful for ameliorating the potential effects that can arise from staff turnover.	- only ***17% of the variation in turnover intention levels among employees was driven by transformational style;*** ***- managers who possess only one component of transformational leadership should not be considered transformational[9] leaders;*** Recommendation: future research should focus on refining and revisiting the work of Bass and his colleagues.
3	- António Sacavém - Rui Cruz - Maria José Sousa - Albérico Rosário - João Salis Jomes[10]	2019	**- Portugal** - qualitative analysis based on an integrative literature review	***- identifying the most effective type of leadership for innovation*** within an organization.	-***leaders who approach leadership in a fatherly, authentic and democratic way are the most effective in supporting the implementation of innovative*** processes in organizations; - the relationship between leader and team is positively influenced by ensuring work autonomy.
4	- Brent N. Reed - Abigail M. Klutts - T. Joseph Mattingly[11]	2019	- Baltimore**, USA** - 441 items identified in initial searches	- Identify and ***summarize definitions of leadership***, definition of competencies and assessment methods used in pharmacy education based on a systematic literature review.	-the most popular definitions of ***leadership involved motivating others to achieve a specific goal and*** involved ***changes in organizational leadership.***
5	Cătălina Roșca[12]	2015	- Bucharest, **Romania** - different batches of respondents (public managers, students, master students and prisoners)	- Determining a correlation between ***the link between emotional intelligence (EQ-i) and transformational leadership variables (MLQ).***	- "in order to bring about change it is necessary that **the core values of the leader are congruent with those of the subordinates."**

Source: *personal adaptation based on the literature cited in the bibliography*

[7] F.M. Barbosa, L. do Nascimento Gambi, M.C. Gerolamo, *Leadership and quality management - a correlational study between leadership models and quality management principles*, Gestão & Produção, 24 (3), Jul-Sep 2017, pp.438 - 449, available online at *https://doi.org/10.1590/0104-530X2278-16*, last time consulted on 10.02.2023.

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[9] The four I's: idealized influence, inspirational motivation, intellectual stimulation and individualized consideration.

[10] A. Sacavém, R. Cruz, M.J. Sousa, A. Rosário, J.S. Gomes, *An Integrative Literature Review on Leadership Models for Innovative Organizations,* Journal of Reviews on Global Economics, 2019, 8, pp. 1741-1751, last time consulted on 25.02.2023.

[11] B.N. Reed, A.M. Klutts, T.J. Mattingly, *A Systematic Review of Leadership Definitions, Competencies, and Assessment Methods in Pharmacy Education,* American Journal of Pharmaceutical Education, November 2019, 83 (9) 7520, pp. 1873 - 1885, available online at *https://doi.org/10.5688/ajpe7520*, last time consulted on 25.02.2023.

[12] C. Roşca, *Liderul transformațional-carismatic*, Tritonic Publishing House, Bucharest, 2015, pp. 219-286.

The research reviewed in this study also showed that transformational leadership has an effect on the creative process, and relational leadership, in the form of inclusive leadership, is closely related to innovative work behavior[13].

3. Leadership styles of Romanian leaders

3.1. Identifying the leadership style using MLQ questionnaire. Description of the study method

Empirical research on the concept of leadership started to be developed in Romania in the last 10-15 years, based on the idea of identifying the portrait of the Romanian leader. This practical study is a qualitative analysis of a cumulative database using the MLQ questionnaire. The aim of the research was to determine in which of the three leadership models (transformational, transactional or passive-avoidant) the Romanian respondents fit and whether there is a differentiation in their approach according to gender, age, seniority or others.

The Multifactor Leadership Questionnaire (MLQ), published and administered by Mindgarden, consists of 36 questions that refer to leadership styles and 9 questions that refer to leadership outcomes. The instrument was created by Bruce J. Avolio and Bernard M. Bass with the sole purpose to assess a full range of leadership styles: transformational (five levels), transactional (two levels), passive-avoidant (2 levels), and 3 levels measuring overall leadership outcomes. The MLQ can be used to differentiate between effective and ineffective leaders at all organizational levels and has been validated across many cultures and types of organizations through internal and external research.

Thus, the three scales in the MLQ that detail the results obtained are:

- EE (extra effort- which refers to the leader's ability to get subordinates to put in more effort to reach the goal);
- EEF (effectiveness which highlights leaders with optimal results that satisfy the interests of the group);
- SAT (satisfaction associated with leadership style, which shows whether the leader inspires confidence in the group through the results achieved).

A scientific study conducted in Romania in 2010[14] based on the MLQ5X questionnaire applied to a sample of 101 public managers who had previously participated in the Young Professional Scheme (YPS), fourth cycle, reveals the following scores on the three dimensions of leadership behavior: 3.4 for the transformational dimension, 2.93 for the transactional dimension and 0.75 for the passive dimension.

According to the characteristics attributed by the theoretical basis to each leadership style, young people are more flexible, open to change, lean more towards new managerial methods and choose digital management. Mature leaders, aged over 35, choose solutions already in place and are more rigid, and their managerial decision has a wide set of variables (they formulate a medium or long-term strategy, are more sober, make a resilience plan and take into account risks they can manage)[15].

3.2. Interpreted results

The practical part of this study started in February 2023 and generated a series of 22 responses received at the time of writing, therefore the analysis was carried out on these preliminary but relevant responses for the proposed hypothesis.

Next, we analyze how and whether these attributes are met for the segment in Romania analyzed so far.

Although most of the studies based on the MLQ questionnaire (already mentioned) have predominantly identified the transformational style, the current sample analyzed generated results that predominantly categorize respondents as transactional. Thus, 15 of the 22 responses received, were classified according to the MLQ interpretation instructions to the transactional style, with higher results than the other styles, as shown in Table 3.

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[13] G. Shuchi, N. Nishad, T. Abhishek, A.C. Shafaq, A. Khushbu, *Impact of Inclusive Leadership on Innovation Performance During Coronavirus Disease*, Frontiers in Psychology, vol. 13, 2022, available online at *URL=https://www.frontiersin.org/articles/10.3389/fpsyg.2022.811330 DOI=10.3389/fpsyg.2022.811330*, ISSN=1664-1078, last time consulted on 15.03.2023.

[14] D.F. Stanescu, C. Roşca, *Transformational leadership in the public sector - not a bedtime story,* Romanian Journal of Communication and Public Relations, vol. 12, no. 2 (19) / 2010, pp. 95-106.

[15] T.C. Ţiclău, *Leadership transformațional în România. O revizuire a studiilor empirice asupra conceptului„* Revista Transilvană de Ştiinţe Administrative*,* 1 (36)/2015, pp. 109-123.

Table 3 Average feedback results for each leadership style. Delimitation by gender and age

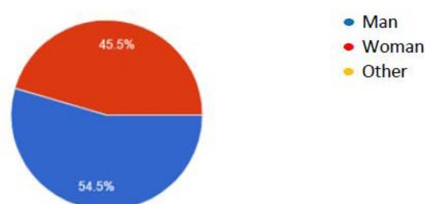
Respondent	Average result Transformational style	Average result Transactional style	Mean score style passive-avoidant	Comparative score - highest score	Gender	Age
R1	1,80	1,42	2,75	passive-avoidant	Man	25-30
R2	2,15	2,54	2,50	transactional	Man	25-30
R3	2,30	3,00	2,75	transactional	Woman	25-30
R4	1,85	3,50	1,75	transactional	Woman	25-30
R5	1,29	1,90	1,63	transactional	Woman	25-30
R6	2,60	3,63	3,63	transactional	Woman	25-30
R7	1,90	2,38	3,00	passive-avoidant	Man	31- 40
R8	2,60	2,46	3,00	passive-avoidant	Man	31- 40
R9	2,30	3,00	2,75	transactional	Man	31- 40
R10	2,25	3,17	3,25	passive-avoidant	Man	31- 40
R11	1,70	1,54	2,38	passive-avoidant	Man	31- 40
R12	2,50	3,75	3,38	transactional	Man	31- 40
R13	2,40	3,17	2,63	transactional	Man	31- 40
R14	1,85	3,17	2,63	transactional	Woman	31- 40
R15	2,25	3,33	2,50	transactional	Woman	31- 40
R16	2,35	3,38	3,25	transactional	Woman	31- 40
R17	2,25	3,75	2,20	transactional	Woman	31- 40
R18	2,10	2,33	2,38	passive-avoidant	Man	41-50
R19	2,85	3,13	2,83	transactional	Woman	41-50
R20	2,20	2,88	2,75	transactional	Woman	41-50
R21	1,85	2,21	2,75	passive-avoidant	Man	≥ 51
R22	1,38	2,20	2,00	transactional	Man	≥ 51

Source: *own processing in Excel based on responses received*

In terms of the age demarcation of the responses, 50% of the respondents are between 31-40 years old, 27.27% are between 25 and 30, and the remaining 22.73% fall into the categories 41-50 years and above.

The gender delineation of respondents is 54.5% male and 45.5% female, with the note that all females were categorized under transactional style as compared to males. As reflected in the data centralized in Table 3, men who were not assigned to the transactional style adopted the passive-exercising style.

Figure 1 Gender breakdown of respondents according to responses received



Source: *own processing in Excel based on responses received*

Also, an analysis of the results according to the participants' education and length of service in the company shows that the majority (10 out of 22) have a university degree at bachelor level and 5-10 years of service (also 10 out of 22 responses). If these preliminary results will have the same weights in the final study, we could make a generalization and assume that the transactional style is characteristic of Romanian leaders with more than 5 years in the company they work for. Also, most of those who participated in the study have the title of Team Manager or Administrator in the company, which can help in the future to draw a conclusion about the title that leaders have, depending on the style they approach.

Table 5 Descriptive analysis based on results

Variable	Mode name	Mode frequency	Categories	Frequency (nr.)	Frequency (%)
Position held within the company	**Team Manager**	6	Administrator	4,00	18,18
			Other title	4,00	18,18
			Analyst & trainer	1,00	4,55
			Executive	2,00	9,09
			Economist	2,00	9,09
			Restaurant Manager	1,00	4,55
			Team Manager	6,00	27,27
			General Manager	2,00	9,09
Education	**Bachelor**	10	Other	2,00	9,09
			PhD	2,00	9,09
			Highschool	1,00	4,55
			Masters	7,00	31,82
			Batchelor Degree	10,00	45,45
Seniority in the company	**5-10 years**	10	1-3 years	2,00	9,09
			3-5 years	3,00	13,64
			5-10 years	10,00	45,45
			> 10 years	5,00	22,73
			< 1 year	2,00	9,09

Source: *own processing in Excel, using XLSTAT*

The MLQ questionnaire also asked for other parameters relevant for the final analysis of the study (after the aggregation of more than 50 responses), but we do not consider that they present major differences at this stage for the 22 respondents.

4. Conclusions

Based on the analysis of the theoretical studies, but also taking into account the results obtained in the analysis of the 22 responses collected, we can draw the conclusion that the practical side in this field is underdeveloped, and that empirical approaches are still needed to justify these leadership styles and to sediment them with greater conceptual clarity.

The overall conclusion is that leadership can be analyzed in detail and attained so that any organization can benefit from the fruits of this process. On close examination, as is evident from the literature discussed in this study, the leadership model applied is often conditioned by culture, education, age or gender and can always be improved or changed to achieve the best possible results. The 22 respondents analyzed support these correlations through their choices.

Preliminary results show that respondents predominantly fit the transactional leadership style, but the available data do not yet allow a clear delineation of styles by company business areas. Future results, obtained by expanding the sample surveyed, may differ from this analysis, but if the preliminary results hold, it means that the leadership style of Romanians is changing and this requires further research.

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FUNDING SOCIAL ENTERPRISES TO ADVANCE THE ACHIEVEMENT OF THE SUSTAINABLE DEVELOPMENT GOALS. THE CASE OF THE SOCIAL IMPACT BONDS

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Abstract

Access to financial resources for SSE entities remains a relevant issue in the spotlight, as despite the emergence of several initiatives and schemes to address this problem, the search for appropriate types of funding is still ongoing. Specifically, the focus of this article will be on the study of SIBs (Social Impact Bonds) which are an innovative financing mechanism that has been more recently developed. It will analyse a type of financing that is conditional on the achievement of results, as well as the actors involved and its role as an innovative system for social enterprises, which overcomes the numerous obstacles that social enterprises often have been encountering when accessing finance.

In order to achieve this objective, the article is divided into five sections. The first section, that is the theoretical background, will provide a discussion of the main approaches to social enterprise, aiming to reach a common understanding of the concept, address the role of these social entities in the SDGs and their financing needs. Then, the second part of the study will offer a framework for understanding as SIBs can be a tool for social enterprises. Finally, conclusions will be drawn about the innovative way of financing social enterprise initiatives represented by Social Impact Bonds.

Keywords: *Sustainable Development Goals, Social Economy, Social Enterprises, Social Impact Bonds, Social Finance.*

1. Introduction

More than profits, there are frontline enterprises looking for overcoming significant challenges over the years. It is the case of Social Enterprises (SEs) that combine business and social and environmental impact. While offering services and products as a *business-as-usual* organization, SEs provide systemic and sustainable solutions to add meaningful value to the world.

Especially in this challenging time characterized by huge inequalities, health crises, increasing vulnerability and environmental stresses, SEs have proven their capacity to provide immediate support while working for a prosperous and sustainable world. In this sense, SEs show that a more responsible and responsive business approach can create economic, social, and environmental value. For these reasons, SEs can also have a key role in realizing the 2030 Agenda.

Adopted by the United Nations (UN) in 2015, the 2030 Agenda for Sustainable Development is a blueprint for achieving peace and prosperity for people and the planet. At the heart of this agenda, there are the 17 Sustainable Development Goals (SDGs) and 169 targets which define priorities and aspirations for 2030. The 2030 Agenda calls for an integrated and interlinked approach among governments, business, and civil society in order to achieve the SDGs.

Nevertheless, innovative, and sustainable solutions designed for unmet needs and societal challenges require considerable economic resources and collective efforts. Over the years, many financial schemes emerged for allowing SEs to implement their actions and boost their impact. It is the case of Social Impact Bonds (SIBs), designed for funding innovative social interventions following a result-based approach.

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This conceptual article explores how SIBs may contribute Social Enterprises to attain SDGs. In order to achieve this objective, the article is divided into five sections. The first section, that is the theoretical background, provides a discussion of the main approaches to social enterprise, aiming to reach a common understanding of the concept, address the role of these SE entities in the SDGs and their financing needs. Then, the second part (section 3) offers a framework for understanding as SIBs can be a tool for SEs, to conclude with the conclusions and bibliographical references.

2. Theoretical background

2.1. Social Enterprise: Concept and definition(s)

Social enterprise has gradually become an important field of research[1] due to the potential in addressing social, economic, and environmental issues. Generally, SEs range along different areas of intervention (such as social services, finance, work integration, circular economy, etc.) using different economic resources like earned income, grants, public procurement, impact investing, venture philanthropy, crowdfunding, etc.[2] moving in various sectors (public, private, volunteer). However, defining social enterprise has not been an easy task. As a concept deep-rooted in national contexts, different meanings of SEs emerged depending on specific internal logics and influential factors.

Especially towards the end of the 20th and early years of the 21st century, confusion and poor clarity characterized the field[3]. Due to the lack of a common definition and universal theoretical framework, existing theories have not been able to capture the rationale and the diversity of SEs[4]. Nevertheless, some scholars pointed out that nowadays social enterprise is a recognized and homogenous concept[5]. Undoubtedly, the legal recognition in several countries has played a role in facilitating its clarification[6].

The starting reference for social enterprise theoretical conceptualization is in two distinct contributions between the end of 1990s and the start of 2002. Specifically, the EMES European Research Network and the British government set a milestone in the theoretical and empirical analysis of such phenomena[7]. The EMES conceptualization represents a methodological tool helping organisations to position themselves in the galaxy of SEs, while the British definition is the result of the UK government in clarifying social enterprise. The need to define and clarify the concept of social enterprise in the framework of the European Action Plan for the Social Economy, which recognises social enterprises as part of the Social Economy[8] , is once again topical and the concept will be further analysed in the near future.

On the one hand, the result of EMES efforts crystallised into the following definition: "SEs are not-for-profit private organisations providing goods or services directly related to their explicit aim to benefit the community. They generally rely on collective dynamics involving various types of stakeholders in their governing bodies, they place a high value on their autonomy, and they bear economic risks related to their activity[9]".

On the other hand, the British contribution in developing a definition for SEs has been part of a national strategy aimed at re-branding the third sector movement[10], and a in position paper "Social Enterprise: A Strategy

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for Success" in 2002, provided the following definition: "A social enterprise is a business with primarily social objectives whose surpluses are principally reinvested for that purpose in the business or in the community, rather than being driven by the need to maximize profit for shareholders and owners"[11].

These two definitions capture the core ideas of SEs: private entities that are part of the market and have a social purpose in order to benefit society. The British definition is more focused on its distinction from capital companies, and the EMES definition is broader, covering issues related to their socio-economic governance. As previously stated, the legal recognition of social enterprise has facilitated its understanding[12] and spreading across the world, especially in Europe. Particularly, the political and legislative EU framework evolved by considering the different school of thoughts, the vibrant scholar debate, and the peculiarity of each Member States[13].

The European Union has also introduced this concept since 2011 through the European Commission Communication on Social Business Initiative (SBI)[14] as a relevant actor in the achievement of the *Europe 2020 Strategy* for a sustainable, smart, and inclusive economy. The definition is in line with the previous ones, especially that of EMES, and includes the same characterizations as the previous ones: "A social enterprise is an operator in the social economy whose main objective is to have a social impact rather than make a profit for their owners or shareholders. It operates by providing goods and services for the market in an entrepreneurial and innovative fashion and uses its profits primarily to achieve social objectives. It is managed in an open and responsible manner and involves employees, consumers and stakeholders affected by its commercial activities".

The social enterprise concept is now generally used in the European Union realm, since 2011 and is understood as part of the social economy and characterized by three main features in the line of a previous document[15]: "Social enterprises operate by providing goods and services for the market in an entrepreneurial and often innovative fashion, having social and/or environmental objectives as the reason for their commercial activity. Profits are mainly reinvested with a view to achieving their societal objective. Their method of organisation and ownership also follow democratic or participatory principles or focus on social progress. Social enterprises adopt a variety of legal forms depending on the national context"[16]. According to the EU criterion, it shares characteristics with social economy entities: primacy of people as well as social and/or environmental purpose over profit, reinvestment of most of the profits and surpluses to carry out activities in the interest of members/users ("collective interest") or society at large ("general interest") and democratic and/or participatory governance[17].

From the analysis of these definitions emerge the two essential characteristics of SE: the coexistence of a commercial activity and a prioritized social mission. Then, while the EMES approach stresses the governance dimension and the non-profit orientation; the British and 2011 European Union definitions highlight the business nature which is at the service of a social purpose. It is highly relevant and deserves to be highlighted the decisive advance in the recognition of its social and governance dimension since the social and governance role of the SE has been strengthened in the latest EU definition[18].

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[11] *Social Enterprise: a strategy for success*, Department of Trade and Industry, 2022, *https://employeeownership.com.au/eoa/wp-content/uploads/2020/08/Social-enterprise-A-strategy-for-success.pdf*.

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[14] European Commission. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Social Business Initiative.* COM (2011) 682/2, Brussels, 2011.

[15] *Ibidem*.

[16] *Ibidem*.

[17] European Commission. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Building an economy that works for people: an action plan for the social economy***.** COM (2021) 778 final. Brussels, 2021.

[18] *Ibidem*.

2.2. The contribution of SEs to SDGs

In the framework of sustainable development, the SDGs contribute to the achievement of social, economic, and environmental goals, and SSE actors are in the "pole position" to pursue such goals, as entities that not only have economic goals as their *raison d'être,* but also other types of goals: social and environmental[19].

SEs gained momentum amongst scholars, policymakers, and entrepreneurs for the capacity to reshape communities by stepping out of the box to deliver innovative practices. The transformative role of SE implies the ability to contaminate the traditional political structures and promote disruptive solutions to the urgent societal challenges. In 2014, the United Nations, through the Inter-Agency Task Force on Social and Solidarity Economy published a first position paper on the role of SSE entities in the achievement of the SDGs[20], which emerged as a consequence of the insufficient attention given to the SSE in the establishment of the SDGs. This paper highlighted the potential of SSE to achieve the economic, social and environmental goals and integrated approaches inherent to sustainable development. Thus, it is worth noticing that SE´s core mission is perfectly aligned with the SDGs, that is to improve the life of communities through an equitable and inclusive society.

Several scholars have observed that social enterprises contribute to SDGs in the following ways: i) addressing societal challenges as the core mission ii) promoting democratic and participative governance structures and processes iii) combing the environmental with the social and governance aspects of their activities iv) operating at local and community level[21].

In this sense, the UN through the Inter-Agency Task Force on Social and Solidarity Economy published its second position paper on the role played by the social economy entities in achieving the SDGs[22]. Specifically, it has been highlighted how social enterprise can help in areas such as women's empowerment and gender equality, food and agriculture, and eco-social approach. It also highlights opportunities and different forms of policy and legal reform that can provide inspiration and lessons to both governments and state legislatures on how to foster an enabling and inclusive institutional environment for SSE entities. Specifically, as a summary, this paper identifies 4 main approaches through which the SSE contributes to the achievement of the SDGs:

Firstly, an economic approach: through decent work, integration of disadvantaged people into the labour market, income generation, access to markets and finance, ethical and solidarity-based financial practices and investments, and fair trade.

Secondly, a social approach: SSE entities integrate the economy into social values and local territories, involving vulnerable people in ways that reduce poverty, increase labour rights and social protection, and ultimately contribute to social cohesion and the building of more resilient communities. Furthermore, as reported by Castro Nuñez *et al.* (2020), the contribution of the SSE to the SDGs by improving women's participation and working conditions, which is a key factor in terms of empowerment and social advancement, is demonstrated through different analyses carried out[23].

Thirdly, an environmental perspective: generating sustainable production and consumption patterns, activities and innovations that preserve, rehabilitate, and sustainably manage natural capital and introduce adaptation and combat climate change. As highlighted by Quiroz-Niño *et al.* (2017), SSE organizations tend to produce a lower carbon footprint, due not only to their environmental objectives but also to the nature of their production and exchange systems[24].

Finally, a cultural and philosophical approach: SSE preserves the role of ethics, justice, democracy, participation, social relations, and governance, as well as fostering cultural diversity and the interconnectedness between human life and nature.

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[19] U. Villalba-Eguiluz, A. Egia-Olaizola, J.C. Pérez de Mendiguren, *Convergences between the Social and Solidarity Economy and Sustainable Development Goals: Case Study in the Basque Country*, Sustainability, 12(13), (2020): 5435.

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[22] UNTFSSE United Nations Inter-Agency Task Force on Social and Solidarity Economy, *II Position Paper: Advancing the 2030 Agenda through the Social and Solidarity Economy,* Genève, 2022.

[23] R. Belén C. Nuñez, P. Bandeira, R. Santero-Sánchez, *Social Economy, Gender Equality at Work and the 2030 Agenda: Theory and Evidence from Spain*, Sustainability, 12(12), 5192 (2020).

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Entities such as the Intercontinental Network for the Promotion of Social Solidarity Economy, for example, have collected a large number of real, intrinsically inclusive local and community initiatives and practices, which encourage the participatory practice of citizens and ultimately achieve the SDGs through the SSE[25], which can serve as an inspiration as well as an indication of the great importance of the SSE when it comes into play in the fulfilment of the 2030 Agenda.

Finally, however, it is worth noting that despite the recognition of the relevance of social enterprises in implementing the SDGs, the second UNTFSSE paper raised some questions about methodologies and indicators able to capture the concrete contribution and impact of social enterprises. In fact, the social enterprise concept is strictly related and rooted in the context where it emerges and for this reason it is hard to develop a standard for evaluation that fits all. It is hard to assess and compare experiences developed in different contexts with different logics behind.

Therefore, there is a need to continuously introduce rules (practices, policies, principles and standards) that are widely accepted, consistent and stable, such as those governing the financial system. Entering a market where there is certainty and transparency will stimulate large and small providers of capital to allocate more resources to financing social initiatives, while demanders will design business models aligned with that supply.

2.3. What social enterprises need to play their part? The role of finance

SSE enterprises and young social entrepreneurs are often at a great disadvantage when it comes to seeking funding for the multiple stages of start-up development. The capacity of a SE to access resources affects the way in which it implements and achieves its actions[26]. Accessing financial resources is still a relevant topic in the debate of SEs. It is not only about demand-side deficiencies related to the SSE entities themselves, but also about supply-side deficiencies related to financial entities that rely heavily on standardised profit criteria[27].

Also, only some types of SSE entities are supported and regulated by law. Weak legal frameworks can limit access to financial services, subsidies, tax incentives, public procurement, and other forms of government support.

Despite the emergence of several initiatives and schemes for addressing this gap, SEs are still looking for the appropriate type of finance[28]. Nevertheless, the centrality of SE' social mission affects its funding relations[29]. On one hand, because of this centrality, SEs have access to a multitude of financial resources[30]; on the other, nature and the type of financial instruments can serve different purposes and affect the social value creation.

The SSE is increasingly accessing hybrid forms of financing involving both private and public loans, grants and state aid and private donations, while reinvesting net profits. This increase in government financial support for the SSE is taking place in a context where social innovation is recognised as key to inclusive and sustainable growth and employment generation.

Over the years, social enterprise funding has evolved rapidly to not only encompass innovative instruments and for-profit finances, but also public and charity finances[31]. By expanding social enterprise financial supply, new initiatives have emerged. The social enterprise funding spectrum[32] includes different approaches, instruments, and traditional and innovative tools that enable the capital for achieving a social return. Ethical and social banking provides access to credit for organizations seeking a social economic impact[33]. Public initiatives

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like these in the EU have been promoted since 2011 via the Social Business Initiative or now the European Social Economy action plan (2021) Over the years, the European Commission has provided many schemes dedicated to social enterprise funding ranging from the Regulation on European Social Entrepreneurship Funds to the EU Employment and Social Innovation Program and the Social Impact Accelerator[34]. Within such frameworks, Social Impact Bonds could represent innovative social enterprise funding that affords opportunities for SEs to obtain greater funding while scaling their impact without committing budgets.

3. What does the rise of social impact bonds mean for social enterprises?

3.1. Social Impact Bond: Concept and definition

SIBs were introduced in 2008 by The Young Foundation, a UK-based think tank specialized in social innovation. Social finance further developed the term, a not-for-profit organization working with public bodies, private actors, and social sectors in the UK.

The UK Cabinet Office in 2013 defined the SIBs as a “commissioning tool that can enable organizations to deliver outcomes contracts and make funding for services conditional on achieving results”[35]. Years later, the academic research centre for outcomes-based contracting and impact bond, namely The Government Outcomes Lab (GO Lab), describes SIBs as a form “of outcome-based contracts” where private funding from investors allows providers to implement a social service. “The service is designed to achieve measurable outcomes specified by the commissioner (that is, the government or local authority). The investor is repaid only if these outcomes are achieved.”

As stressed in the two definitions, the SIB is a mechanism belonging to the family of result-based and commissioning finance. Usually, the SIB is a contract between an outcome’s payer (usually a public actor) and a service provider intending to improve a pre-fixed outcome. An investor who agrees to be paid back when the outcomes are proven and validated by an external validator offers the financing for implementing the interventions.

Thus, the SIB scheme is conceived as an arrangement with the following features[36]:

- a contract between a commissioner and a legally separate entity (*i.e.*, delivery agency or service provider);
- a particular social outcome or outcomes, which, if achieved by the delivery agency, will activate a payment or payments from the commissioner;
- at least one investor that is a legally separate entity from the delivery agency and the commissioner;
- and some or all the financial risk of non-delivery of outcomes sits with the investor(s).

Under a SIB, a social provider receives long-term funding commitments from private (impact) investors to implement or expand social intervention with the support of a public commissioner targeting measurable outcomes[37]. If and how much investors are repaid depends on the intervention results. Typically, SIB contracts establish specific thresholds that must be achieved to pay back investors. The repayments include an interest rate because the outcomes achieved will generate cost savings or social improvement, creating substantial economic and social values.

Ética en Europa: el enfoque del crédito como criterio de configuración de un espacio de alternativa, CIRIEC-España, Revista de economía pública, social y cooperativa, 75, (2012): 276-299.

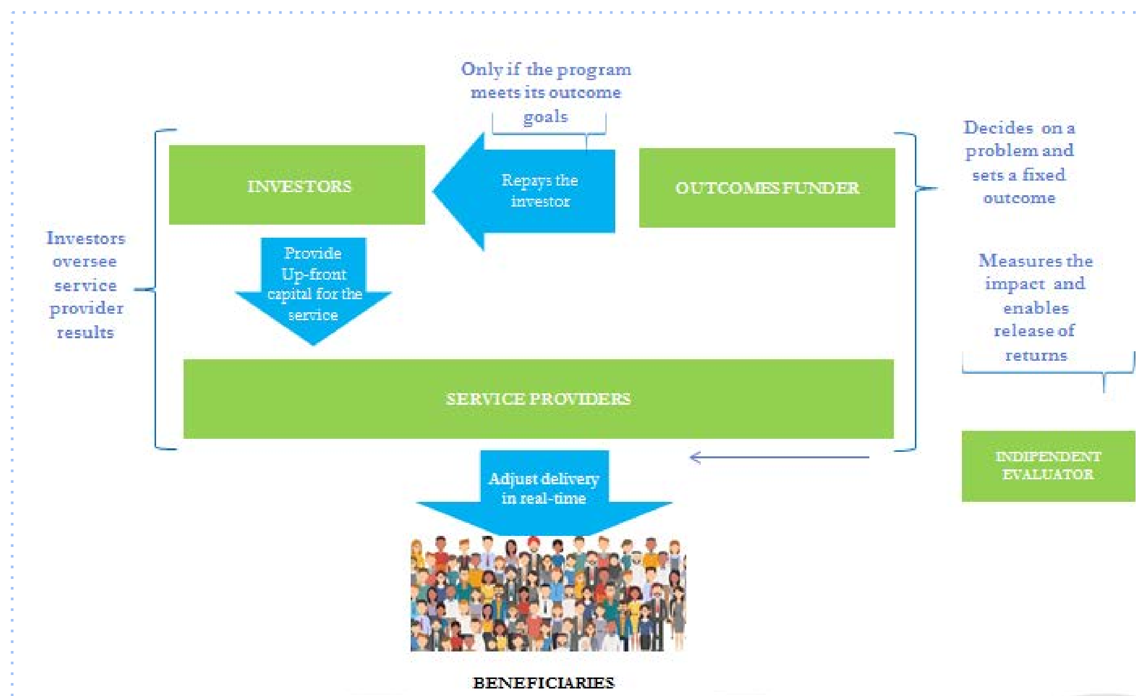
[34] M. Valcárel, *Los fondos europeos de emprendimiento social: su aplicación en España*, CIRIEC-España, Revista de Economía Pública, Social y Cooperativa, 75, (2012): 105-128.

[35] *Knowledge Box - Guidance on Developing a Social Impact Bond*, UK Government, 2013, *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/646733/Knowledge_Box_Guidance_on_developing_a_SIB.pdf.*

[36] A. Nicholls, E. Tomkinson, *The Peterborough Pilot Social Impact Bond*, University of Oxford - Case Study, 2013, *https://emmatomkinson.files.wordpress.com/2013/06/case-study-the-peterborough-pilot-social-impact-bond-oct-2013.pdf.*

[37] G. Peter, Dagher Jr., *Social Impact Bonds and the Private Benefit Doctrine: Will Participation Jeopardize a Nonprofit’s Tax-Exempt Status?,* Fordham Law Review, vol. 81, issue 6 (2013): 3479-3519.

Figure 1: Social Impact Bonds (SIBs) general functioning scheme



Source: Elaborated by the authors

As described in the figure above, SIBs involve different actors. The commissioner contracting SIBs is usually a central or local government body. The involvement of a public actor in this type of scheme is related to the possible social cost savings associated with the social intervention. In this sense, only in cases of successful programs, the public commissioner repays the investor. Failures in meeting the agreed outcomes will negatively affect the financial actor, who will bear the partial or total loss. Although the public actor sets the desired social outcome, the investor provides financial resources to the social provider to ensure the intervention's deliverance for the specific social need. By offering a mixture of work and risk capitals[38], SIBs allow social organizations acting as social providers to enjoy stable, long-term funding[39]. The social provider involved is the actor that delivers the intervention to the final user. Usually, the social provider is a socially oriented organization. However, it can also be a for-profit enterprise. Apart from traditionally outcome-based commissioning schemes, upfront working capital is provided by investors who bear the risk of non-performance. After the contract, governments can decide to fund the directly involved service provider through another SIB, wherein investors will only receive a return if the fixed outcome is achieved. Then, the external evaluator monitors and assesses the agreed outcomes' achievement. Lastly, the beneficiary or the target group is the population who received the intervention.

3.2. Social Impact Bonds: an innovative scheme for funding Social Enterprises?

SIBs are thus configured as multi-year and multi-stakeholder partnerships. This entails both commissioning and funding innovations. On one hand, SIBs introduce a new funding structure for the relationship between the government and social sector organizations[40]. On the other hand, SIBs express new logic, new actor, and improved financial schemes recently developed, including impact investing and social finance. The development of these practices and emerging actors can be seen clearly through the lens of the financialization and privatization of the public interest[41].

[38] D.R. Young, *Financing Nonprofits and Other Social Enterprises: A Benefits Approach*, Edward Elgar Publishing House, Georgia, 2018.

[39] G. Peter, Dagher Jr., *Social Impact Bonds and the Private Benefit Doctrine: Will Participation Jeopardize a Nonprofit's Tax-Exempt Status?,* Fordham Law Review, vol. 81, issue 6 (2013): 3479-3519.

[40] C.M. Balboa, *Accountability of Environmental Impact Bonds: The Future of Global Environmental Governance?,* Global Environmental Politics, MIT Press, vol. 16(2) (2016): 36-41; N. McHugh, S. Sinclair, M. Roy, L. Huckfield, C. Donaldson, *Social impact bonds: A wolf in sheep's clothing?* Journal of Poverty and Social Justice, 21(3), (2013): 247-257; M.E. Warner, *Private finance for public goods: social impact bonds*, Journal of Economic Policy Reform, 16(4), (2013): 303-319.

[41] E. Chiapello, *Financialisation of Valuation*, Human Studies 38 (2015): 13-35.

Leveraging varieties of pay-by-results contracts, SIBs are poised to change the way in which welfare services are delivered by focusing on outcomes rather than actions. By introducing a market-based approach to the social services, several key implications have emerged in the literature: increased flexibility, better service delivery, social impact measurement, and scaled-up impacts. But also, distortive and incentives such as creaming or cherry picking and mission drift.

Upfront working capital and long-term funding enable SEs to become more responsive and solution-oriented by adapting their interventions, which otherwise would not occur without private financing. Under a SIB, SEs are not required to follow prescribed activities, but are rather pressed to achieve certain outcomes. Thus, flexibility in selecting and adjusting social intervention helps the social enterprise deliver innovative solutions. Furthermore, SIBs encourage SEs to develop and promote new organizational cultures based on impact measurement. Delivering SIB intervention requires data collection, reporting, and impact measurement. The efforts and complexity associated with structuring a SIB contract are widely accepted because of potential tangible community improvements and resultant social change. Accessing capital to scale-up interventions with measurable results might also incentivize SEs to scale up their impact.

A very positive element is that this mechanism provides the social enterprise with multi-year funding, to avoid dependence on subsidies in many cases on an annual basis, while the problems addressed by the SEs are structural by its own nature and normally require long-term activity to achieve the desired results. On the other hand, due to its multi-stakeholder nature involving public and, as a novelty, private actors (social investors), it allows access to financing models that would not otherwise exist and enables SEs to achieve their social purpose, which would otherwise be more difficult.

It is remarkable the fact that the mechanism itself includes the achievement of results, *i.e.,* there is a shift from the concept of social service provision with a focus on the actions carried out, to a model based on the achievement of previously determined objectives. This mechanism helps to measure the social impact attained. On the one hand, it allows the assessment of the achievement of the sustainable development objectives, which one(s) and in what concrete way. It also favors the dissemination of the results to society and in general to the stakeholders, and therefore the visibility of the social effects of this type of organizations, which is its logic and differential raison d'être. It is also essential for assessing, from the perspective of the efficiency of public finances, the aid provided, and the social return involved.

4. Conclusions

Social enterprises have been considered by their nature and purpose as particularly conducive to the achievement of the SDGs, as recognized by the United Nations and the specialized literature. Their effects on unmet social challenges and their governance model have earned them interest and the creation of a line of work on them both by different organizations (United Nations, European Union, etc.) and by the scientific literature.

These are entities that develop economic activities (production and services) for the market, are not for profit, and with the maximum aspiration of achieving a social impact, benefiting the community, and addressing unmet social challenges. This approach, radically different from as usual businesses, in turn implies a differential model both in terms of economic governance (reinvestment of possible profits obtained in the entity itself and its beneficiaries), corporate governance (democratic management and collaboration with stakeholders) and its own functioning articulation, which is innovative and disruptive.

In order to achieve these desirable outcomes, securing funding is essential and of utmost relevance for social enterprises. There has been an evolution in financing mechanisms, from more traditional models to more evolved and complex ones, which include the social component in the financing mechanisms. Within this realm, SIBs could represent an innovative way to fund social enterprise initiatives.

Despite their limitations, SIBs may help SEs in accelerating their social impact. By receiving up-front capital and working in closer collaboration with other private and public actors, SEs can better focus on the development of tailor-made solutions which really are helpful for the target population and for the achievement of the SDGs.

Assessments of the degree of compliance with the Sustainable Development Goals show that progress is being made, albeit at a slower pace than set and that would be desirable. This is why, with only 7 years to go before the deadline, it should continue to be the object of attention, among other aspects, through scientific

studies and analyses. It is also of utmost importance to continue to deepen the aspects of financing social entities, combining both more traditional mechanisms and those of a more innovative nature, like the SIBS.

In this way, progress could be made towards a higher rate of compliance with development objectives. In fact, at EU level, the Next Generation Europe funds finance different types of actions aimed at achieving a more cohesive Europe. In the framework of the European Action Plan for the Social Economy, and more specifically for this type of social entities, the financial dimension is understood as a key element for the development of this type of enterprises and their recognised socio-economic effects. This research is therefore rooted in a consolidated line of research, which is both open and forward-looking, regarding the need for funding from social entities to boost the SDGs.

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USING INSTAGRAM FOR DESTINATION MARKETING: CREATING THE PERCEPTION OF A TOURISM DESTINATION EXPERIENCE AND INFLUENCING THE TRAVEL DECISION-MAKING PROCESS

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Abstract

Nowadays Instagram has a big influence on the tourism sector. A large number of travelers are using Instagram to post pictures, videos and stories, during and after their holidays, for experience sharing and travel tips. Travelers love to share their impressions of the places they have discovered with their friends and the wider travel community. This type of user-generated content is generally more trusted than official tourism websites and advertising and it is used to discover new travel ideas. Therefore, Instagram plays an important role in shaping the image of a tourism destination and in presenting the destination experiences. This article aims to evaluate how can Instagram influence the viewers' perceptions towards travel destinations and to identify how Instagram posts are influencing the travel decision-making process. The article also discusses the implications of using Instagram in promotional strategies for destinations, since now conventional tourism promotion is not enough for presenting the travelers experiences. Overall, the travel decision-making process is a complex and multifaceted process that can be influenced by a wide range of factors. By understanding these factors and keeping up with emerging trends and changes in the travel market, businesses in the tourism industry can develop more effective strategies and offerings that resonate with travelers and help them make informed decisions about their travel plans.

Keywords: *destination branding, destination experience, destination marketing, social media, Instagram.*

1. Introduction

Destination marketing is the process of promoting a particular destination to attract visitors, increase tourism revenues, and enhance the overall reputation and brand image of the destination. The aim of destination marketing is to create awareness and interest among potential travelers, and to motivate them to choose the destination as their preferred travel destination. Destination marketing plays a critical role in the tourism industry, helping to promote destinations and attract visitors, while supporting economic growth and sustainable tourism development.

Effective destination marketing requires a deep understanding of the target market and their travel preferences and motivations. Destination marketing organizations and other stakeholders in the tourism industry must identify the needs, interests, and behaviors of potential travelers, and to develop marketing messages and strategies that resonate with them. Destination marketing typically involves a range of activities and strategies, including advertising campaigns, public relations and media outreach, social media and digital marketing, tourism trade shows and exhibitions, and partnerships with other businesses and organizations in the tourism industry. Social media has proven to be an effective method for destination branding according to numerous previous studies, leading to its increased utilization in marketing and promoting destinations to boost tourist numbers[1].

Nowadays social media plays a crucial role in developing an effective destination marketing strategy. Social media platforms provide a powerful tool for destinations to present their unique offerings, promote their attractions, reach new audiences, engage with potential visitors, and build their brand image. Social media can be utilized for destination marketing in numerous ways, but the most important advantages are being offered by the visual and interactive nature of these platforms. Social media platforms "are not simply used as interaction

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[1] A. Basit, A.D. Nurlukman, A. Kosasih, *The effect of social media destination branding: the use of Facebook and Instagram*, in Advances in Social Science, Education and Humanities Research, 2019, vol. 439.

or communication tools but also as an active component in the destination image formation process"[2]. Social media provides an opportunity to present the destination's attractions in a visually appealing way through pictures and videos.

A tourism destination image refers to the perceptions that potential tourists have about a certain destination. In order for a destination's image to be effective, it must include attributes that satisfy the needs of tourists and differentiate it from competitors. The image of the destination has two main functions in consumer behavior: to influence tourists' decision-making processes and to have an impact on their intention to visit or recommend the destination again[3].

Social media allows destinations to connect with visitors and locals and create online communities where people can share their experiences, photos, and opinions. Social media can be also used to encourage visitors to share their experiences and photos, creating user-generated content that can be further used to promote the destination, reach new audiences and showcase the offerings to a wider audience.

A tourism destination experience refers to the overall experience that a traveler has when visiting a certain destination. A tourism destination experience can be influenced by a wide range of factors, including the natural and built environment, the availability and quality of accommodations, transportation and infrastructure, the local culture and traditions, and the activities and attractions that are available. In order to create a positive tourism destination experience, destination managers and businesses in the tourism industry need to focus on creating an environment that is welcoming, authentic, and memorable and on developing and promoting unique experiences. Travelers are increasingly seeking out experiences that are unique, authentic, and connected to the local culture and traditions. Destination managers and tourism businesses can develop and promote these experiences by working with local communities, cultural organizations, and other businesses to showcase the best that the destination has to offer. Thus, social media can be a powerful tool for promoting a tourism destination experience, enabling destinations to reach new audiences and engage with visitors in a way that is both interactive and immersive.

One of the most popular social media platforms is currently Instagram. By leveraging the facilities offered by Instagram, destinations and travel brands can create a compelling and engaging presence on the platform, which can influence the travel decision-making process of their target audience and ultimately lead to increased bookings and visits. Instagram offers a variety of tools and features that can be utilized by destinations to build a strong online presence and connect with potential visitors. Some of the key features include Instagram Stories, IGTV, Instagram Reels, and Instagram Live, which allow brands to share engaging and interactive content with their audience. By using these features, destinations and travel brands can showcase their unique offerings, share behind-the-scenes experiences, and highlight the best aspects of their destination, creating a powerful visual narrative that resonates with their target audience. Additionally, Instagram provides a platform for user-generated content, enabling destinations and travel brands to feature content from their visitors and followers, which can serve as authentic and trustworthy endorsements for the destination.

This paper aims to highlight the ways in which Instagram can be used for destination marketing, and more precisely for creating the perception of a tourism destination experience and influencing the travel decision-making process. Overall, influencing the travel decision-making process through social media can prove to be very useful for a destination. Social media can increase a destination's visibility, engagement, reputation, competitive advantage, and revenue, and it can help to stay competitive in the fast-paced and ever-evolving tourism market. This article aims to review all the features and tools offered by Instagram and to highlight how these features of the platform can be used for destination marketing strategies and tactics. The existent specialized literature has devoted increased attention to this subject in recent years, but the field is evolving, new solutions are emerging and they deserve to be highlighted. While various research papers have emphasized the significance of social media in promoting tourist destinations, the existing literature still lacks studies that specifically explore the impact of Instagram content on a destination's image and on the perception of a tourism destination experience.

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[2] S. Shuqair, P. Cragg, *The immediate impact of Instagram posts on changing the viewers' perceptions towards travel destinations*, in Asia Pacific Journal of Advanced Business and Social Studies, 2017, vol. 3, issue 2.

[3] R. Antolín-Prieto, J.R. Sarmiento-Guede, A. Antonovica, *Instagram as a value co-creation tool for the image of tourist destination. Analysis of the case of Spain during Covid-19: the Balearic and the Canary Islands*, Revista Espacios, 2021, vol. 42, issue 12.

2. Key aspects regarding the travel decision-making process

The travel decision-making process refers to the series of steps that a person goes through when making a decision about where to go on vacation, which activities to do, and how to get there. This process can be broken down into several stages, including:

- Inspiration: This stage involves the initial spark that triggers a desire to travel, such as seeing an advertisement, hearing about a friend's trip, or browsing through social media;
- Research: Once a person has been inspired to travel, they will begin to research potential destinations, activities, and accommodations. This stage involves gathering information from various sources, including travel websites, guidebooks, and social media;
- Planning: After conducting research, the traveler will begin to plan the details of their trip, such as selecting dates, booking flights and accommodations, and making reservations for activities and tours;
- Booking: This stage involves making final reservations and purchases for the trip, including flights, hotels, rental cars, and tours;
- Experience: Finally, the traveler experiences the trip itself, which includes the various activities and experiences that they have planned and booked.

Besides understanding the stages of the travel decision-making process, it is also important to recognize the factors that can influence a person's decision. These can include personal preferences and interests, budget, travel history, cultural background, and the influence of family, friends or other persons. Understanding the travel decision-making process is essential for businesses in the tourism industry, as it allows them to tailor their marketing strategies and offerings to meet the needs and preferences of their target audience at each stage of the process.

In addition to the stages and factors that influence the travel decision-making process, there are also some emerging trends and changes that are affecting the way people make travel decisions. Some of these trends include the increasing importance of social media and user-generated content. The rise of social media and online reviews has given travelers access to more information and options than ever before, which can influence the decision-making process. Social media platforms like Instagram and YouTube are increasingly shaping the way people discover and research travel destinations, and user-generated content like photos and reviews are becoming more influential in the decision-making process.

By keeping up with these trends and understanding the changing needs and preferences of travelers, businesses in the tourism industry can stay ahead of the curve and develop strategies that resonate with their target audience. For example, during the inspiration stage, a travel company might use social media influencers or targeted ads to spark the traveler's interest in a particular destination. During the research stage, they might use social media to offer detailed information about the destination and highlight the unique experiences that are available. During the booking stage, they might use social media to promote certain hotels or flights and offer discounts or special packages to encourage the travelers to make a reservation. Overall, social media can play a significant role in the travel decision-making process, providing inspiration, research, recommendations, engagement, and user-generated content that can influence a traveler's destination choice and travel planning.

3. Using Instagram for destination marketing

‘’Instagram is the most popular type of social media used in tourism’’[4]. Instagram is a powerful tool for generating and sharing content that can help create the perception of a tourism destination experience. Overall, Instagram's visual nature and community-driven content can play a significant role in influencing users' travel decisions and inspiring them to explore new destinations and experiences. By leveraging a series of facilities offered by Instagram, destinations and travel brands can create a strong presence on the platform and influence the travel decision-making process of their target audience.

Destination image is not solely established by destination marketing organizations, social media users now play a significant role in co-creating the image of a destination by sharing stories and photos that display their

[4] Iglesias-Sánchez, P. Patricia, Correia, B. Marisol, Jambrino-Maldonado, Carmen, C. de las Heras-Pedrosa, *Instagram as a Co-Creation Space for Tourist Destination Image-Building: Algarve and Costa del Sol Case Studies*, Sustainability, 2020, vol. 12.

experience with the destination's offerings[5]. Additionally, travelers are using social media to express their opinions and emotions about destinations, accommodations, restaurants and their general experience.

Thus, Instagram can be used for destination marketing in the following ways:

- Inspiration: Instagram is a visual platform that displays beautiful images and videos of destinations and experiences. By browsing Instagram, users can be inspired by stunning imagery and get ideas for their next travel destination or activity;
- Authenticity: Instagram allows users to see real-life experiences shared by other travelers, giving them an authentic look at what a destination has to offer. This can help users make more informed decisions about where to travel and what to do when they get there;
- Recommendations: Influencers and other users on Instagram often share recommendations and reviews of destinations and experiences, which can influence users' travel decisions. Seeing positive reviews and recommendations from others can increase users' confidence in their decision to visit a certain destination or try a certain activity;
- Personalization: Instagram's algorithm uses users' activity and interests to personalize their feed, showing them content that is relevant and interesting to them. This can help users discover new destinations and experiences that align with their interests and preferences;
- Convenience: Instagram's booking and shopping features make it easy for users to book accommodations, tours, and experiences directly through the app. This convenience can make the travel decision-making process more streamlined and efficient for users;
- Branding: Instagram allows destinations and travel brands to showcase their unique brand identity and personality through their content. This can help users connect with a destination or brand on a deeper level and influence their decision to visit;
- Social proof: Seeing friends, family members, or influencers visiting a destination or trying an activity on Instagram can provide social proof and influence users' travel decisions. Users are more likely to trust recommendations and reviews from people they know or admire;
- Accessibility: Instagram's accessibility features, such as alt text and closed captions, make it possible for users to fully engage with the platform's content. This inclusivity can help more people discover and consider travel destinations and experiences;
- User-generated content: User-generated content, such as photos and videos shared by travelers on Instagram, can provide an authentic and relatable perspective on a destination or experience. This type of content can influence users' travel decisions and encourage them to try new things;
- User engagement: Engaging with users on Instagram can help build a sense of community and loyalty around a destination or travel brand. Responding to comments and messages, reposting user-generated content, and hosting Instagram contests or giveaways can all help increase user engagement and influence travel decisions;
- Interactive features: Instagram's interactive features, such as polls, questions, and quizzes, can engage users and provide valuable feedback for destinations and travel brands. This two-way communication can help build a stronger relationship between the brand and its audience, ultimately influencing travel decisions;
- Hashtags: Hashtags on Instagram can help users discover and explore content related to a specific destination or travel experience. Destinations and travel brands can use relevant hashtags to make their content more discoverable to users who are interested in those topics;
- Location tagging: Location tagging on Instagram allows users to see content related to a specific location or landmark. Destinations and travel brands can use location tags to make their content more discoverable to users who are exploring a certain destination or region;
- Stories: Instagram Stories can provide a behind-the-scenes look at a destination or travel experience, allowing users to see a more personal and authentic perspective. Destinations and travel brands can use Stories to display unique experiences, share travel tips, and engage with their audience in real-time;
- Reels: Instagram Reels can be used to exhibit short-form video content that highlights a destination or travel experience. Reels can be a great way to capture the attention of users who are scrolling through their feed and looking for quick, engaging content;

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[5] R. Filieri, D.A. Yen, Q. Yu, *#ILoveLondon: An exploration of the declaration of love towards a destination on Instagram*, Tourism Management, 2021, vol. 85.

- Instagram Ads: Instagram Ads can be targeted to specific demographics, interests, and behaviors, making them a powerful tool for reaching users who are interested in travel. Ads can be used to promote a destination, experience, or travel brand, and can be customized to fit a variety of marketing objectives;
- Instagram Guides: Instagram Guides allow users to create curated lists of content related to a specific topic, such as a destination or travel experience. Destinations and travel brands can use Guides to showcase the best things to do, see, and eat in a certain location, providing valuable travel recommendations to their audience;
- Influencer marketing: Influencer marketing on Instagram can be a powerful tool for destinations and travel brands to reach a wider audience and promote their offerings. Influencers with a large following and a strong engagement rate can present a destination or experience to their followers, who may be inspired to visit based on the influencer's recommendation;
- Influencer takeovers: Destinations and travel brands can invite influencers to take over their Instagram account for a day or week, sharing their experiences and recommendations with the brand's followers. This can provide a fresh perspective on a destination or travel experience and encourage users to consider visiting;
- Analytics: Instagram's analytics tools allow destinations and travel brands to track their performance on the platform and optimize their content and strategy accordingly. By analyzing engagement rates, follower growth, and other metrics, destinations and travel brands can better understand their audience and create more effective content that influences travel decisions.

4. Instagram tactics for promoting a travel destination

As mentioned above, Instagram is a powerful social media platform that can be an effective tool for destination marketing. The following tactics can be used to promote a travel destination and to create the perception of a tourism destination experience via Instagram:

1. Create a business account: To make the most of Instagram for destination marketing, create a business account. This will give you access to features like Instagram Insights, which can provide valuable analytics on your followers and the performance of your posts.
2. Post consistently: Consistency is key on Instagram. Regularly posting high-quality content can help keep your audience engaged and interested in your destination. Create a content calendar and plan out your posts in advance to ensure you are consistently sharing compelling content.
3. Use high-quality visuals: Instagram is a visual platform, so it is important to use high-quality photos and videos that display the best aspects of your destination. This can include scenic views, local landmarks, cultural events, and activities. Make sure the images are well-lit, well-composed, and visually appealing.
4. Engage with your audience: Engaging with your audience is key to building a loyal community of engaged travelers. Respond to comments and messages in a timely and professional manner, encourage your followers to share their own experiences and thoughts, and actively seek out opportunities to connect with potential visitors. This can help build trust and create a sense of community around your destination, ultimately helping to attract more travelers.
5. Share user-generated content: User-generated content can be a powerful tool for showcasing the authentic experiences that visitors can have in your destination. Encourage travelers to share their own photos and experiences of your destination by using your unique hashtag. You can then share this content on your own Instagram account, feed and Stories, giving potential visitors an authentic glimpse into what they can expect.
6. Monitor and respond to reviews: Reviews on Instagram, as well as other platforms like TripAdvisor and Yelp, can have a big impact on a traveler's decision to visit a destination. Be sure to monitor and respond to reviews in a timely and professional manner, addressing any concerns or issues that visitors may have.
7. Showcase your destination's history and culture: Highlighting the unique history and culture of your destination can help attract visitors who are interested in learning more about the world around them. Share posts and stories that present the local cuisine, architecture, art, music, festivals, and traditions that make your destination unique. This will give your followers a glimpse of what it's like to experience the local culture and immerse themselves in the destination.
8. Highlight unique experiences: To make your destination stand out, highlight unique experiences that visitors can have there. This can include anything from local cuisine and cultural festivals to outdoor activities and off-the-beaten-path attractions.

9. Show diversity and inclusivity: Inclusivity and diversity are important values in travel, so be sure to showcase the different types of travelers and experiences that your destination can offer. This can help attract a wider audience and create a welcoming and inclusive environment.

10. Showcase sustainable and responsible tourism: Sustainable and responsible tourism are becoming increasingly important to travelers. Be sure to highlight the efforts that your destination is taking to promote sustainable and responsible tourism, such as eco-friendly initiatives and community-based tourism.

11. Share travel tips and recommendations: Sharing travel tips and recommendations can help position your destination as a helpful resource for travelers. You can share insider tips on the best places to eat, unique experiences to have, and other recommendations that can help visitors make the most of their trip.

12. Use hashtags: Hashtags can help increase the visibility of your posts and reach a wider audience. Research popular travel-related hashtags and use them in your posts. You can also create a unique hashtag for your destination and encourage travelers to use it when they share their own photos and experiences. Use relevant hashtags that relate to your destination and the type of content you are sharing.

13. Use Instagram Stories: Instagram Stories can be a great way to share behind-the-scenes glimpses of your destination and highlight events or activities in real-time. Instagram Stories offer a great way to share quick snapshots of your experience and create a sense of immediacy and authenticity. Use Stories to share updates on events, showcase local businesses, and give your audience a sense of what it's like to experience your destination in real-time. You can also use Stories to create polls, ask questions, and engage with your audience.

14. Utilize Instagram Live: Instagram Live is a real-time video feature that can be used to showcase events, Q&As, and behind-the-scenes glimpses of your destination. This can be a great way to connect with your audience in a more personal way and give them a sense of what it's like to experience your destination in real-time.

15. Use Instagram Reels: Instagram Reels is a feature that allows you to create short-form videos that are up to 60 seconds long. This can be a fun and creative way to showcase your destination and its attractions in a more dynamic way.

16. Host Instagram contests: Hosting Instagram contests can be a fun and engaging way to promote your destination and encourage user-generated content. Consider hosting a photo or video contest that encourages visitors to share their experiences in your destination, with the chance to win a prize.

17. Use Instagram Ads: Instagram Ads can help increase your reach and promote your destination to a targeted audience. You can use ads to promote specific events, offers, or activities, or simply to increase general awareness of your destination. Use targeting options like location and interests to ensure that your ads are reaching the right people.

18. Leverage user-generated content in advertising: User-generated content can be a powerful tool for advertising your destination. Consider using photos and videos shared by travelers in your advertising campaigns to showcase the authentic experiences that your destination can offer.

19. Partner with influencers: Collaborating with Instagram influencers who have a large following in the travel niche can help increase awareness of your destination and influencers can help create a sense of credibility and authenticity for your destination. Influencer marketing can be a powerful way to reach a wider audience and promote your destination to travelers, providing an insider's perspective that can be very appealing to potential travelers. Consider partnering with influencers who align with your brand and can create high-quality content that showcases your destination.

20. Collaborate with local businesses: Partnering with local businesses, such as restaurants, hotels, and tour operators, can help you create a more comprehensive and engaging presence on Instagram. You can feature their businesses in your posts and stories, and they can do the same for you, creating a mutually beneficial relationship. Partnering with local businesses can be a great way to showcase the unique experiences and attractions that your destination has to offer.

21. Collaborate with other destinations: Partnering with other destinations can be a great way to cross-promote your destinations and attract new visitors. Consider collaborating with neighboring cities or regions to create joint campaigns or events that highlight the unique experiences that your destinations can offer.

22. Monitor your competition: It is important to keep an eye on what your competitors are doing on Instagram. Look at what is working well for them and consider how you can adapt those strategies to work for your destination. Additionally, identify any areas where you can differentiate yourself and stand out from the competition.

23. Analyze and adjust your strategy: It is important to regularly analyze the performance of your Instagram strategy and adjust as needed. Use Instagram Insights to track your performance metrics, such as engagement rates and follower growth, and make adjustments based on what is working and what is not.

By implementing these strategies, you can create a comprehensive and effective Instagram marketing strategy for your destination. By showcasing the unique experiences, culture, and attractions that your destination has to offer, you can attract more visitors and build a loyal community of engaged travelers.

5. Conclusions

The use of marketing strategies to promote tourist destinations is very useful in terms of attracting more visitors to a particular destination and even extending the length of stay, which can help to generate more tourism revenue and support the local economy. Effective destination marketing can help to build a positive reputation and brand image for the destination, which can support sustainable tourism development over the long term.

The use of online promotion and the integration of social media tools within the tourism marketing strategies of the destination can help on several levels, such as:

- Increased visibility: Social media provides a powerful platform for destinations to reach a wider audience and increase their visibility in the crowded tourism market.
- Improved engagement: Social media enables destinations to engage with potential visitors and build a relationship with them, leading to increased brand loyalty and repeat visits.
- Enhanced reputation: A positive perception of a destination can enhance its reputation and increase its appeal to potential visitors, leading to increased bookings and visits.
- Competitive advantage: By creating a unique and compelling perception of the destination experience, destinations can differentiate themselves from their competitors and gain a competitive advantage in the tourism market.
- Increased revenue: A positive perception of the destination experience can lead to increased bookings, visits, and revenue, benefiting the local economy and tourism industry.

Overall, the travel decision-making process is a complex and dynamic process that can be influenced by a wide range of factors. By understanding this process and the various factors that can affect it, businesses in the tourism industry can develop more effective marketing strategies and offerings that resonate with travelers and help them make informed decisions about their travel plans.

By leveraging the various features and tools on Instagram, destinations and travel brands can create a comprehensive and effective marketing strategy that influences the travel decision-making process of their target audience. By implementing the above-mentioned strategies and tactics, organizations can create an Instagram marketing strategy that can help attract more visitors to a destination and build a loyal community of engaged travelers.

Overall, Instagram can be a powerful tool for destination marketing when used effectively. By creating high-quality content, partnering with local businesses and influencers, and engaging with the audience, Instagram can showcase the best aspects of a destination and attract more visitors. On Instagram, the goal is to create a perception of the tourism destination experience through visual content and storytelling. By using Instagram strategically, organizations can showcase the unique experiences and attractions of the destination, and inspire potential travelers to book their next trip.

This paper aimed to highlight how the tools offered by Instagram can be used to promote a tourist destination. The limits of this article come from the fact that the approach was a theoretical one and no practical examples were analyzed. Further research work should include research on users' opinion on the effectiveness of promoting tourist destinations through Instagram.

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RISKS OF PAYMENT SYSTEMS IN THE CONTEXT OF RUSSIA'S MILITARY AGGRESSION AGAINST UKRAINE AND INTERNATIONAL SANCTIONS AGAINST RUSSIA

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Abstract

Russia wants to include Ukraine in its territory for several reasons: they share a common history and culture, the multiple natural resources that Ukraine possesses (including oil and gas), the large population of this country and its vast territory. Ukraine has long been considered an independent country since the fall of the Union of Soviet Socialist Republics in 1991. Tensions began to emerge in 2014, when Russia invaded and annexed Ukraine's Crimean Peninsula (mainly for the natural resources available in the area, but also in response to the pro-European Euro Maidan protests that led to the change of government that year). Later, in 2022, the Russian Federation deployed large-scale military forces on the territory of Ukraine. With this action, Russia began an invasion of the entire country of Ukraine. These acts generated disapproving responses from the entire global community due to their violent nature, and due to the impact they generated in the West. A lot of Ukrainians took refuge in neighbouring countries, generating a humanitarian and political crisis. The response of the European Union, the United States of America and Great Britain came very quickly to the aggressions generated by Russia; thus, a package of sanctions was implemented targeting: Russian oligarchs, annexed regions, certain banks, entities, individuals, but also certain goods or services provided by/for natural or legal persons from Russia, thereby wanting to decrease the power economic of Russia. In this article, we will analyse the effects of these sanctions and the risks generated by their implementation in international payment transfer operations.

The purpose of this research is to analyse the impact of risks on payment systems in the context of the international sanctions imposed on Russia as a result of the war against Ukraine.

Keywords: *international sanctions, risks, payment systems, international transactions, the implementation of measures.*

1. Introduction

The use of payment and settlement systems has acquired an increased share of the total payments made, which is caused by the increase in the volume and value of commercial and financial transactions carried out in the monetary and foreign exchange markets. This is mainly due to the development of international trade, along with the increase in the degree of globalization and the development of mechanisms that allow the free movement of capital.[1]

International payment systems therefore allow individuals and legal entities around the globe to send and receive money in various currencies and various intermediaries act as mediators for the creditor and debtor, maintaining confidentiality and objectively applying legal rules regarding: maintaining accounts banking, fraud detection protocols and attempts to circumvent international rules, as well as using technical mechanisms to ensure that the payment has been processed in the correct currency. In this way, they provide an efficient option for companies to carry out their business without the latter devoting other resources to processing payments apart from the fees or charges requested.

One of the first measures taken by the European Union, immediately after the start of the war by Russia, was the exclusion of seven banks (VTB, Bank Otrkitie, Novikombank, Promsvyazbank, Bank Rossiya, Sovcombank and VEB) from the SWIFT system due to their links with the Russian state, public banks already being subject to sanctions following the annexation of Crimea by Russia in 2014. The numerous sanctions packages imposed also

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[1] Sisteme de plăţi, available at *https://www.bnr.ro/Sisteme-de-plati-304-Mobile.aspx*, last time consulted on February 27, 2023.

sanctioned entities based in this country that supported Russia's aggressive military and industrial actions against Ukraine or that are owned by the sanctioned individuals, subjecting them to export/import restrictions. Many sanctioned companies could no longer enter into economic relations with other companies located in the countries that applied the sanctions, so the banks or intermediate institutions of these transactions have the obligation, if they encounter situations where the clients try to evade the sanctions, to apply the legal rules and return the funds or freeze them depending on the sanctions applicable on a case-by-case basis.

It is obvious that a large part of the difficulty in maintaining economic relations globally is generated by the sanctioning of certain Russian banks and their exclusion from the SWIFT system - the Global Interbank Financial Telecommunications Society of international payments, but also by the rigorous review by financial or banking institutions, which thoroughly check each transaction which they mediate through this payment system and which involves Russian entities/banks/individuals. This delaying payments of raw materials, payment of wages to sea crews in Russia and Ukraine and further destabilizing the supply chain through delays.

The prohibition of the operations carried out by certain banks in the SWIFT system stops its possibility to trade on the international market. Thus, it cannot fulfil its contractual obligations, receive payments for exports on behalf of its customers, or provide credit for imports.

Although, after the settlement of international sanctions in 2014, once Russia annexed Crimea, Russia developed and implemented its own payment systems, for example MIR - under the authority of the Russian Central Bank, they cannot ensure its total autonomy from the SWIFT payment system.

In 2020, international payment systems and SWIFT were used five times as much as MIR was used, thus being necessary for the processing of international transactions by banks and even for individuals to be able to use their credit cards within Russia.[2]

In addition to sanctioning individuals, entities or banks, some of the toughest sanctions on Russia have been on exporting and importing certain goods or obtaining certain services from the West.

Among the most effective sanctions imposed were: refusal of exports of developed/sensitive technology with potential military use produced in the countries of the European Union/ Great Britain/ United States of America to Russia, limitation of exports of goods that could be used in the defence, aviation and maritime sectors. Also, the export sanctions that have really affected the Russian economy also target: the construction of machines, the pharmaceutical industry and the one producing medical equipment.

Moreover, the ban on the provision of certain services to Russian companies is aimed at limiting their profitability and limiting their integration into the international business environment. Thus, the provision of the following services to Russian companies was prohibited, according to Article 5n of Regulation (EU) no. 833/2014 of the Council of July 31, 2014 regarding restrictive measures in view of Russia's actions to destabilize the situation in Ukraine amended and supplemented[3]: market research, technical analysis, advertising, accounting, auditing services, as well as legal, IT or tax or business/public relations consulting services. The provision of architectural and engineering services was also prohibited.

2. Contents

2.1. Risk management of intermediating international transactions with Russia by financial institutions

Financial institutions must implement programs to eliminate the risks of evasion of laws with regard to the international sanctions that they are obliged to apply. Such programs are called compliance programs and use an effective approach to ensure compliance with international norms in terms of controlling and assuring conformity with sanctions in the transactions they intermediate, but also regarding the necessary controls that have to be performed for the goods that are exported if the transactions are processed. Thus, financial institutions are forced to develop, implement, and constantly update their compliance program. In developing this package of internal procedures, the size of the respective institution, the variety of the range of products

[2] C. Miller, *How sanction-proof is the Russian economy?* in Econofact, available at *https://econofact.org/how-sanction-proof-is-the-russian-economy*, last time consulted on March 18, 2023.

[3] Council Regulation (EU) no. 833/2014 of 31st of July 2014 concerning restrictive measures in view of Russia's actions destabilizing the situation in Ukraine, available at *http://data.europa.eu/eli/reg/2014/833/oj*, last time consulted on February 27, 2023.

and services offered, the number of clients it has, but also the number of geographical locations in which it works, so to speak, whether or not it is a multinational institution.

Therefore, compliance programs include and detail the following aspects:

- management's commitment in ensuring compliance and conformation with international norms;
- the degree of risk to which the institution is subject;
- periodic assessment of the risks to which the institution is subject and the method of carrying out this assessment;
- how internal controls are carried out, ensuring quality control and auditing;
- ways to test and train staff so that they are able to identify and report any transactions that appear to generate compliance risks;
- types of controls that the financial institution should carry out automatically for each transaction it mediates according to the risks it faces, the number of customers and the multitude of locations where it operates.

Regarding the risks of payment systems, today, based on the geo-political situation caused by the Russo-Ukrainian conflict, we can mention the following categories:

2.1.1. Cyber risk

With the beginning of military aggression in Ukraine, Russian cybercrime groups have launched multiple threats to the global digital system, being adaptable, constantly acting towards their goals and determined to exploit unilaterally, in their favor computer systems and, in particular, international payment systems. Cyber infrastructure is a very important area today (especially in the processing of international payments). The most important parts of the cyber ecosystem are: internet, hardware and software technologies, which are globally linked to each other, but also from the actions and decisions taken by those who use them, making it possible to create, process, store or transmit data or, even, international payment massages.

Cybercrime, in our case, is the area that sums up the crimes of individuals who carry out attacks on payment systems networks, on internal systems used by financial institutions, but also on the infrastructures necessary for carrying out the economic activities. Cyber vulnerabilities are becoming increasingly risky, and can be attacked at any time, and the fact that payment system technology is constantly evolving leads to more security risks. Among the targets of cybercriminals are the entities in the financial services sector, themselves, or the technical tools used by these to transmit payment messages. Cyber-attacks include: identity theft, phishing (which helps attackers steal confidential details from users' computers when they are accessing spam e-mail), Distributed Denial-of-Service (hackers use a network of many unknown computers that attack a particular target in order to overload it so that it can no longer be used), malware attacks (software programs for cyber-attacks, which are installed on computers via viruses) or ransomware (a type of malware that blocks data from computers or user servers until payment is received for data unlocking, which is basically a call for rewards).

"In this case, persistent advanced threats (PAT) are known, which refer to the moment when an opponent possesses sophisticated levels of expertise and sufficient resources to achieve his goals, using multiple attack vectors by selecting the target, target research, command and control, extracting data, disseminated information and exploiting information."[4]

A study by the Deloitte EMEA Center for Regulatory Strategy discusses the need for European banks to implement rigorous ways to combat cyber risk. The study analyzes the ability of regulators to function optimally and to carry out the necessary controls in a technologically complex, constantly evolving environment while the regulatory framework is also always changing. Thus, the emphasis is on the stability of banks (authorities place more emphasis on the end result and on the implications that a cyber-attack can have on the stability of a bank). Furthermore, it is concluded that cyber risk is part of the systemic risk category, given that cyber risks are a danger to the stability of banks, means that it can also generate the risk of contamination of other banks or financial institutions, this leads regulatory authorities to focus on the risks posed by connections with financial market infrastructures or on links with third-party service providers. As necessary measures to increase the resilience of financial institutions to cyber risks, the following were mentioned: regulation, and implementation,

[4] C.-A. Gabrian, *Modul în care războiul dintre Rusia și Ucraina poate modifica ecosistemul de criminalitate cibernetică*, „Carol I" National Defense University Bulletin, pp. 23-24, 2022, available at *https://revista.unap.ro/index.php/revista/article/view/1600/1550*, last time consulted on March 20, 2023.

at international level, of a regulatory and supervisory framework, which should be outlined on certain basic standards that will have to be met by all financial institutions.[5]

In an attempt to harmonize the relevant legislation at the end of 2020, The European Commission and the European External Action Service (EEAS) have presented a new European Union cyber security strategy to increase Europe's resilience to cyber risks. This strategy consists of proposals on implementation methods, regulatory instruments, but also on investment and policy. Subsequently, in March 2021, the Council adopted conclusions on the European Union's strategy on cybersecurity, and the ministers of the European Union agreed that the key objective must be to achieve strategic autonomy, but still maintaining an open economy, thus, referring to the ability of the states to make autonomous decisions in this field. On the other hand, two legislative proposals are being developed and discussed at European Union level, to address current and future risks in this area: a directive to ensure the best protection of networks and information systems and another one referring to the resilience of critical entities.[6]

2.1.2. Risk of circumvention of sanctions and avoidance of controls carried out by financial institutions intermediating payments which involve Russian individuals/entities

The Bureau of Industry and Security (BIS) of the US Department of Commerce, US Department of Justice (DOJ) and The Office of Foreign Assets Control (OFAC) of the US Department of the Treasury (OFAC) have recently issued a compliance note to alert the private sector and the public regarding the attempts of Russian sanctioned persons/entities to evade the application of sanctions intended to ensure the reduction of goods or funds destined for the Russian military or industrial sector and their attempts to evade controls regarding the exports/imports of goods. Thus, this document details how Russia uses intermediaries and transshipment points to circumvent sanctions, providing common red signals, which financial institutions must take into account, and showing a potential risk. [7]

These red signals detailed in the compliance note referred to above and which financial institutions must take into account in the case of intermediation of transactions with any connection with Russia are highlighted in the scheme below:

[5] A. Ionescu, D. Goranitis - *Riscul cibernetic și reglementările bancare în Europa, O nouă paradigmă pentru bănci*, (Deloitte Romania, 2018 - deloitte.com), available at *https://www2.deloitte.com/ro/ro/pages/risk/articles/riscul-cibernetic-si-reglementarile-bancare-in-europa.html*, last time consulted on March 26, 2023.

[6] Europa, C. (2023) Securitatea cibernetică: în ce fel combate UE amenințările cibernetice, available at *https://www.consilium.europa.eu/ro/policies/cybersecurity/*, last time consulted on March 26, 2023

[7] Publication of Tri-Seal Compliance Note: Cracking Down on Third-Party Intermediaries Used to Evade Russia-Related Sanctions and Export Controls. (2023, January 3), available at *https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20230302_33*, last time consulted on March 12, 2023.

the use of shell companies (to hide the source of funds and the involvment of Russia/Belarus)

- this problem has been identified on a large scale and is unavoidable for all international companies in ensuring the compliance of transactionswith the legal norms established at the international level; in response, many international firms have implemeted customer awarness programs to find out the real beneficiaries

a customer's reluctance to provide additional information about the end user of the goods/funds transferred

- the end user of the goods, as opposed to their byer, is the one who uses them in the end. Although the buyer is usually the end user, when trying to hide the true destination of the goods, there may be differences and the end user may be asking another buyer to pay for the goods to hide his identity

last minute changes to shipping instructions that appear contrary to custumer history and/or business practice

- these changes attempt to miselead thosw who check the transport documents or the route of the goods

using personal e-mails in business comunications and not the official ones of the company involved in the transaction

- this tactic is also used to hide the true identity of the cmpanies involved in the transacton in communications

operating businesses using registered offices of other entities in the same group

- the scope of this tactic is to hide the true location of the entity involved in the transaction

last minute changes in the export route of goods that were previously intended to be shipped to Russia/Belarus

- in this way, transhipment of goods that were initially shipped to certain ports as a final destination can occur to illegally re-transprt the goods involved in the tranction to their real final destination (which is a sanctioned country: Russia/ Belarus)
- the locations where transhipments to Russia/Belarus can take place could be located in China and other countries close to Russa geo-politically, such as: Armenia, Turkey, Hungary or Uzbekistan etc.

transactions involving legal entities that cannot be found on the internet, in reliable sources (on official, business websites or various databases)

- thus, as there is no information available regarding this entities, no information can be found on the sector of activity, on the registered office, or regarding the associates, shareholders, or the persons that have the control in the respective entity

cyber risks

- cyber risks require increased attention as they are an increasingly used means of evading the imposed sanctions
- financial institutions must implement programs that ensure adequate control of these risks and plans to ensure the continuity of the actiities undertaken

Best practices in the face of such risks may include:

Knowledge of identity of new clients and existing ones, of activities in which they engage and verification of information which clients offer in different Know Your Customer questionnaire

Verifying the possible existance of an intermediary in the transaction and knowing the final end user of the goods

Performing all due diligence in managing the risk of the transaction, by verifying the parties, intermediaries,goods involved

Implementation of diversified employee training programs according to the position they occupy

Declaring all incidents as soon as possible and implementation of mechanism which can prove that the required actions and measures have been taken in order to prevent such incidents from reppeting

Ensuring access to IT platforms and databases that contain up-to-date information about sanctions implemented

Continuous consultation of guidelines and recommendations developed by international organizations responsible for issuing regulations in the field

Verification of all documents provided by customers regarding the transactions carried out

Writing up-to-date internal policies and in accordance with international regulations that the financial institution must comply with

The European Banking Authority has stressed the importance of financial institutions in ensuring that the transactions they process comply with the sanctions imposed by the European Union against Russia/Belarus following the invasion of Ukraine. The European Banking Authority has also advised financial institutions to consider the economic, reputational and legislative impact of the violation of international sanctions and the non-application of the rules implemented by the European Union.

Some of the measures adopted by the European Banking Authority to ensure the implementation of the imposed sanctions are the following:

- working with various authorities in the Member States to ensure the implementation of the laws and compliance of the measures taken by the financial institutions for the application of the rules imposed by the Council of the European Union against the countries of Russia/Belarus;
- receiving and organizing by category questions on the scope of the regulations, on the sanctions imposed and sending them to the European Commission, which is competent to issue answers on the interpretation of regulations drawn up by the Council of the European Union;
- ensuring the controls and monitoring of financial institutions;
- assessment of the level of implementation of the sanctions imposed;
- issuing information on the decisions taken, the risks involved.[8]

2.1.3. Operational risk

Operational risk in payment systems can be characterized as the risk caused by inadequate processes, errors in internal systems, errors generated by employees or arising from external events related to elements of the payment systems.

The importance given to operational risk has also become increasingly important for payment, clearing and settlement systems. They are made up of networks of interdependent elements, such as operators, participants and billing agencies. Operational errors in any element involved can disrupt the system as a whole and negatively affect financial stability. Although the financial market is always changing, through well-defined methodologies, attempts are being made to minimize the risk, through activities such as: a solid and well-established corporate governance, internal controls and the assurance of quality control and auditing, policies and procedures completed on time, the employment of diligent and professional people, as well as the adoption and implementation of solid emergency plans.[9]

Operational errors may also affect the financial institution that brokered the transaction, both from an economic point of view (fines being imposed for non-compliance with the applicable legal rules) and reputational, or may also lead to the sanctioning of that institution with the prohibition of carrying out certain activities.

With the implementation of the vast packages of sanctions regarding the Countries Russia/Belarus, as well as regarding various physical or legal persons that supported the conduct of military aggression in Ukraine, the operational risks in the case of institutions that mediate transactions through international payment systems have also increased, caused by: the very rapid change of the legislation in the field, the large volume of transactions to be verified, the lack of skilled labor in the field and technical limitations of the software used.

The measurement of losses can be defined as proportionate to the ratio cause-effect, which are determined by internal controls. The outcome depends on how this risk is managed and how many risk mitigation measures are put in place to mitigate this impact. The management of this risk must take into account both the current gaps and the anticipations of the gaps that will follow in the financial environment and in the evolution of the payment systems. Examples of measures taken to reduce operational risk can be:

- rigorous analysis of the activity and the tools used, in order to ensure that the operational standards are met, but also of the reinforced programs of actions to be undertaken in the event of operational errors;
- outsourcing processes or functions can reduce certain risks in the market;
- investing in better risk management tools and applications;

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[8] EBA calls on financial institutions to ensure compliance with sanctions against Russia following the invasion of Ukraine and to facilitate access to basic payment accounts for refugees, European Banking Authority, (2022, July 1), available at *https://www.eba.europa.eu/eba-calls-financial-institutions-ensure-compliance-sanctions-against-russia-following-invasion*, last time consulted on March 12, 2023.

[9] K. McPhail, *Managing Operational Risk in Payment, Clearing, and Settlement Systems Working Paper*, Bank of Canada, 2003, available at *https://www.bankofcanada.ca/wp-content/uploads/2010/02/wp03-2.pdf*, last time consulted on March 26, 2023.

- a greater tolerance can be established in the level of operational risk and more budgeting amounts can be allocated to protect the financial institution from operational events that cause pecuniary sanctions;
- investment in network elements used to ensure that no serious operational events occur, at network or application level;
- investments in the development of plans that contain emergency measures to mitigate the effects if operational risks occur;
- training of employees in order to reduce the likelihood of human error;
- internal quality controls and internal audit can provide a timely verification of human or system errors and remove potentially serious consequences;
- robust and tested plans on how to keep the business going, can mitigate the consequences generated by operational risks, they are used in the event of unpredictable events occurring and which cannot be fully solved without extraordinary measures;
- the legal norms in the field, at international level, but also the requirements within each legislation, however, require assurances that the financial institutions have a minimum level of capital to cover various claims generated from the application of sanctions.[10]

2.1.4. Liquidity risk

First of all, there is a need for liquidity at the level of banks, in order to settle payments and complete transfer. Liquidity can be obtained from the central bank or commercial banks through the money market.

As far as liquidity is concerned, it always generates certain costs, as it is low in the market and banks have to optimize their use of this type of resources. There is, however, a free source in terms of liquidity, being generated through the payment system itself, through the payments it is made by using it. Therefore, the faster the liquidity circulates from one bank to another, the more the need for liquidity in the system is covered and the need to receive it from the outside decreases. On the other hand, in addition to the costs generated by the acquisition of liquidity, costs resulting from settlement delays are also generated. Some of the payments made through payment systems are urgent and need priority processing and settlement, thus generating more costs for banks that do not settle on time, (by deteriorating the customer service, causing those companies to choose another bank in the future as an intermediary) or explicit (penalties agreed with customers to cover the damage). Liquidity risk generates a possible loss that may occur when liquid assets are insufficient or quick access to credit is blocked, the bank is not being able to fulfill its obligations to settlement of payments. The liquidity risk sums up: change risk (resulting from constant changes in the liquidity needs of a bank or financial institution, because under certain circumstances they do not are able to settle the payments made, having no liquid assets and having to postpone the processing of the payment), the risk of availability (this occurs when a bank can no longer access liquidity in the market and can no longer make the payments it is obliged to make), the risk of foreclosure (for example, in the inability of a bank to meet its obligations to repay payments which also blocks the execution of transfers of other parties involved in the transaction, the blockage occurs due to insufficient liquidity of a part involved in the transaction, to prevent blockages, they can split payments or compensate for delays).[11]

With the sanctioning of Russia, which is the eleventh largest economy globally, there have been many payment interruptions, which has many difficulties with the West through exports and imports of goods and raw materials, but also through bank exposure or because of their dollar bonds about $33 billion owned by it. Although some of Russia's ties to the West have been hidden due to previous sanctions imposed after the Crimea annexation, and the impact of recently blocked payments is hard to calculate, however, there have already been liquidity gaps in the market because investors they gave up their Russian assets, and went to those denominated in dollars/euros. Signs of are-tightening of the E-Union's debt can be identified, and on the other hand, the US Treasuries, although they are on the most liquidating market at the international level, have shown some signs

[10] *Ibidem.*

[11] H. Leinonen, *Liquidity, risks and speed in payment and settlement systems-a simulation approach*, Bank of Finland Studies (Helsinki 2005), available at *https://publications.bof.fi/bitstream/handle/10024/45674/118263.pdf?sequence=1*, last time consulted on March 27, 2023.

of tension. Moreover, there are forecasts that estimate that markets are in danger of experiencing a greater turnaround and a greater drop in liquidity in the near future, with the risk of default. [12]

2.2. The global economic situation. Economic implications. Risks and possible solutions

The banning of a large number of banks in a given country has the capacity to freeze the sectors of that state's economy involved in international trade. [13] The sanctioning of the largest Russian banks, had an important economic impact on the economy of this state, thus, the power of the ruble decreased considerably, and inflation increased.[14]

However, it has been proven over time that international sanctions also pose risks to the states that impose them or to the global economy. The pressure put on the Russian financial system and on the economy of this country has the capacity to also affect the energy supply to the Member States of the European Union, or the international exports of goods. Thus, there were price increases in various sectors at global level, which were added to the price increases generated by the economic repercussions of the pandemic caused by COVID-19 in the sector: energy, food, petroleum products. These increases, in turn, generate price increases in all sectors of the economy and cause inflation to rise globally.[15]

The sanctions against Russia may, however, also lead to the failure to comply with the obligations it has assumed in the West, which may also have repercussions on the lenders who lent this state and are likely to produce a liquidity crisis in the European or American banking market, with Russian entities having quite high debts.

As regards the risk of the food crisis, the European Union has a multitude of policy instruments to address the crisis: '*These include agricultural, trade, environmental, aid, energy, fiscal and external policies. However, in the complex interaction of local and global, agricultural and non-agricultural markets, seemingly simple solutions can have significant undesirable consequences and political compromises must be taken into account*." [16] In this respect, agricultural policy refers to the adjustment of production. On the other hand, energy policies interfere with food security by means of the link between the food and energy systems, the latter being essential in order to be able to produce basic groceries particularly through agriculture. Fiscal policy is designed to discourage inefficient consumption of resources such as food or energy waste, and trade policy can help to allocate effectively key factors for agricultural production, such as fertilizers. Policies should lead to: reducing rigidities in production, trade and consumption processes, to help increase production in countries that are dependent on imports to ensure the need for food. The European Commission has calculated that around 25 million tons of wheat are needed just to be able to cover basic food needs worldwide in the short term.

In the spring of 2022, Russia blocked Ukraine's ports with the start of the war and 20 million tons of grain remained blocked. One of the most important measures taken by the European Union was to help Ukrainian exporters start transporting again. That is why the Member States, together with their partners, have launched the 'solidarity lanes' program to transport food by land in order to compensate for at least part of the loss brought about by the lack of maritime transport. Through this program, by March 2023, around 29 million tons of agricultural products had been exported. By means of this alternative, that is, by land transport, a large part of these goods was directed outside the Ukrainian territory and it was possible to release part of the available storage capacity for the new harvest. However, because this program was not sufficient to compensate for the losses caused by the difficulty in maritime transport caused by the Russian army in Ukraine, the European Union has announced another EUR 1 billion with the aim of expanding export capacity through the program. Work has also been done to restore maritime transport routes. In July 2022, the United Nations together with Turkey

[12] T. Alloway, *How Russian Liquidity Risk Can Become a Global Credit Risk* (Bloomberg, 2023) available at *https://www.bloomberg.com/news/articles/2022-03-03/how-russian-liquidity-risk-can-become-a-global-credit-risk*, last time consulted on March 27, 2023.

[13] A. Rebucci, K. Komro, E.D. Lemon, M.D. Livingston, R.A. Spencer, B. Woods-Jaeger, *Swift sanction on Russia: How it works and likely impacts*, Econofact, available at *https://econofact.org/swift-sanction-on-russia-how-it-works-and-likely-impacts*, last time consulted on March 18, 2023.

[14] Statista, *Russia inflation monthly 2023*, available at *https://www.statista.com/statistics/276323/monthly-inflation-rate-in-russia/*, last time consulted on March 18, 2023.

[15] D. DeSilver, *Research from 44 countries shows levels of rising inflation across the world*, World Economic Forum, available at *https://www.weforum.org/agenda/2022/06/inflation-stats-usa-and-world/*, last time consulted on March 19, 2023.

[16] G. Zachmann, P. Weil, S. von Cramon-Taubadel, *A European policy mix to address food insecurity linked to Russia's war*, Bruegel, available at *https://www.bruegel.org/policy-brief/european-policy-mix-address-food-insecurity-linked-russias-war*, last time consulted on March 19, 2023.

agreed on an agreement for the implementation of a safe corridor in the Black Sea. The ports of Chornomorsk, Odessa and Yuzhny/Pivdennyi can be used again.[17]

2.2.1. Impact of international sanctions on Russia's economy

Although, at the beginning of the military aggression and with the Russian invasion of Ukraine, it was hoped that international sanctions would seriously destabilize the Russian economy, however, the effects did not occur so quickly, the Russian economy having results beyond expectations, although numerous economic and logistical challenges were generated for this country.

Among the economic effects of international sanctions, those that have had the greatest impact are the following: massive losses of funds for the financial sector, the cessation of production in factories due to the lack of raw materials from countries of the European Union or from Great Britain or America, the sale of much smaller quantities of Russian oil, below the market price. Moreover, the closure of most multinational companies in this country, such as Renault Group, Siemens, Whirlpool, Société Générale, PWC, Honeywell, Accenture, etc. it has had significant effects on the economy, but also on the increase in the unemployment rate.

Russian oil exports to the European Union were not sanctioned until December, 2022 and were an important source of revenue. As of the last part of 2022, however, there is evidence that this state's economy is beginning to deteriorate more rapidly. Last November, Russia's central bank estimated a faster contraction of the economy in Q4 of 2022 (7.1%) compared to the previous quarters of the same year (about 4%).

In January 2023, Russia's budget deficit reached 1.76 trillion rubles (in dollar equivalent – 25 billion), a significant contribution to its deepening being the decrease in revenues oil and gas tax by 46% compared to the previous year and, respectively, the increase of expenses due by the scrap by 59%. To cover the deficit, 3.6 tons of gold and 2.3 billion Chinese yuan were sold from the Sovereign Fund (NWF) in January this year, assets amounting to 38.5 billion rubles (543 million dollars).

Although the European Union has not yet been able to stop imports of Russian oil, it nevertheless imposed a maximum price level for Russian oil products in February 2023. The Council thus set two price caps below, or at the level of which, oil products of Russian origin, or exported from Russia, are exempt from the prohibitions of: providing maritime transport for these products to other countries, as well as technical assistance services, brokering or financing, or financial advisory services, necessary to be able to organize the maritime transport of these products.[18] Moreover, the economic effort to sustain a war, involving the mobilization of civilian labor for military purposes, has created negative effects from an economic point of view.[19]

As for Russia's billion-dollar reserves, maintained by the Central Bank of Russia in various currencies (such as the dollar, the euro, the British pound and the yuan), but also the amount of gold held by it abroad, in order to be able to intervene in the currency markets, supporting the ruble in case of volatility, they were lost because the sanctions imposed by America, The European Union or The United Kingdom against it sought to deny access to these reserves. Russia's Central Bank has been banned from using emergency reserves to save the economy from economic pressure from the west. The coordinated action of the US, EU and UK banned the Russian bank from selling foreign currencies from its reserves.

An infographic of the Council of the European Union made in March 2023 specifies the estimates regarding the impact of international sanctions on Russia's economy in 2022, as well as the forecasts made regarding the country's economy for the current year. These estimates and forecasts have been made by world institutions such as the World Bank, the International Monetary Fund, the Organization for Economic Co-operation and Development, etc.

Firstly, all these three major institutions: the World Bank, the International Monetary Fund (IMF) and the Organization for Economic Co-operation and Development (OECD) agreed that 2022 was a difficult year for the Russian economy. Estimates showed that in 2022 Russia's gross domestic product (GDP) fell by a value in the range of 2.2% - 3.9%. According to the Government Statistics Agency Rosstat, the Russian economy contracted

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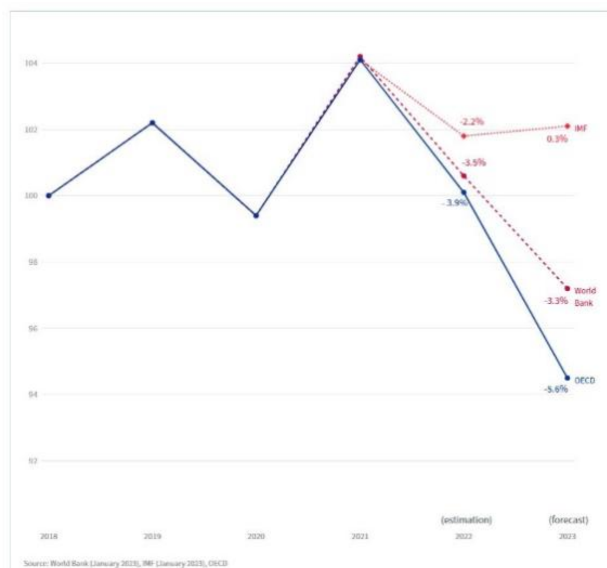
[17] C. Europa, *Food for the world*, available at *https://www.consilium.europa.eu/en/food-for-the-world-eu-countries-mitigate-impact-russia-war/*, last time consulted on March 18, 2023.

[18] C. Europa, *HAD agrees on level of price caps for Russian petroleum products*, available at *https://www.consilium.europa.eu/en/press/press-releases/2023/02/04/eu-agrees-on-level-of-price-caps-for-russian-petroleum-products/*, last time consulted on March 2, 2023.

[19] Congressional Research Service, *The Economic Impact of Russia Sanctions*, available at *https://crsreports.congress.gov/product/pdf/IF/IF12092*, last time consulted on March 23.

by only 2.1% in 2022 despite Western sanctions. The country's economy is projected to remain declining in the current year 2023 as well, with decreases in the range of 3.3% to 5.6% in the GDP level specified in the reporting. Indeed, however, the IMF expects in their reports an increase in 2023 of up to 0.3% in the level of GDP.

GDP of Russia – evolution from 2018 to 2023
(Base 100 in 2018)



Graph: EC

Secondly, the estimates of the aforementioned institutions demonstrate the increase in the inflation rate in Russia in 2022, its value approaching 14%. The forecasts for the current year, 2023, specify values ranging from 5% (IMF) to 6.8% (OECD).

On the other hand, in terms of imports and exports, the IMF estimates that during the last year, imports to Russia decreased by about 19 percent, and exports by about 15 percent compared to the previous year. Imports are expected to have a slight increase of about 5% this year compared to last year, and exports will continue to fall by at least 3%. As for the statistics carried out by the World Bank, imports into Russia last year decreased by almost 21% compared to the previous year, and exports by about 12%. This year, the World Bank forecasts an increase in imports by about 3% compared to last year, and a continuous decrease in costs by another 9 percentage points. [20]

In January 2023, Russia's budget deficit reached 1.76 trillion rubles (in dollar equivalent – 25 billion), a significant contribution to its deepening being the decrease in revenues oil and gas tax by 46% compared to the previous year and, respectively, the increase of expenses due by the scrap by 59%. To cover the deficit, 3.6 tons of gold and 2.3 billion Chinese yuan were sold from the Sovereign Fund (NWF) in January this year, assets amounting to 38.5 billion rubles (543 million dollars).

Although the European Union has not yet been able to stop imports of Russian oil, it nevertheless imposed a maximum price level for Russian oil products in February 2023. The Council thus set two price caps below, or at the level of which, oil products of Russian origin, or exported from Russia, are exempt from the prohibitions of: providing maritime transport for these products to other countries, as well as technical assistance services, brokering or financing, or financial advisory services, necessary to be able to organize the maritime transport of these products.[21]

[20] C. Europa, *Infographic - Impact of sanctions on the Russian economy*, available at *https://www.consilium.europa.eu/en/infographics/impact-sanctions-russian-economy/*, last consulted on March 25, 2023.

[21] C. Europa, *op.cit., HAD agrees on level of price caps for Russian petroleum products.*

3. Conclusions

The war between Russia and Ukraine has generated strong shocks on the economy around the world, especially through the rise in the price of gas, food and inflation. All the more so, as the global community was barely trying to recover from the economic problems generated by the COVID-19 pandemic, and the conflict affected global supply chains as well as energy prices. According to the Council of Europe, the impact of the war was felt massively on the energy and food markets. Through the Versailles Declaration, adopted in March 2022, the leaders of the 27 EU member states agreed to eliminate the EU's dependence on Russian fossil fuels as soon as possible. On 30-31 May 2022, the European Council agreed to ban almost 90% of all Russian oil imports by the end of 2022 – with a temporary exception for crude oil delivered through pipelines. Fatih Birol, executive director of the International Energy Agency, said the bloc's countries still import30 billion cubic meters of gas from Russia, although this import **represents less than a third compared to pre-war purchases**[22]**.**

Also, negative effects on the global economy have been generated due to the sudden cessation of certain economic relations with Russia, due to the international sanctions imposed against it.

Most international organizations, as well as most countries in Europe and America, have provided support to Ukraine. Moreover, the financial aid for Ukraine was soon to emerge because of the impact of this war on international affairs. For example, the International Monetary Fund reached a preliminary agreement on a loan of around EUR 20 billion, and the World Bank which also offered a package 'Financing recovery from the economic emergency situation in Ukraine'. The reason for this funding lies in the current and future impact of the war on the world's stock market return.

Moreover, the European Union, the United States of America, the United Nations, but also several states that wanted to sanction (independently of these international bodies) the actions taken by Russia against the territorial integrity of Ukraine, such as: Canada, Australia, Great Britain, France, Ukraine, etc. imposed numerous packages of international sanctions against it and the individuals / legal entities that had a role in these actions.

With all the sanctions imposed on Russia and the macroeconomic indicators of the Russian economy for 2022 have exceeded the most optimistic expectations. According to the report "The 2022 Russian Economic Anomaly: How It Works, and Where It Is Headed", one of the authors, Oleg Itskhoki, a professor at UCLA, describes a standard chain of events under the conditions of a typical financial crisis. An unfavorable event such as the fall in exports causes a sudden outflow of capital from the country and a depreciation of the national currency. The attempt of the population to protect their economies leads to a liquidity crisis and, implicitly, to a crisis of the financial system. The sudden contraction of the loan generates the stoppage of the production, the companies being in the situation of non-observance of the contracts. The current account deficit obliges the state and economic agents to reduce their debts and reduce expenses, which leads to a new contraction of economic activity, a decrease in demand and an increase in unemployment. Although it was semi-isolated from the rest of the world, the gains in commodity exports at the end of the year reached a record $580 billion (compared to a ten-year average of $420 billion). The state did not impose austerity measures, on the contrary, the additional expenditures of the state exceeded 4% of GDP. Although production has declined, economic agents have fulfilled their contractual obligations. Therefore, in addition to the interruption of imports, the strongest shock was the outflow of capital, which amounted to USD 250 billion, or 14% of GDP. However, a large influx of exports has helped to mitigate its effects on the economy. Overfunding has benefited those who have received government support and state-sponsored contracts. The ruble was stronger in 2022 due to the large surplus. Asa result, imports became more accessible to enterprises despite the change in their structure, while the appreciation of the ruble did not translate into higher prices: in rubles, prices were even lower than last year, despite a measured increase in dollars.[23]

Although these international sanctions have been implemented and must be respected and applied, however, certain economic relations with Russia must have continuity, because you cannot suddenly break any ties with this country, which was an exporter of energy, petroleum products and food products into the world.

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[22] *ANALIZĂ Un an de război în Ucraina: Cum au evoluat economiile invadatorilor din Rusia și a țării atacate, Ucraina/ Efectele sancțiunilor occidentale și peisajul economiei românești, vecină cu un război*, economedia.ro, available at *https://economedia.ro/analiza-un-an-de-razboi-in-ucraina--au-evoluat-economiile-invadatorilor-din-rusia-si-a-tarii-atacate-ucraina-efectele-sanctiunilor-occidentale-si-peisajul-economiei-romanesti-vecina-cu-un-razbo.html#.ZCHcrcpBzIU*, last time consulted March 24, 2023.

[23] *Russia's 2022 economic anomaly*, Wilson Center, available at *https://www.wilsoncenter.org/blog-post/russias-2022-economic-anomaly*, last time consulted March 24, 2023.

Also, the packages of sanctions that are progressively imposed on this state, because only in this way they can be proportionate and continuous, must be applied immediately and there must be noun due delay in their implementation by the financial or banking institutions that process various payment messages.

The rapid development of the IT infrastructure of electronic payment systems, the multiplicity of the number of transactions processed, as well as the continuous regulation of international sanctions that have immediate applicability, generate the increase in cases of cybercrime, incidents or circumvention of legal norms by sanctioned persons. Incidents over payment systems can cause considerable damage and lead to failure to meet the purpose of international regulations. As regards the security issues of international electronic payment systems, they are of particular importance in bridging the risks of breaches of international sanctions.

The organizational and legal measures by which the risks can be reduced in the transactions carried out through electronic payment systems can be the following: knowledge of the customers' identity, of the activities in which they are involved and the verification of the information they offer, checking the possibility of an intermediary in the transaction and knowing the end user of the goods, ensuring the access of the employees to it platforms or various databases, the use of cyber threat detection systems , employee training, both on the need to comply with the transactions with the regulations in force, but also on the vigilance necessary not to become victims of cyber-attacks, ensuring an optimal level of protection of customers' personal data, but also the declaration of all incidents as soon as possible.

Thus, it is the duty of the financial and banking institutions to mediate these essential transactions, but also to stop any attempt to circumvent the international sanctions imposed. These risks can and must be managed through robust compliance policies, vigilance, and the use of the necessary and sufficient software tools and databases to ensure compliance of each individual transaction.

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EVALUATION OF BANKING PERFORMANCE BASED ON THE RATE OF RETURN ON EQUITY AND THE TOTAL CAPITAL RATIO

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Abstract

In the financial-banking field, rational behavior is explained by maximizing return at an assumed level of risk or vice versa, maximizing risk at an expected return in order to maximize the value of the economic entity. The performance of a credit institution is no longer defined by the traditional profit, but by the profit that shows a real increase in the value of the economic entity, of the shareholders' equity. Peter Drucker[1] says that "Management gives up its traditional master - profit, it now engages, more and more meaningfully, in the service of value". We agree with this opinion, demonstrating that a credit institution can obtain this profit by properly managing their banking assets and liabilities from a temporal, value and financial standpoint, as well as by keeping track of the bank's liquidity and solvency at the microeconomic level. Performance and risk are two essential components of the management of credit institutions. Starting from the fact that in recent years the economic crises have generated the emergence of new risks and vulnerabilities, we utilized the regression method to better analyze the financial performance based on banking performance ratios, and thereby revealed the correlations between return on equity and risk, as well as the form and strength of the correlation.

Keywords: *banking performance, return on equity, capital risk, regression equation, total capital ratio.*

1. Introduction

Financial theory is built around a fundamental concept: maximizing the value of the economic entity. The banking performance is aimed first of all at determining the bank's soundness, the degree of its exposure to the various categories of risk and then its level of efficiency. For these reasons, the financial diagnosis of banking activity has two components: the diagnosis of profitability (return on own capital, economic profitability); risk diagnosis (operating risk, financial risk, bankruptcy risk).

Hughes & Mester[2] identify two broad approaches in measuring the performance of banks *i.e.,* non-structural and structural approaches. Non-structural approaches use different performance measures (*e.g.,* ROE, ROA, net interest margins, Tobin's q-ratio among others) while structural approaches are based on theoretical models of banking behaviour such as efficient and profit frontiers.

In terms of non-structural approaches, performance can be quantified through indicators, namely rate of return on assets (ROA) which is obtained by reporting net income by total assets reflects the profitability of the entire capital invested in the bank, while the rate of return on equity (ROE) reflects the fruit yield of the equity of the bank and measure reporting net profit to equity. In literature this indicator is met as the financial return that measures the return on investment made by shareholders. The Modigliani-Miller model[3] represents the first substantiation of the rate of return on equity expected by the shareholders, under the given conditions of the taxation rate. In addition to the return on the economic assets of the company, the shareholders request to be remunerated with a risk premium for holding shares of the indebted company. The risk premium is based on the difference between the rate of return on assets and the market interest rate and based on the level of indebtedness of the company (leverage). Shareholders of a credit institution are focused on increasing the return

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[2] J. Hughes, L. Mester, *Measuring the performance of banks: theory, practice, evidence and policy implications*, The Oxford Handbook of Banking, 2nd ed., pp. 247-270, Oxford University Press.

[3] F.Modigliani, M.Miller, *The Cost of the Capital Corporation Finance and the Theory of Investment*, American economic Review, XLVIII, no. 3, June 1958.

on their shares, the return on equity, but a high debt ratio puts pressure on the bank's capital, *i.e.,* it decreases it. The result of an excessive indebtedness is a higher return to shareholders, however, this also leads to a decrease in the bank's capital and a decrease in profit. By limiting those investments, shareholders can achieve a higher rate of return on investment, allowing them to generate the same amount of net profit while investing less per unit, thus increasing the income per investment unit.

This article follows the analysis of the economic dependence of bank profitability on the level of the main risk factors, especially on capital risk through the analytical model of unifactorial regression.

2. Models for evaluating banking performance

There are a variety of primary and secondary, essential and non-essential factors that influence social-economic phenomena, and they are all interconnected. Using statistical and economic mathematics, different techniques and approaches can be applied to analyze the tangible links between different elements, quantify them, and determine the strength of the correlations.

It is essential to utilize these analysis methods for economic research, as when dealing with mass economic matters such as those in the banking industry, not all correlations are expressed with the same strength, in the same direction and free of any influence from each other.

The increasing intricacy of the elements that constitute banking operations enlarges the count of variables that cannot be observed directly or can only be estimated through specific statistical conventions. There can be functional or statistical correlations between economic phenomena and processes.

The first category corresponds to causal correlations, *i.e.,* one of the phenomena uniquely determines the change of the other.

The functional correlation between the cause-characteristic string and the effect-characteristic string is such that a single value from the former is associated with a single value from the latter, and any change in the quantity of the first characteristic will be accompanied by a similarly-measured change of the same type in the second.

This mathematical function can be used to model such correlations:

$Y_i = f(x_1 , x_2 , ...x_p)$

Where $x_1 , x_2 , ...x_p$ are the factors that act together on the result variable "y" and which also include a random component.

Statistical correlations between stochastic, or uncertain, phenomena are often observed in economic processes. These links are usually associated with the uncertainties that impact banking operations and outcomes. The defining feature of this correlation is that a factor "x" (independent, exogenous or cause) impacts another factor "y" (dependent, endogenous or effect), often referred to as the factorial characteristic and resulting characteristic, respectively.

In statistical correlations, a certain value of "x" corresponds to a distribution of values for the resulting characteristic "y". This is because "y", the dependent characteristic, is also affected by other factors which, in what regards the correlation between "x" and "y", are deemed random.

The degree to which the values of the result characteristic vary in comparison to the changes of the factorial characteristic will depend on the conditions in which the causal relationships are expressed.

Statistical correlations, specific to banking processes, can be classified according to the following criteria:

- based on the number of characteristics being studied:
  - simple correlations: when it is considered that there is a single essential factor feature that determines a result feature, and the other factors are constant, interpreted as residual factors.

example: the relationship between the number of profit centers and the banking assets value

  - multiple correlations: when more than two factor features are taken into account and interpreted.

example: *e.g.*, the influence of “n” risks on banking profitability

- based on the direction of the correlations or variations determined:
  - direct correlations: when the variation of the result feature has the same direction (either increases or decreases) with the modification of the factor feature values.
  - inverse correlations: when an increase in the values of one factor feature corresponds to a decrease in the other feature.
- based on the analytical expression of the correlations:

- linear correlations: synthetically expressed by the equation of the straight line
- nonlinear or curvilinear correlations: expressed by equations of the curve (parabola, hyperbola, exponential function, etc.).

2.1. Regressive analysis method for researching banking performance

A qualitative approach is used first to analyze the correlations between economic (banking) phenomena, followed by the use of quantitative methods that are tailored to the statistical approach, in order to identify the factors, assess the shape and strength of the correlation.

Of these, we used the regression analysis method to research banking performance.

Regression analysis is a statistical technique that is used to examine the correlation between two or more variables by fitting a function (called a regression function) to the observed data.

Where "y" is the dependent variable and "x_1 , x_2 , ...x_n" are the independent variables, the regression equation can be expressed as:

$Y_i = f(x_1 , x_2 , ...x_n)$

Because of the unpredictable nature of financial-banking operations, the theoretical model mentioned above has been replaced by a statistical dependence model:

$Y_i = f(x_1 , x_2 , ...x_n) + \varepsilon$

Where ε represents a random error (a residual variable) with constant dispersion and a mean of zero.

Depending on the number of factors (x_1 , x_2 , ...x_n) that influence the resulting feature (Y), we could use:

- Unifactorial or simple regression, if the function includes one factor;
- Multifactorial or multiple regression, if the function includes several factors.

One of the most well-known single-factor regression models is the linear model according to which, if it is deemed that the correlation between "y" and "x" is linear, then:

$y = \alpha + \beta x + \varepsilon$

We define the single-factor regression model through a mathematical relationship that assumes that the variable Y is the result of two categories of factors:

- an essential factor, X
- several non-essential factors, specified by a random disturbance variable ε

This theoretical model is estimated by an average trend equation that can be written as follows:

$y = \alpha + \beta x_i + \varepsilon$

The linear dependence between "y" and "x" is considered a stochastic dependence in which several "y" values can correspond to one "x_i" value.

There is a function *f* such that the variable *X* explains the variable *Y* through the function *f*, $Y = f(X)$, a linear function $f(x) = \alpha + \beta \cdot x$.

The linear regression model is $Y = \alpha + \beta X + \varepsilon$.

The variables X and Y are observable variables, that is, their values can be measured.

The variable ε is called random error or error term or disturbance variable and represents the effect of all factors, except factor X, which affect Y and which are considered unobservable. The variable ε captures the measurement errors of the variable values and the random nature of human behavior. The error term ε represents that part of the value of the Y variable that cannot be measured through a systematic relationship with the X variable.

The coefficients of the simple linear regression model

For each of the three years, the values of the two variables, *X* and *Y*, were noted, thus obtaining the data series $\{(x_1, y_1), (x_2, y_2), \ldots, (x_n, y_n)\}$ or $\{(x_i, y_i), i = \overline{1, n}\}$. Based on this sample we will determine the estimators *a* and *b* of the parameters α and respectively, β of the regression model. Estimators *a* and *b* represent the solution of the system **of normal equations**:

$$\begin{cases} na + b\sum_{i=1}^{n} x_i = \sum_{i=1}^{n} y_i \\ a\sum_{i=1}^{n} x_i + b\sum_{i=1}^{n} x_i^2 = \sum_{i=1}^{n} x_i y_i \end{cases}$$

Solving the system using the method of determinants: $a = \frac{\Delta_a}{\Delta}$ and $b = \frac{\Delta_b}{\Delta}$,

where $\Delta = \begin{vmatrix} n & \sum_{i=1}^{n} x_i \\ \sum_{i=1}^{n} x_i & \sum_{i=1}^{n} x_i^2 \end{vmatrix}$ is the determinant of the matrix of the system of equations,

and $\Delta_a = \begin{vmatrix} \sum_{i=1}^{n} y_i & \sum_{i=1}^{n} x_i \\ \sum_{i=1}^{n} x_i y_i & \sum_{i=1}^{n} x_i^2 \end{vmatrix}$, $\Delta_b = \begin{vmatrix} n & \sum_{i=1}^{n} y_i \\ \sum_{i=1}^{n} x_i & \sum_{i=1}^{n} x_i y_i \end{vmatrix}$ are the minors corresponding to the two unknowns.

$$\begin{cases} a = \dfrac{\Delta_a}{\Delta} = \dfrac{(\sum_{i=1}^{n} y_i) \cdot (\sum_{i=1}^{n} x_i^2) - (\sum_{i=1}^{n} x_i) \cdot (\sum_{i=1}^{n} x_i y_i)}{n \cdot (\sum_{i=1}^{n} x_i^2) - (\sum_{i=1}^{n} x_i)^2} \\ b = \dfrac{\Delta_b}{\Delta} = \dfrac{n \cdot (\sum_{i=1}^{n} x_i y_i) - (\sum_{i=1}^{n} x_i) \cdot (\sum_{i=1}^{n} y_i)}{n \cdot (\sum_{i=1}^{n} x_i^2) - (\sum_{i=1}^{n} x_i)^2} \end{cases}$$

a = $\frac{\sum y - b \sum x}{n}$

The coefficient "a", which can take both positive and negative values, represents the coordinate at the origin, respectively it is the value of "y" when "x" is equal to zero.

Coefficient "b", called regression coefficient, shows the extent to which the dependent characteristic changes if the independent characteristic changes by one unit.

Depending on the sign of the regression coefficient, we can appreciate the type of correlation:

- in the case of direct correlation, the coefficient has a positive value;
- in the case of inverse correlation, the value of the regression coefficient is negative;
- if b = 0, it is deemed that the two variables ("x" and "y") are independent.

The value of the regression equation is computed for every size of the characteristic "x" using the parameters "a" and "b". The regression equations' values are regarded as the theoretical values for the characteristic "y" based on "x". The process of substituting the actual terms of "y" with the theoretical values is known as "adjustment"[4].

2.1.1. Applying the performance evaluation model at the level of the banking system

The objective of analyzing the economic dependence of banking profitability on the primary risk factors, particularly the capital risk, prompted us to employ the unifactorial regression analytical model to express these correlations. It adjusts the variable effect-rate of return on equity based on the independent variable – the total capital ratio (the former solvency ratio). Following the prudential framework in effect at the EU level, which is directly applicable at the national level, credit institutions are required to fulfill the subsequent minimum capital requirements at all times: 8 percent for the total capital ratio, 6 percent for tier 1 capital ratio and 4.5 percent for the common equity tier 1 capital ratio.

Regression analysis is frequently employed to determine how changes in the independent variable impact the dependent variable, which is one of the most common use cases.

Next, we will evaluate the model using data pertaining to the banking industry in Romania between 2019 and 2021. Due to objective reasons, the entire banking system was considered as a whole, rather than a specific bank being taken into account. This approach does not change the results obtained, in principle.

Item no.	Ratios	2019	2020	2021
1.	Net profit	RON 6.4 billion	RON 5.02 billion	RON 8.27 billion
2.	Total capital ratio (the former solvency ratio)	22%	25.1%	23.3%
3.	ROE (Annualized net profit / Average equity)	12.2%	8.7%	13.3%
4.	ROA (Annualized net profit / Average total assets)	1.3%	1%	1.4%
5.	The leverage effect	10.2	10.3	8.6

[4] T Baron, E.Biji *et al.*"Statistica teoretica si economica" Didactica si Pedagogica Publishing House,| 1996, ISBN:| 973-30-4025-8 p.168

As the complexity of the phenomena inherent in banking activities grows, the number of factors involved increases, making it more challenging to identify and measure causal relationships.

Initially, assuming that other factors (risk categories) exert a constant and negligible impact on the rate of return on equity (ROE), we examine the effect of capital risk, measured by the total equity ratio, on ROE using the unifactorial regression method.

In our study, the variables are:

X – total capital ratio (the former solvency ratio)

Y – ROE

To determine the regression equation based on banking performance ratios, we calculate the regression coefficient "b". The evolution and adjustment of the ROE ratio depending on the total capital ratio is presented in the table below.

The calculations are presented in the table below:

Adjusted values Linear model y= - 6.66 + 30x	**Period**	**x_i values of variable *X***	**y_i values of variable *Y***	x_i	$(y_i)^2$	$x_i \cdot y_i$
-0.06	*2019*	x_1=0.22	y_1=0.122	$(x_1)^2$=0.0484	$(y_1)^2$=0.0148	$x_1 \cdot y_1$=0.0268
0.87	*2020*	x_2=0.251	y_2=0.87	$(x_2)^2$=0.0630	$(y_2)^2$=0.7569	$x_2 \cdot y_2$=0.2183
0.33	*2021*	x_3=0.233	y_3=0.133	$(x_3)^2$=0.0542	$(y_3)^2$=0.0176	$x_3 \cdot y_3$=0.0309
		$\sum_{i=1}^{3} x_i = 0.704$	$\sum_{i=1}^{3} y_i = 1.125$	$\sum_{i=1}^{3} x_i^2 = 0.1656$	$\sum_{i=1}^{3} y_i^2 = 0.7893$	$\sum_{i=1}^{3} x_i\ y_i = 0.276$

We obtain: $a = \frac{\Delta a}{\Delta} = \frac{1.125 \cdot 0.1656 - 0.704 \cdot 0.276}{3 \cdot 0.1656 - 0.704^2} = -6.66$

$b = \frac{\Delta b}{\Delta} = \frac{3 \cdot 0.276 - 0.704 \cdot 1.125}{3 \times 0.1656 - 0.704^2} = 30$

The value of the regression equation was computed for every size of the characteristic "x" using the parameters "a" and "b".

Therefore, the regression line is the equation $y = a + bx$ = - 6.66 + 30x.

It follows that the equation of the linear model is $Y_i = \alpha + \beta X + \varepsilon$ = - 6.66 + 30x + ε, i = $\overline{1.3}$

and the adjusted values of the observations $Y_i = \overline{1.3}$ by regression are

$Y_i = a + bx$ = - 6.66 + 30 x_i, i = $\overline{1.3}$

After drawing up the correlation table, we observe an uneven change in the dependent variable (ROE) under the influence of the change in the independent variable (total capital ratio).

Moreover, the value of the regression coefficient b is positive (b = 30) and indicates an increasing regression.

The estimated regression equation (- 6.66 + 30x) shows that the correlation between the two ratios is direct.

Estimation by confidence interval for the error variant[5]

$S_e^2 = \frac{\sum_i \varepsilon_i^2}{n-2} = \frac{\sum_i (Y_i - a - bx_i)^2}{n-2}$

Error calculation

Y_i	Y_{xi}	ε_i	ε_i^2
0.122	- 0.06	0.182	0.033
0.87	0.87	0	0
0.133	0.33	0.97	0.940
			0.973

[5] Analiza de Regresie Simpla | PDF (scribd.com)

ε_i = Y_i - Y_{xi}

Estimation of the error variant

$S_e^2 = \frac{\sum_i \varepsilon_i^2}{n-2} = \frac{0.973}{3-2} = 0.973$

The level of the rate of return on equity depends on the size of the risks (in our case the capital risk) that the banking system is willing to manage.

Bank profitability increases by assuming high risks, but decision-makers within credit institutions seek to obtain increased returns for certain assumed risks.

3. Conclusions

The rate of return on equity represents the most important ratio of bank profitability, because it is influenced by the bank's performance in relation to each profit category (depending on the source or specific activity), as well as due to the fact that it indicates the bank's ability to compete for private sources of capital from the national economy.

The existence of equity and its adequate sizing (in relation to risk-weighted assets) represent the third line of defense for banks after profits and provisions.

An excessive capitalization is generally associated with economic inefficiency for shareholders, a too high capital adequacy index contributing to the reduction of dividends. It is true that the banks establish the size of capital according to the regulations in force domestically and internationally and in accordance with the requirements of economic efficiency. However, regulatory constraints often conflict with shareholders' wishes for greater capital leverage and higher revenues.

If we were to assess the trend based on the evolution of the ratios from the last three years, with the exception of 2020, we notice that, in the case of ROE, the trend is increasing. The decrease in the ROE level for 2020 is mainly due to a lower level of net profit. The net profit of the banking system decreased in 2020 by RON 1.2 billion (19.5%) compared to the previous year, due to provisions for potential non-performing loans caused by the coronavirus crisis, according to statistical data provided by the National Bank of Romania (NBR). The decrease in profit was caused by the increase by RON 680 million (8.7%) of provisions for potential losses from non-performing loans (adjustments for expected losses, according to the rules of the European Banking Authority (EBA), up to almost RON 8.5 billion.

The provisions were of a preventive type, for the period after the expiry of the moratoriums on deferring loan installments, given that the rate of non-performing loans fell to 3.83% in 2020, from 4.06% in 2019.

If in industrial enterprises the ROA must be higher than the inflation rate in order for it to maintain its economic substance, in a banking unit, this is the result of the rotation of banking assets and of the unit's net profit obtained from the entirety of collected revenues. At the end of 2020, the assets of the banking system increased by about RON 65 billion (+13%) compared to December 2019, reaching a new record level of RON 560 billion, while the rate of return on assets (ROA) decreased to 1% in the context of reporting a lower profit during the Coronavirus pandemic. In this situation, the evolution of this ratio is the result of the forecast dynamics of the profit ratio (with an increasing trend) and less of the forecast dynamics of asset turnover. As in the case of ROE, ROA recorded an upward evolution in 2021 compared to 2019.

The level of the total capital ratio recorded in the period under review had a slight decrease in 2021. On December 31, 2021, the total capital of credit institutions, Romanian legal entities, reached a level of RON 57,895.2 million, down 1.0 percent compared to the end of the previous year, while the total value of the exposure at risk increased by 6.7 percent, up to a level of RON 248,280.0 million. This decrease is due not only to the increase in the total value of the risk exposure at a rate higher than that recorded by the capital, but also due to the incorporation of part of the profit related to the year 2021 and the decision of the credit institutions to distribute dividends from the reserves constituted from the profits of the previous years (2019 and 2020), according to the decision of the General Council of the National Committee for Macroprudential Supervision (CNSM) not to extend the period of application of Recommendation no. R/2/2021 after September 30, 2021. Although the capital requirements based on the value of risk exposure are required for the correct sizing of capital in relation to unexpected losses, they are not sufficient to ensure a prudential behavior on the part of credit institutions, which may be tempted to assume excessive and unsustainable risks through an excessive level of indebtedness. Thus, the set of capital adequacy assessment ratios, calculated based on the total value of risk

exposure, was completed by the leverage effect ratio. "Starting with June 28, 2021, the requirement regarding the leverage effect ratio, of at least 3 percent, entered into force, according to the provisions of Regulation (EU) no. 876/2019 amending Regulation (EU) no. 575/2013. On December 31, 2021, the leverage effect for credit institutions in Romania was 8.6 percent, according to the transitional definition, and 8.1 percent, according to the full definition, being below the level recorded in December 2020, of approximately 10.3 percent, in the case of the transitional definition and 10.0 percent in the case of the full definition"[6].

According to NBR data for the first three quarters of 2022[7], the net profit of the entire banking industry was RON 7.6 billion, fueled by the accelerated dynamics of lending in 2022 and the increase in net interest income. Regarding performance ratios, in September 2022, ROE reaches the level of 16.6 percent and ROA of 1.5 percent.

We tested the model on the aggregated data related to the banking industry in Romania. The results we obtained showed that the increase in ROE implies the assumption of a greater capital risk.

Considering that the analyzed ratios have a favorable trend, the application of the linear model is questionable. If the evolution had been unfavorable, according to the linear model we could have said that one or several banks within the banking system may face insolvency. However, we must not omit the fact that at the level of the banking system there are a number of vulnerabilities, among which the possible increase in the risk of non-payment of loans granted to the manufacturing industry in the context of deteriorating macroeconomic conditions, uncertainties regarding future developments, but also an increase in debt service through the increase interest rates.

In conditions of uncertainty at the macroeconomic level, the market value of banks is dependent on variables that they cannot control (the interest rate on the money market, the price of assets), thus making it difficult to distinguish insolvent banks from solvent ones[8].

The analysis and study of the performance ratios, their evolution over time, as well as the correlations between the ratios, contribute to the improvement of the activity and the achievement of an improved level of banking efficiency.

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ANALYSIS OF THE RISK OF FRAUD IN PROJECTS FINANCED FROM EUROPEAN FUNDS

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Abstract

The European funds represent a source of non-refundable financing allocated to the EU member states, in order to reduce the economic and social development gaps between them. Funding from the EU is dedicated especially for the fields that generate the highest added value in the EU economy, and the allocations at the level of each member state are negotiated with the European Commission. Unfortunately, however, a number of irregularities or even frauds also appear in the allocation and implementation of European funds.

This paper aims to analyse the risk of fraud in projects financed from European funds and the measures that can be adopted to reduce the financial corrections applied in the case of irregularities found in the use of European funds.

Keywords: *European funds, fraud, OLAF, shared management, anti-fraud.*

1. Introduction

In order to carry out this paper, a series of reports of institutions with authority in the field of financial and tax fraud investigation which could affect the financial interests of the European Union in Romania, were analysed. This paper is a presentation and analysis of how the risk of fraud with European funds is managed, both by international institutions and by Romanian institutions.

At the European level, in 1999, on April 28th, the European Anti-Fraud Office (OLAF)[1] was created. Its purpose is to intensify activities to combat fraud, corruption and other illegal activities that adversely affect the Community's financial interests. OLAF's activity consists in investigating serious facts related to professional activities, which could constitute a violation of professional obligations. These violations are sanctioned with disciplinary measures and even criminal actions, when deemed appropriate.

OLAF's work is also regularly monitored by a supervisory committee, whose powers and composition are determined by the European Parliament.

The European Anti-fraud Office (OLAF) carries out administrative investigations in Member States on actions concerning the EU's financial interests and investigations targeting the staff of the European institutions.

2. The risks involved in financing from European funds

European funds are one of the most sought-after sources of funding in the European Union, all the more so as funding programs are increasingly diverse and more and more areas are funded. In recent years, OLAF investigations have become more and more complex, which means that OLAF is faced with transnational cases, across several Member States and even beyond them. For example, one of these cases was analyzed by OLAF in 2018. It was a transnational case developed in two EU member states, Romania and Italy, consisting of buying and reselling the same products between companies from the two states, through an intermediary, without being paid VAT. (See fig. no 1)

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[1] 1999/352/EC, ECSC, Euratom: Commission Decision of 28 April 1999 establishing the European Anti-fraud Office (OLAF) (notified under document number SEC (1999) 802).

Figure 1: Carousel fraud to evade paying VAT

Source: https://anti-fraud.ec.europa.eu/system/files/2021-09/olaf_report_2018_en.pdf

According to an OLAF report, in 2020, Romania had 8 out of the 109 cases of fraud with European funds (the same number of cases as Bulgaria and Hungary), after 2015 – 2017 and 2019, when our country had the highest number of fraud files analyzed annually by OLAF.

Table 1 – Analysis of OLAF's activity in 2015 - 2021 (files analyzed)

YEAR	FILES ANALYZED by OLAF		
	TOTAL	Total files of România	Files concluded with recommendations
2021	115	5	4
2020	109	8	4
2019	100	11 (the most)	9
2018	84	4	2
2017	102	11(the most)	8
2016	141	21 (the most)	11
2015	199	45 (the most)	22

Source: OLAF activity Report, 2015 - 2021

Table 2 - Investigations into the use of EU funds managed or spent in whole or in part at national or regional level concluded in 2020 (OLAF)

Country	Cases concluded	
	Total number per country	of which closed with recommendations
Italy	13	9
Bulgaria	8	7
Hungary	8	4
Poland	7	2
Romania	8	4
France	7	3
Serbia	6	3
Slovakia	6	5
Spain	4	2
Syria	4	2
Uganda	4	3
Croatia	3	3
Greece	3	3
United Kingdom	3	2
Ethiopia	2	1
Mauritania	2	2
Armenia, Bangladesh, Bosnia & Herzegovina, Burkina Faso, Czechia, Denmark, Egypt, El Salvador, Estonia, Iraq, Moldova, Nigeria, North Macedonia, Portugal, Somalia, South Africa, Sweden, Turkey, Tanzania, West Africa*, Yemen	21 (1 per country)	13
Total	**109**	**68**

* Single investigation covered several West African countries (Côte d'Ivoire, Guinea, Liberia, Mali, Nigeria, Senegal, Sierra Leone)

Source: OLAF activity Report, 2020[2]

Many countries face challenges in managing fraud and corruption risks related to European funds. Although the European Commission has issued guidelines (*e.g.,* on fraud risk assessments), the documents are general and not country-specific. As a result, Romania has set out to develop its own specific strategy for managing fraud and corruption risks related to European funds. It was developed in a new form for the period 2021-2025. The vision of this strategy is to strengthen the national system for preventing and combating corruption by strengthening mechanisms for identifying and managing risks, threats and vulnerabilities related to this phenomenon, in order to guarantee professionalism and efficiency in the public sector, the safety of citizens and support a developed social and economic environment.

The Council of the EU adopted on 17 December 2020 the regulation on the new Multiannual Financial Framework (MFF) 2021-2027 and the Next Generation EU Economic Recovery Package (NGEU), which provides for a long-term budget of EUR 1 074.3 billion (in 2018 prices) for the 27 Member States of the European Union, Including the integration of the European Development Fund. Together with the 750 billion EUR of Next Generation package, it will allow the EU to provide unprecedented 1.8 billion EUR in funding in the coming years to support the recovery from the COVID-19 pandemic and the EU's long-term priorities in different policies/areas[3].

The need for a detailed analysis of fraud risk and the development of fraud prevention and detection measures has become increasingly greater, especially after the launch of the National Recovery and resilience Plan (NRRP).

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[2] *https://ec.europa.eu/anti-fraud/system/files/2021-12/olaf_report_2020_en.pdf.*

[3] *https://www.fonduri-structurale.ro/2021-2027.*

Romania's National Recovery and resilience Plan is part of the RRF (Recovery and Resilience Facility), being designed to support Romania's development by implementing programs and projects funded by european funds made available by the European Union through the NextGenerationEU program. Romania's National Recovery and resilience Plan is structured on 15 components, covering all 6 pillars provided by the Regulation: 1. The green transition; 2. Digital transformation; 3. Smart, sustainable and inclusive growth; 4. Social and territorial cohesion; 5. Health, as well as economic, social and institutional resilience; 6. Policies for the next generation.

Programs financed from the European Union budget can be classified, depending on the type of management, in: 1. Direct management programs (EU funds are managed directly by the European Commission); 2. Programs under shared management (EU funds are jointly managed by the European Commission and national authorities); 3. Indirect management programs (the funds are managed by EU or non-EU authorities or even partner organizations in those programs). Of these EU funding programs, shared management funds account for around 70%.

The 5 EU funds under shared management are:

1. European Regional Development Fund (ERDF)
2. European Social Fund (ESF)
3. Cohesion Fund (CF)
4. European Agricultural Fund for Rural Development
5. European Maritime and Fisheries Fund

3. Fraud against the financial interests of the European Union

An **irregularity** is an act that does not comply with EU rules, and which may affect the financial interests of the EU, but which may arise as a result of errors, committed unintentionally, both by beneficiaries who have requested funds and by the authorities responsible for making payments.

When irregularities are committed with the obvious intention of benefiting from undue benefits, they are cases of fraud.

Fraud is an "act of cheating committed to obtain personal gain or to cause a loss to a third party."[4]

In Romania, the main institution with responsibilities in the field of protection of the financial interests of the European union is the Department for Combating fraud. This is the institution that initiated and implemented the National Anti-fraud Strategy (SNLA).

The elaboration of the National Anti-fraud Strategy for the Protection of the European Union's Financial interests in Romania had as a starting point the need to streamline the financial control and fiscal control that is exercised in relation to European funds. The strategy strictly concerns fraud against the EU's financial interests, with a delimitation between this type of fraud and corruption.

Fraud is defined as "any intentional act or omission in relation to:

- use or presentation of false, incorrect or incomplete statements or documents, which have the effect of allocating / acquiring, respectively inappropriate or incorrect use of Community funds from the general budget of the European Community and / or the corresponding co-financing amounts from the state budget;
- failure to communicate information in breach of a specific obligation;
- "diverting funds from the purposes for which they were originally granted."[5]

Although fraud is a broad legal concept, the external public auditor is interested in fraud that produces significant distortions. There are two types of intentional distortions that are relevant to the external public auditor:

- distortions resulting from the misappropriation of assets and
- distortions resulting from fraudulent financial reporting.

GE 79/2003 (updated) defines, in addition to fraud, the irregularity as "any deviation from legality, regularity and compliance, as well as any non-compliance with the provisions of the financing memoranda, memoranda of understanding, financing agreements – supporting the non-reimbursable financial assistance granted to Romania by the European Community –, as well as the provisions of the contracts concluded under these memoranda/agreements, resulting from an action or omission by the economic operator, which, through

[4] EU Directive 2017/1371, art. 3, line (2).

[5] GE no. 79/2003, (updated on 23 August 2008), on the control and recovery of Community funds, as well as the related co-financing funds misused.

a non-eligible expense, has the effect of prejudicing the general budget of the European Community and/or local budgets."

For example, the fact that a bidder, even if it has no intention to do so, can influence the conditions of a tender in a way that is favorable to it, constitutes a situation of conflict of interest. When a conflict of interest is detected, Member State authorities should take into account possible implications for other operations or contracts for the operation(s) concerned and act accordingly to prevent new situations of conflict of interest.

So, the thing that distinguishes fraud from irregularity is **the intention**, *the good will with which the deed is done.*

4. Specific elements for shared management[6]

The overall responsibility for the implementation of the EU budget rest with the Commission. However, around 75% of the EU budget is implemented by Member States under shared management, in accordance with the rules of FR 2018, applicable EU sectoral law and national rules. Close cooperation between the Commission and national authorities is therefore necessary to ensure that the EU budget is used in accordance with the principles of sound financial management and that the EU's financial interests are protected by an appropriate accountability model.

Shared management means that Member States (and their regions, too), taking into account their institutional and legal framework, are responsible for the implementation of programs and actions funded under shared management. This role also includes defining the scope of support from the Funds and developing specific tools for support and the allocation of funds to beneficiaries (*e.g.,* businesses, farmers, municipalities, etc.), as well as audits and controls on the implementation of the programs. Under shared management, the Commission is responsible for proposing EU legislation, adopting programs, performing certain advisory functions and supervising the implementation of programs, including monitoring and auditing, without intervening directly at operational level.

For the assessment of the main fraud models related to EU funds under shared management, the distinction must be made between: detected irregularities and fraudulent irregularities (as fraud cases are difficult to be detected).

4.1. Risks to fraud of European funds

The main risks of fraud are:

- the falsification of documentation – this may consist of:
  - the falsification of documents, which give the impression that the applicans fulfill the conditions necessary for obtaining the funds;
  - the artificially split of the project and submit multiple applications for funding.
- the breach of contract terms:
  - the falsification of documents by which the non-compliance with the contractual conditions can be masked;
  - the reception and the payment of non-executed works, through false supporting documents (attesting compliance with contractual clauses).
- fraud related to the fulfillment of eligibility criteria:
  - falsification of the documents necessary to obtain an additional score in the selection of the funded projects;
  - submission of false statements regarding the fulfillment of the eligibility conditions.
- fraud related to breach of public procurement rules:
  - simulating by the beneficiary the procedures for awarding contracts for works or equipment;
  - subcontracting the works to another company after winning the contract;
  - overloading the financier through requests for reimbursement of costs for goods or services purchased at lower prices;
  - "plagiarism" means that a project which receiving funding has been copied;

[6] *https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:52021XC0409(01)&from=EL*, Communication from the European Commission - Guidelines on the avoidance and management of conflicts of interest under the Financial Regulation

  - "double funding" – which involves financing a project from several sources, without the financiers knowing that there are other sources of funding.
- fraudulent financial reporting
  - manipulation, falsification (including the production of false documents) or modification of the accounting records or supporting documentation on the basis of which the financial statements are prepared;
  - intentionally misrepresenting or omitting from the financial statements of the operations, transactions or other important information;
  - intentional misapplication of accounting principles in terms of values, classification, presentation or description. Fraudulent financial reporting often involves the to avert the controls by the management, that, in fact, seem to work effectively.

As regards internal fraud committed by EU staff and staff of the EU institutions, 60% of the sections mentioned undeclared conflicts of interest, 57% confidential information leaks and fraudulent payment claims of 21%. Indeed, illegal or false subcontracting, the use of offshore bank accounts and corruption are the types of public procurement fraud that are often the subject of OLAF investigations[7].

5. Combating fraud against the EU budget

The Financial Regulation requires EU Member State authorities to put in place effective internal control systems to prevent or detect and correct fraud and irregularities, but it does not require them to maintain a blacklist and apply exclusion situations and procedures similar to those used for EDES, which only cover expenditure under direct or indirect management. The Financial Regulation and sectoral legislation[8] also provide for Member States to use the IMS (irregularity Management System) to report fraud and irregularities related to EU funds under shared management[9]. However, the Commission should consult the Member States before using the reported data in this way[10] and may use those data only to exclude counterparties from receiving funds under direct or indirect management.

The EU public Procurement Directive[11] requires Member State authorities to exclude counterparties in certain situations. The requirement applies to all public procurement in the Member States, including those involving EU funds. The Directive lists the mandatory and optional exclusion situations that Member States must transpose into national law. Optional exclusion situations include those that are mandatory under the EDES (bankruptcy, insolvency and other similar situations), but in practice, Member State authorities may exercise considerable discretion as regards exclusion situations that apply in certain public procurement procedures. Thus, there is a different classification from one country to another of the criteria for excluding counterparties from financing and thus the protection of EU financial interests under shared management is less than under direct management.

6. Conclusions

The protection of the EU's financial interests in Romania is carried out through the DLAF (Anti-fraud Department). It is the contact institution for OLAF in Romania and ensures, supports and coordinates the fulfillment of Romania's obligations regarding the protection of the EU's financial interests, in accordance with the provisions of art. 325 TFEU.

From 1st of January 2016, in order to protect the EU's financial interests more effectively and to ensure fairer financial management, the European Commission has established the EDES – the early detection and exclusion system, which has brought a number of improvements in:

- Early detection of persons or entities which present risks to the financial interests of the Union
- Exclusion of persons or entities from participation in award procedures or selection for the implementation of Union funds, where they fall under the following circumstances: bankruptcy or insolvency,

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[7] *https://eur-lex.europa.eu/legal-content/RO/ALL/?uri=CELEX:52019SC0171.*

[8] Art. 144 of the Financial Regulation, art. 5 of Commission Delegated Regulation (EU) 2015/1971 and art. 5 of Commission Delegated Regulation (EU) 2015/1970.

[9] Art. 122, para. 2 of Regulation (EU) no. 1303/2013, art. 50, para. 1 of Regulation (EU) no. 1306/2013, art. 30, para. 2 of Regulation (EU) no, 223/2014, art. 5, para. 5 of Regulation (EU) no. 514/2014, art. 21, para. 1, lit. (d) of Regulation (EU) no. 1309/2013.

[10] Art. 144 of the Financial Regulation.

[11] Art. 57 of Directive 2014/24/EU on public procurement.

non-payment of taxes or social security contributions, serious professional misconduct, involvement in criminal activities (fraud and corruption or participation in a criminal organization), serious breach of a contract, entities created with the intention of circumventing tax, social or other obligations (Creation of letter box companies, in accordance with Article 136(1) of the Financial Regulation;

- Imposing a financial penalty on a person or entity (Article 138 of the Financial Regulation);

Information[12] on early detection, exclusion or financial penalty may come from:

- final judicial decisions or final administrative decisions;
- concrete data and findings of the Commission's Anti-fraud Office (OLAF), the European public Prosecutor's Office (EPPO), the Court of Auditors, audits or any other checks or controls carried out under the responsibility of the authorizing officer responsible;
- non-final decisions or administrative decisions that are not final;
- decisions of the European Central Bank (ECB), the European Investment Bank (EIB), the European Investment Fund or international organizations;
- cases of fraud and/or irregularities reported by national authorities managing the budget under shared management;
- cases of fraud and/or irregularities reported by the entities implementing the budget under indirect management.

In view of the situations created until the new financial protection system was established, we consider it is opportune to apply the main elements of the EDES to all types of European financing (including shared financing), so that there is no longer discrimination or exclusion of counterparties from financing, depending on national laws.

The practical work also notes the need for an extensive database on activities financed by European funds in the Member States of the European Union.

As so far, in the coming period, both the European institutions (OLAF, ECA, EPPO) and the national institutions need to continue and expand their actions to prevent and combat fraud and corruption, including frauds generated by shared management of European funds.

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ASPECTS REGARDING THE USE OF OXYTOCIN IN MARKETING

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Abstract

The main purpose of the marketing activity is to convince consumers to purchase a good or service or to adopt a certain behavior. Companies make significant investments in this marketing activity aimed at persuading people to take action.

We know on a scientific basis much of what lies behind consumer behavior. Mr. Kotler's black box is starting to become more and more transparent. Thus, current studies clearly support what marketers only suspected some time ago, namely that certain images or actions cause the human brain to release a series of hormones with different effects on the human body. Among these hormones, oxytocin stands out, called the happiness hormone or the love hormone due to its effect on people. Thus, through a marketing activity aimed at stimulating the release of this hormone in the human body, we can build trust in a product or brand, which will translate into a lasting relationship with consumers and, finally, into an effective marketing activity for the company.

Being in a permanent search for those secrets that ensure the success of marketing campaigns, marketing specialists must also understand the perspective of human psychology and physiology involved in carrying out a convincing activity. In this context, the following paper reveals important aspects regarding the necessity of understanding how oxytocin is influencing consumer behavior together with ways in which this hormone can be stimulated for the use of the company's marketing activity.

Keywords: *consumer behavior, oxytocin, happiness hormone, consumer trust, strategic marketing.*

1. Introduction

For the specialists in the field, the purchase process represents the central theme addressed in the activity of studying consumer behavior. In the process of making the purchase decision, the emphasis started to shift from satisfying physical needs to the need to signal identity and acquire social status. In this sense, science has demonstrated that the chemistry of the human body lies to a significant extent behind consumer behavior, purchase decisions being associated with a change in dopamine levels in certain brain regions, associated with the desire to obtain a good[1]. However, another hormone that has been ignored so far by marketing specialists also contributes to the stimulation of dopamine release, namely - oxytocin.

Significant amounts of money are invested in planning effective marketing campaigns. And identifying those buttons that must be pressed to achieve maximum efficiency is desirable. Many of the marketing campaigns carried out have succeeded in achieving the desired changes in consumer attitudes. Unfortunately, however, a positive attitude does not always determine action. In order to increase the probability of taking an action, the acquired attitude must be strong. And a strong attitude is obtained through attention-grabbing campaigns, that stand out significantly from everything that exists around.

Empathy can be one of the buttons that can be pushed for determining action. In this case, emotionally involved individuals will want to alleviate their own suffering or satisfy their own need. In social marketing, for example, empathy can lead the consumer to satisfy the need to alleviate someone's suffering or the need to support a noble cause. As we mentioned before, at the basis of consumer behavior is the chemistry of the human body, so empathy can also be physiologically determined, oxytocin being associated with the feeling of empathy

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[1] P.Y. Lin, N.S. Grewal, C. Morin, W.D. Johnson, P.J. Zak, *Oxytocin Increases the Influence of Public Service Advertisements*, Plos One Journal, 27 February 2013, vol. 8, issue 2, *https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0056934&type=printable* last time consulted on 10.02.2023.

in a number of studies[2]. Also, oxytocin is the hormone that determines, in the women's segment in particular, the impulse and unplanned purchases. In addition, a high level of oxytocin is associated with a positive relationship with a certain brand that is materialized, among other things, in a high level of positive reviews about the brand[3] if we were to list some of the results of the studies carried out to determine the effects of this hormone in specific marketing activities.

Taking everything into account, we can affirm that a marketing activity focused on stimulating the release of oxytocin in the human body represents one of the steps that can be taken in creating an emotional bond with a product or a brand[4], a fact that will lead to consumer loyalty and, implicitly, to constant purchases, a defining objective for the company's success.

In this context, in the first section of the paper a detailed presentation of the oxytocin hormone and its effects on the human body will be made, followed by a presentation of the implications that this hormone has for the marketing activity of an organization in the next section. Next, the main actions that can be adopted in the marketing activity carried out by a company that wants to exploit these discoveries related to the happiness hormone will be presented, and at the end of the paper we will formulate a series of conclusions and limits of this documentary study.

2. Oxytocin - the happiness hormone

Oxytocin is a neuropeptide produced by the hypothalamus gland in the forebrain region. Oxytocin reaches several important areas of the central nervous system that are involved in the regulation of interactive social behaviors, fear, aggression, pain perception, calmness, well-being, and stress reactions.

According to medical studies, oxytocin can induce well-being by stimulating dopamine release, increase social interaction and decrease anxiety through actions in the amygdala - a key region in the brain's "fear" network[5], decrease stress reactions through actions in the hypothalamic-pituitary-adrenal axis (HPA axis) and by decreasing noradrenergic release in the locus coeruleus (LC) and solitary tract nucleus. Also, oxytocin can decrease pain sensitivity by increasing opioidergic activity and modulates serotonergic activity[6].

One of the effects of releasing this hormone into the body is the facilitation of connection between people, due to its role as a chemical messenger, playing an important part in forming trust and building relationships[7]. Oxytocin decreases individuals' risk aversion and favors a greater capacity to adapt to change[8].

Oxytocin plays such an important role in social behavior that it has been called the "love hormone", „feel-good hormone”, the "cuddle hormone"[9], the "moral molecule"[10] and "liquid trust"[11]. When oxytocin levels rise, people seem to become more altruistic, trusting, and generous.

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[2] P.Y. Lin, N.S. Grewal, C. Morin, W.D. Johnson, P.J. Zak, *Oxytocin Increases the Influence of Public Service Advertisements*, Plos One Journal, 27 February 2013, vol. 8, issue 2, *https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0056934&type=printable* last time consulted on 10.02.2023.

[3] V. Agrawal, *Biomarketing: Human Body as the Marketing Engine*, SSRN Electronic Journal, February 2022, *https://www.researchgate.net/publication/359503293_Biomarketing_Human_Body_As_Marketing_Engine* last time consulted on 08.02.2023.

[4] E. Rowley, *Feeling loved: What marketers need to know about oxytocin*, Psykked - where marketing meets psychology, November 9, 2021, *https://medium.com/psykkd/oxytocin-what-marketers-need-to-know-about-the-love-drug-34192dbfcc74* last time consulted on 07.02.2023.

[5] J. Adetunji, *The dark side of the love drug - oxytocin linked to gloating, envy and aggression*, The Conversation UK, September 8, 2011, *https://theconversation.com/the-dark-side-of-the-love-drug-oxytocin-linked-to-gloating-envy-and-aggression-2781* last time consulted on 11.01.2023.

[6] K. Uvnäs-Moberg, L. Handlin, M. Petersson, *Self-soothing behaviors with particular reference to oxytocin release induced by non-noxious sensory stimulation*, Frontiers in Psychology, January 12, 2015, vol. 5, *https://www.frontiersin.org/articles/10.3389/fpsyg.2014.01529/full* last time consulted on 19.12.2022.

[7] A. Martin, *The Power of Content Chemistry: Release the Oxytocin!,* The Tilt, September 20, 2019, *https://www.thetilt.com/content/power-of-content-chemistry* last time consulted on 20.12.2022.

[8] V. Agrawal, *Biomarketing: Human Body as the Marketing Engine*, SSRN Electronic Journal, February 2022, *https://www.researchgate.net/publication/359503293_Biomarketing_Human_Body_As_Marketing_Engine* last time consulted on 08.02.2023.

[9] A.L. Penenberg, *Digital Oxytocin: How Trust Keeps Facebook, Twitter Humming*, Fast Company Magazine, July 18, 2011, *https://www.fastcompany.com/1767125/digital-oxytocin-how-trust-keeps-facebook-twitter-humming* last time consulted on 13.01.2023.

[10] P.J. Zak, *Molecula Morală. Sursa iubirii şi a prosperităţii,* Humanitas Publishing House, Bucharest, 2015.

[11] M. Mikolajczak, J.J. Gross, A. Lane, O. Corneille, P. de Timary, O. Luminet, *Oxytocin Makes People Trusting, Not Gullible*, Psychological Science, 2010, vol. 21, issue 8, pp. 1072-1074, *https://www.researchgate.net/publication/45188550_Oxytocin_Makes_People_Trusting_Not_Gullible* last time consulted on 01.02.2023.

Over time, a series of studies have been carried out in which the prosocial effect of oxytocin on people was analyzed. Thus, it was concluded that oxytocin[12]:

- determines a behavior characterized by trust, generosity and cooperation;
- increases the perception of trust, attractiveness, accessibility and attachment;
- supports social interactions (awareness, communication style, etc.).

There is also ample evidence that oxytocin's influence on human behavior is contextual, depending on the individual or the situation. Thus, oxytocin appears to increase trust in partners only when cues to mistrust are absent and increases the level of cooperation only when the partner is known[13]. On the other hand, many studies show that oxytocin can also have an antisocial effect, increasing feelings of envy, mistrust or insecurity.

In addition, following the studies carried out in this field, a conclusion could be formulated stating that the release of oxytocin in the body can be triggered in order to counterbalance the body's reaction to stress in three main ways[14]:

- oxytocin can be released in response to pleasant mental experiences. Such a state can be induced by seeing, hearing, smelling or thinking about a well-known and loved person, but it can also be determined by other pleasant situations;
- oxytocin is also released in response to somatosensory nerve activation induced by touch, caress, warmth, and light pressure on the skin;
- oxytocin can also be released by mental and sensory stimuli that are perceived as stressful. Oxytocin's role in these situations may be to moderate stress responses and facilitate adaptation.

Given the fact that nowadays effective marketing campaigns are not just about increasing sales at a certain point in time but are rather focusing on building relationships with consumers and solving their problems, we can rely on the use of oxytocin in order to develop sustainable relationships with consumers, based on trust and empathy.

3. The implications of oxytocin stimulation for the marketing activity

It is imperative that in the process of organizing and carrying out marketing activities in which significant sums of money are invested specialists should also be aware of the perspective of human psychology and physiology. Through each marketing action undertaken to support a brand, product or organization, we can aim to stimulate certain hormones in the human body (cortisol, serotonin, dopamine, oxytocin). Among these hormones, oxytocin contributes to building a sense of security and connection to the brand, product or company. This conclusion is supported by the results of the studies carried out in this field.

In this sense, the results of various studies support the conclusion regarding the existence of a correlation between oxytocin and empathy. Thus, following an experiment carried out in this field, the oxytocin level of the participants who watched an emotional clip of 100 seconds made for the collection of funds by St. Jude's Children Hospital saw a 47% increase[15]. In addition, the increase in the level of oxytocin in the human body determined behavioral changes associated with emotional involvement (recognition of other individuals' emotions, increase in charitable donations, etc.). Following this study, the conclusion regarding the existence of the correlation between the increased level of oxytocin and the empathy felt by the participants was formulated. When individuals empathize, oxytocin is released in their bodies, a situation that induces the feeling of trust, a key element in the long-term relationships we want to develop with consumers as well as in their loyalty.

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[12] E. Rowley, *Feeling loved: What marketers need to know about oxytocin*, Psykked - where marketing meets psychology, November 9, 2021, *https://medium.com/psykkd/oxytocin-what-marketers-need-to-know-about-the-love-drug-34192dbfcc74* last time consulted on 07.02.2023.

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[14] K. Uvnäs-Moberg, L. Handlin, M. Petersson, *Self-soothing behaviors with particular reference to oxytocin release induced by non-noxious sensory stimulation*, Frontiers in Psychology, January 12, 2015, vol. 5, *https://www.frontiersin.org/articles/10.3389/fpsyg.2014.01529/full* last time consulted on 19.12.2022.

[15] P.Y. Lin, N.S. Grewal, C. Morin, W.D. Johnson, P.J. Zak, *Oxytocin Increases the Influence of Public Service Advertisements*, Plos One Journal, 27 February 2013, vol. 8, issue 2, *https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0056934&type=printable* last time consulted on 10.02.2023.

According to a study carried out by Furst *et al.* in 2015[16], oxytocin facilitates the development of relationships between consumers and brands, in a similar way that it facilitates the relationships between people. In addition, the study concluded that exposure to certain brands can stimulate a higher level of oxytocin than that released by human interactions. Brands can stimulate a hormonal response that exceeds, in certain cases, the hormonal response that people have in relation to family and friends.

For stimulating the release of oxytocin in the human body, the existence of a social stimulus is a necessary condition. For example, simply asking for help in ordinary social interactions can represent such a stimulus. Also, in the process of stimulating the release of this hormone, the human brain fails to make a significant difference between the physical interactions of daily life and those viewed on a computer screen.

According to experts, among the activities that cause the brain to release oxytocin in the body are: watching an emotional video clip, trusting someone, physical touch, attending a wedding, petting a pet, moderate stress, holding one's own child, breastfeeding, sexual activity and even tweeting. At the same time, advertisements illustrating these kinds of activities can induce the release of oxytocin in the human body. In addition, the use of social interactions in commercial spaces or within promotional events[17] is another way in which this objective can be achieved.

In the marketing activity aimed at stimulating the release of the oxytocin hormone in the human body, the fact that certain consumer segments will not react in the same way to the used stimuli must also be considered. It has been shown, for example, that oxytocin causes an increase in impulse purchases for the women's segment[18]. Thus, this segment can represent the target of communication activities in which the stimulation of the oxytocin hormone release is desired, taking into account the fact that, for the men's segment, another hormone, this time testosterone, inhibits the release of oxytocin.

Unfortunately, the interest in the field of oxytocin hormone stimulation and its implications strictly for the marketing activity has only just begun to manifest itself, so that studies carried out in this field are limited in number.

However, for the marketing field, several activities can already be defined that can be implemented in the campaigns aimed at eliciting an increased degree of attachment for a certain brand.

4. Marketing tactics used to stimulate the oxytocin hormone

As we previously mentioned, in order to achieve the marketing objectives aimed at creating a long-term relationship with consumers and their loyalty, certain systematic actions can be carried out that can determine the stimulation of the oxytocin hormone release in the human body, as follows:

- **Knowing the audience**. The only way in which we can reduce the degree of uncertainty in order to successfully implement an activity aimed at human physiology is a good knowledge of the targeted consumers' body chemistry. Also, among the elements that determine the stimulation of oxytocin release are consumer memories and the recognition of shared values. In this context, studying the audience is useful for determining childhood memories (for example, we can look for answers about what life was like for consumers when they were 10 years old)[19] on the basis of which a series of experiments can be carried out in order to capitalize on them, later evolving from this point.
- **Telling a good story** causes the audience to feel trust and empathy towards the hero of the story. According to Joe Lazauskas, author of The Storytelling Edge[20], humans are programmed to listen to stories. Focusing on developing an interesting story that engages the audience can be far more successful than simply presenting boring facts and figures. When we are enchanted by a story, cortisol, dopamine and oxytocin are

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[16] A., Furst, J. Thron, D. Scheele, N. Marsh, R. Hurlemann, *The neuropeptide oxytocin modulates consumer brand relationships*, Scientific Reports, October 9, 2015, vol. 5, *https://www.nature.com/articles/srep14960* last time consulted on 05.02.2023.

[17] P.Y. Lin, N.S. Grewal, C. Morin, W.D. Johnson, P.J. Zak, *Oxytocin Increases the Influence of Public Service Advertisements*, Plos One Journal, 27 February 2013, vol. 8, issue 2, *https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0056934&type=printable* last time consulted on 10.02.2023.

[18] J. Liu, M. Monakhov, P.S. Lai, R. Enstein, S.H. Chew, T. Tong, X. Zhang, *Does Oxytocin Increase Impulse Buying?,* in E - European Advances in Consumer Research vol. 10, 2013, eds. Gert Cornelissen, Elena Reutskaja, and Ana Valenzuela, Duluth, MN: Association for Consumer Research, pp 263-264, *https://www.acrwebsite.org/volumes/1014045/volumes/v10e/E-10* last time consulted on 21.01.2023.

[19] K. Bost, *Chemical Reactions in the Brain in Relation to Marketing*, True North Social - digital marketing agency, *https://truenorthsocial.com/blog/chemical-reactions-in-the-brain-in-relation-to-marketing/* last time consulted on 22.01.2023.

[20] J. Crossfield, *The Neuroscience of Storytelling*, Content Marketing Institute, April 2019, *https://contentmarketinginstitute.com/cco-digital/april-2019/storytelling-neuroscience-joe-lazauskas/* last time consulted on 16.02.2023.

released in the body, depending on what is happening in that story. This is the reason why content marketing works so well.

Thus, the story that we want to communicate about the product or the organization should not be just a list of features. We can communicate all of this through a story that conveys the company's values or a story about what the field of interest will look like in the future. We will tell the story looking primarily from the consumer's perspective. Also, in the story we convey, we will not lose sight of its four key features: relatability, novelty, fluency and tension[21]. In fact, in one of the experiments carried out by the neuroeconomist Paul Zak, it was discovered that when plots are designed to build suspense in anticipation of a climax, the attention of the participants increases significantly, and an increase in the level of oxytocin is recorded immediately after the increase in the level of attention, peaking shortly after the stories reached their climax[22].

As for the themes used in the stories we want to weave around the brands, the 12 archetypes created by Margaret Mark and Carol Pearson in order to carry out the branding activity can be of great use - the Purist, the Pioneer, the Entertainer, the Conqueror, The Magician, The Protector, The Seducer, The Imagineer, The Emperor, The Rebel, The Source, The Straight Shooter[23], which are based on the archetype theory postulated by Jung[***]. Any of these archetypes can be used to create an engaging story around the brand.

In addition, in this context, the consumer stories so generously disseminated online in the form of reviews and various stories posted in dedicated blogs should also be mentioned. Digital word-of-mouth has a significant impact on the stories we want to tell in our marketing activity. On the other hand, visual storytelling - using visual elements to tell a company's story - is another opportunity to capitalize on people's innate preference for stories[24].

- **Sensory marketing.** Within the marketing activity of an organization, an aspect of utmost importance is currently the stimulation of the senses for the creation of the company's identity and the clear delimitation of its values with the strategic aim of creating brand awareness and a sustainable image of it. Sensory marketing can be done in such a way that it can significantly contribute to the release of oxytocin in the human body. Thus, a particularly important aspect in this context is touch, either that relating to objects and the environment, or that within interpersonal interactions.

Human interactions during exhibitions, conferences and in commercial spaces can contribute to stimulating the oxytocin hormone and establishing an emotional connection with consumers. To be remembered in this context is the fact that *active listening* is a basic principle for social interactions and building solid relationships. In addition, it is necessary for the organization to initiate activities in which the targeted community has the opportunity to get involved, which determines the creation of an emotional connection based on feelings of affinity and trust.

The results of previous studies led to the conclusion that tactile sensations can change the visual perception of a product in a positive or negative way[25]. This conclusion confirms one of the basic rules in marketing activity, namely the one related to the fact that the customer must be encouraged to hold the product in his hands and to touch it, an aspect that will also determine the release of oxytocin in the consumers' body[26]. As far as auditory stimulation is concerned, it is necessary that the voices used be as close to natural as possible (including synthesized ones).

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[21] J. Crossfield, *The Neuroscience of Storytelling*, Content Marketing Institute, April 2019, *https://contentmarketinginstitute.com/cco-digital/april-2019/storytelling-neuroscience-joe-lazauskas/* last time consulted on 16.02.2023.

[22] P. Minnium, *The science of storytelling*, MarTech, August 10, 2018, *https://martech.org/the-science-of-storytelling/* last time consulted on 02.02.2023.

[23] M. Mark, C. Pearson, *The Hero and the Outlaw: Building Extraordinary Brands Through the Power of Archetypes*, McGraw-Hill Publishing, New York, 2002.

[***] According to Jung's theory, archetypes are images or themes derived from the collective unconscious. Jung identified four major archetypes (Self, the Persona, the Shadow, and the Anima/Animus) but also believed that there was no limit to the number that may exist. Jung acknowledged that the four main archetypes can intermingle and give rise to 12 archetypical images: Ruler, Creator/artist, Sage, Innocent, Explorer, Rebel, Hero, Wizard, Jester, Everyman, Lover, Caregiver.

[24] E. Walter, J. Gioglio, *The Power of Visual Storytelling: How to Use Visuals, Videos, and Social Media to Market Your Brand*, McGraw Hill Education, 2014.

[25] M. Pagani, M. Racat, C.F. Hofacker, *Adding voice to the omnichannel and how that affects brand trust*, Journal of Interactive Marketing, 2019, vol. 48, pp. 89-105, *https://www.sciencedirect.com/science/article/abs/pii/S1094996819300726* last time consulted on 07.02.2023.

[26] A.E. Shehata, W. Alaswadi, *Can Sensory Marketing Factors Improve the Customers' Pleasure and Arousal in Egyptian Resort Hotels?*, Journal of Association of Arab Universities for Tourism and Hospitality, 2022, vol. 22, no. 2, pp. 111-131, *https://jaauth.journals.ekb.eg/article_226093_05d199ebf75ecac893482e545e4fbeb4.pdf* last time consulted on 15.01.2023.

- **Actual interaction within online communities** elicits a psychological response similar to real-world human interactions. In other words, online interactions in the form of shares, likes, comments cause the release of oxytocin in the brain, which determines the feeling of closeness and connection with others. In order to stimulate the release of oxytocin through the online environment, it is necessary to keep in mind that not all content leads to this result. Thus, interactive and social content has a higher chance of triggering the release of this hormone in the body compared to passive content[27].
- **Altruistic and selfless behavior** can stimulate the release of oxytocin in the human body. In this sense, companies can offer gifts or perform random acts of kindness, all of which determine a state of well-being for all those involved in that action.
- **Sales promotions actions.** According to studies carried out in the field[28], offering online shopping coupons stimulates the release of oxytocin in the body, these being processed by the brain as representing a physical gift and having a social load. This fact is surprising in the context where for a long time it was concluded that the release of oxytocin in the human body is stimulated only by physical social interactions.

All of the mentioned represent a series of tools that can be easily integrated into the marketing efforts of any company that is aware of their effect in order to achieve long-term objectives related to consumer loyalty and developing a sense of attachment to the brand.

5. Measuring the effectiveness of marketing activity aimed at stimulating oxytocin release

In order to measure the success achieved through a marketing activity focused on stimulating the oxytocin hormone, we will use the same indicators used to measure the success of the relational marketing efforts. In this sense, we will keep track of the shares, purchases or subscriptions made. But beyond these of great importance are consumers' preferences and motivations, their attitudes, the degree of attachment to the brand and the image formed about it.

In order to determine all these dimensions, any form of feedback that the consumer can provide is of utmost importance. *Surveys* can be an important method for determining various dimensions of consumer behavior. *Focus groups* also offer the possibility of obtaining important details regarding consumer reaction. In addition, *observing* consumer behavior is particularly relevant, *neuromarketing* being distinguished among the specific methods which allows the measurement of consumers' brain activity in order to determine the effects of the activity carried out. At the same time, *experiments* can be carried out in this field to reflect the effectiveness of different combinations of elements used to stimulate the release of the oxytocin hormone in consumers' bodies. In addition, it is useful to determine how the stimulation of oxytocin by means of the marketing activity that was carried out translates into actual actions of the targeted consumers.

6. Conclusions

Carrying out a marketing activity aimed at determining the release of oxytocin in the consumer's body is a step forward in building an emotional relationship with a product or brand.

There is little research carried out strictly in the field of marketing with an eye on the use of oxytocin hormone, which is why this article has an exploratory character, based on a variety of bibliographic references, taking into account that oxytocin is the object of numerous fields (medicine, economy, etc.). This aspect limits the generalization of this work at this time, but it does not diminish the interest for a field of research that has a great potential to provide solutions for marketing activity.

Also, the results of this exploratory research provide marketing practitioners with a practical way to use the oxytocin hormone to stimulate the emotional response and behavior of consumers.

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[27] *Why Social Media and Content Can Be Addictive: The Science of "Happy Hormones"*, May 12 2022, Vanquish Media Group, *https://www.vanquishmediagroup.com/why-social-media-and-content-can-be-addictive-the-science-of-happy-hormones/* last time consulted on 27.01.2023.

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DOMESTIC VIOLENCE AS SOCIAL DEGENERATION, CAUSES, EFFECTS,CONSEQUENCES

Narcis Dumitru BADEA[*]

Abstract

Domestic violence cannot be put into a definition, as it has a multitude of manifestations determined by, mentalities, history, religious upbringing, punitive legislation, education, etc, with geographical and historical variability.

Updated studies show that domestic violence can have adverse consequences for family life and for social and economic life as a whole. The causes of domestic violence range from problems of upbringing, mentality, traditions, economic-financial situation, vices, to negative effects in the workplace and the costs incurred by the authorities in protecting the abused. In addition to legislation and education, religious factors play an important role in influencing local customs.

From a historical point of view, it can be said that it is only since the 20th century that the issue of equal rights between women and men, including women's right to vote and the protection of minors, has been raised, butnot all states have understood to implement them, with different justifications.

Of course, there have also been strong, more or less minority, even reactionary resistance to maintainingthe traditionalist rights of men over family members, so that beyond the many meanings associated with it, violence is an abuse of power, almost always linked to a position of power and the imposition of that power on others. This characterisation best defines the situation of the man in relation to that of the woman, child or elderly person within the family unit.

The development of the economy locally and globally has contributed to an increased need for additional labour, so that the manufacturing industries have differentiated in favour of men and women.

In "civilised" countries with functioning democracies, the state is involved both in the establishment of legislation against discrimination of any kind and in the protection of abused persons of both sexes and minors, and budgetary funds are even provided.

Keywords: *physical abuse, sexual abuse, sexual discrimination, other types of discrimination with harmful effects on members of society.*

1. Introduction

As we have shown, violence in the family often continues into violence in society and it can be said that forms of violence can be traditional and/or contemporary, specific to each historical-geographical area. From a legal point of view, violence means the use of physical force or other persuasive means to cause harm, harm to the integrity and rights of a person. In this sense, an act of violence is often premeditated, being intentional or signifying the intentionto cause physical harm or suffering to another person. In a psychological context, violence refers to aggressive behaviour, most often as a result of frustrations that cannot be socially defused.[1]

The World Health Organization defines violence in relation to physical, psychologicaland social health and well-being, *the intentional threat or use of physical force or power against oneself, another person, a group, or the community, and which carries an increased risk of causing injury, death, psychological harm, abnormal development or deprivation*" [2]

According to statistical studies, based on relatively objective reporting, only 7% of casesof domestic violence are reported in Romania. It is noted that many cases would go unreporteddue to the reluctance of some women or even men to confess about the physical/mental abuse to which they have been subjected, so as not to be stigmatised in their rural or urban environment.

The phenomenon of domestic violence manifests itself concretely in our country through:

- Physical abuse of a partner (either female or male);
- Abuse of minors or the elderly within the family;
- Abuse of the psyche of family members through verbal manifestations;
- Restriction of rights or benefits.

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[1] A. Andorniceanu, *The Three-Dimensional Approach of Total Quality Management, an Essential Strategic Option for Business Excellence*, Bucharest, Amfiteatru Economic Publishing House, 2017.

[2] S.M. Rădulescu, *Sociology of Intrafamilial Violence*, Lumina Lex Publishing House, Bucharest, 2001.

Fig. 1. View of promotion by authorities

For each, the competent authorities must find a solution, according to the legislation inforce, so local centres have been created for victims of domestic violence where they also benefit from housing conditions, medical care, counselling by social workers, psychological counselling, food and legal advice. These are supported by the specialist bodies of the urban town halls and on the basis of an "individualised plan" drawn up by a social worker who must also specify deadlines for finding a job, securing social or rented housing, enrolling minors in kindergarten/school, going to court to obtain a protection order and the formalities for obtainingmaintenance, etc., for which funds must be allocated for each individual case.

2. Paper content

In the traditional patriarchal mentality of the Romanian family, the man is the head of the family who assumes the material obligations of maintenance and protection of his family, and the female part the role of housekeeping (food, cleaning, education and supervision of minors). Any dysfunction in the assumption of these duties, as well as in the assumption of a decent and loyal sexual life, can lead to conflicts between family members, even to abuse.

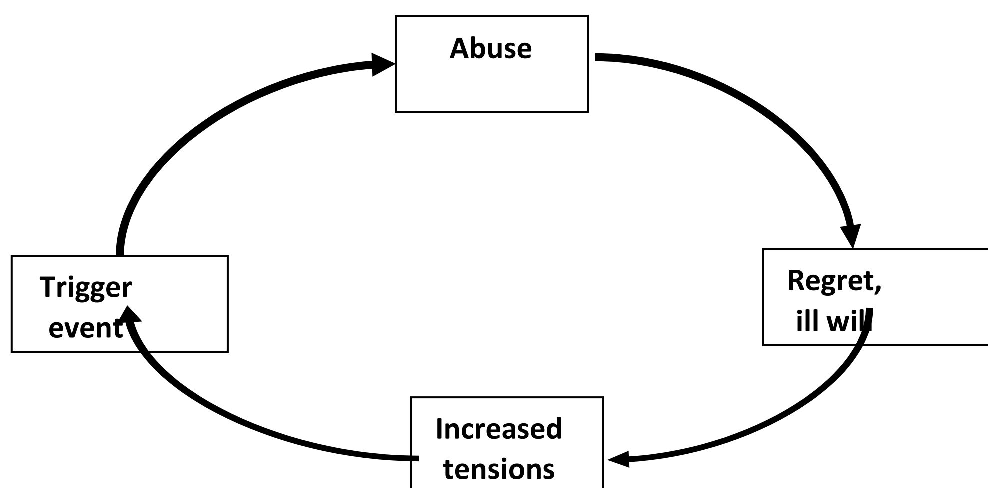
The development of urbanism in Romania has shifted and mixed rural traditions from various areas to the city and has led to new causes, potential conflicts within the same families. In view of this, Romania, as a democratic European state, must promote an integrated public policy to increase the effectiveness of crime prevention and control in the field of domestic violence, based on a proactive attitude aimed at reducing cases of domestic violence, developing quality social services for victims and for the legal and social rehabilitation of family aggressors, increasing public confidence in the relevant institutions and involving civil society in support programmes. The national strategy to prevent and combat domestic violenceis based on the political premise of the importance of ensuring the stability of the legislative and institutional framework in this field and the allocation of resources. Thus, the first types ofdomestic violence appeared in emotional (*e.g.* insults, swearing, etc.), physical (hitting, beating,spankings, etc.), financial (limiting the right to buy/sell), sexual (rape, etc.), spiritual (church- related, schooling, etc.) forms.

Social life has required the regulation of conflict situations, known generically as domestic violence, through specific legislative rules, the establishment of authorities with powers in this area, for the protection of victims. As a member of the European Union, Romaniahas also had to adopt legislation to prevent domestic violence, as set out in:

- Law no. 217/2003, republished in the Official Gazette of Romania, Part I, no. 205 of 24 March 2014;
- GO no. 6/2015, republished in the Official Gazette of Romania, on amending and supplementing Law no. 217/2003 on preventing and combating domestic violence;
- Law no. 217/2003, republished in the Official Gazette of Romania, Part I, no. 205 of 24 March 2014;
- ORDER no. 304/385/1018 of 21 July 2004 approving the Instructions on the organisation and functioning

of units for the prevention and combating of violence, published in the Official Gazette of Romania no. 818 of 6 September 2004".

Fig.2. Lenore Walker's Theory of Violence



Specialised social services to prevent and combat domestic violence are offered free ofcharge to victims. The National Agency for Equal Opportunities for Women and Men shall prepare and submit for approval the draft decision on the completion of GD no. 867/2015 approving the Nomenclature of Social Services, as well as the framework regulations for the organisation and operation of social services, with subsequent amendments and additions, in order to regulate the social services referred to in para. (4) lit. a). The National Agency for Equal Opportunities for Women and Men shall prepare and submit to the Minister of Labour and Social Justice for approval the draft order on the approval of minimum quality standards for social services, organised as information and counselling services for victims of domestic violence of the helpline type.

As far as the perception of domestic violence by the population in Romania is concerned, no significant progress has yet been made. According to the information provided by the National Institute of Forensic Medicine ,,Mina Minovici" Bucharest and the Centre for Urban and Regional Sociology, in the framework of the research on the cause of violence in 2019, the Romanian population perceives domestic violence as a common occurrence, and a fairly significant proportion (60%) is tolerant of violent behaviour in the family, considering that such acts are justified in certain situations or sometimes, depending on the context, even inall situations.

In the light of this reality, many victims choose not to take action against the perpetrator,such an approach being based on a whole complex of factors and perceptions, often justified bythe lack of material means that would allow the victim to lead an independent life, the fear or even shame of stigmatisation by the community, the lack of knowledge of the law and of available social services that could benefit them.

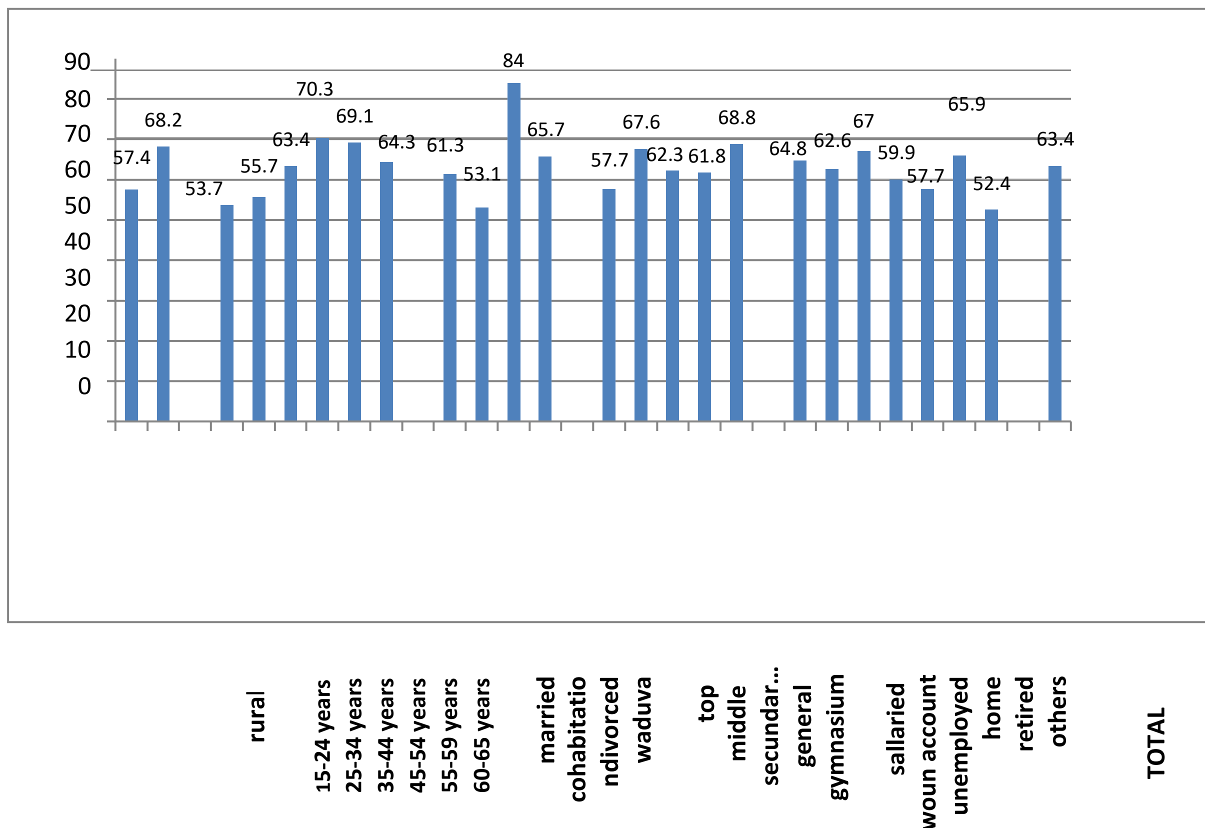
Although the official statistics of the central public authorities show a number of approximately 82,000 reported cases of domestic violence in the period 2017-2021 and 900 deaths, these figures are however greatly underestimated when compared to the values obtained by statistical, sociological studies which show an incidence of about 20% over a lifetime. Increases in domestic violence have been recorded in the crimes of bodily harm by 35.23%; battery or other violence by 22.04% and ill-treatment of minors by 21.15%.

According to the statistics of the *Necuvinte* Association, 23,090 cases of domestic violence were registered in the country by the IGPR in 2019. In 2020, 28,204 crimes of violencewere reported nationwide, according to the Romanian Police. The total number of victims was28,796, of which 4,414 were men, the rest were women; 28,362 people were reported to have committed domestic violence crimes (spouse, cohabitant/cohabitant, parent/guardian, son/daughter, or other degrees of kinship). Of these, 24,202 are men, 3,979 women and 181 minors (at the time of the criminal offence).

Results of studies on violence against women

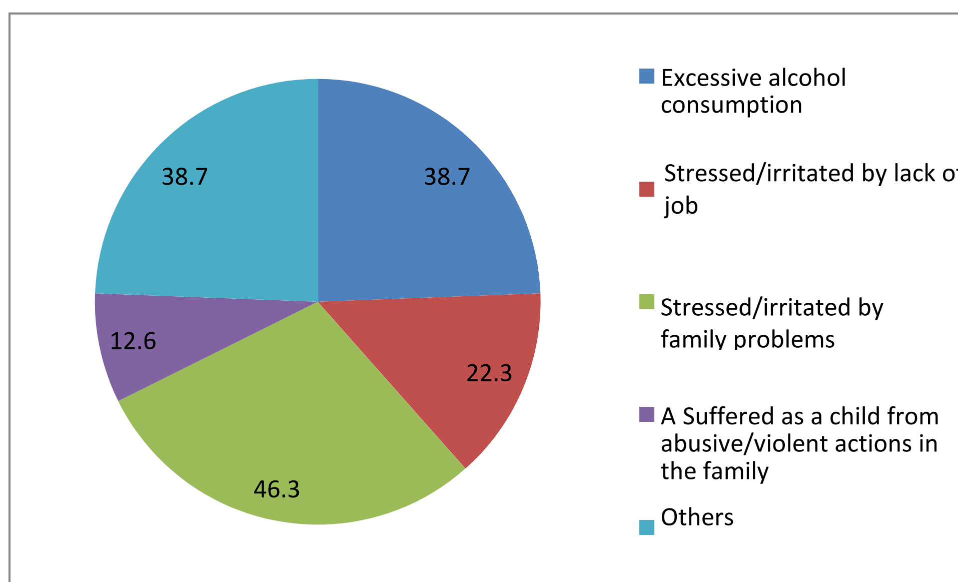
Even if figures obtained statistically, through epidemiological studies or surveys offer only limited reliability, they certainly help us to form an accurate idea of the scale of the problem.

Fig. 3. Total lifetime prevalence rate of partner violence (psychological, physical or sexual) since age 15, % (violence against women in the family)



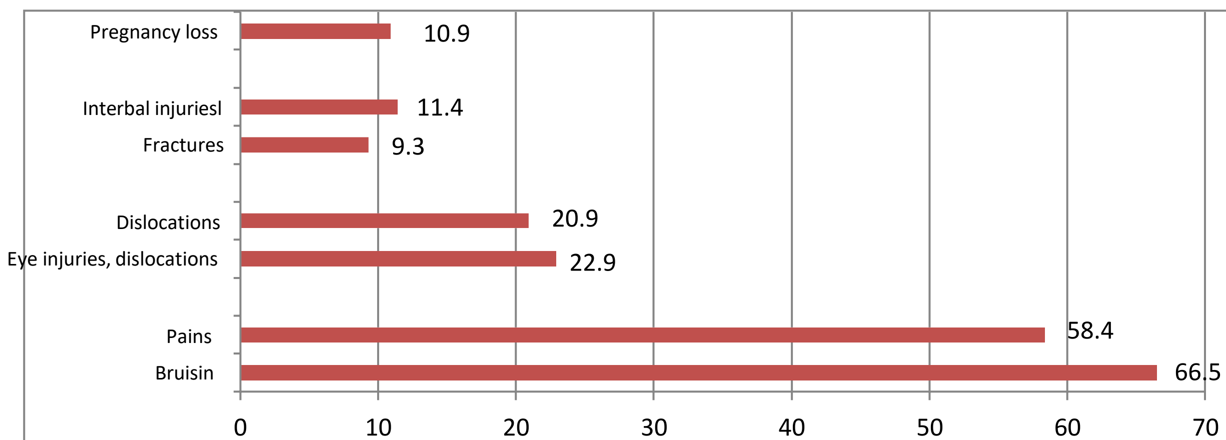
In terms of the overall rate of violence against women, we can see a fairly high proportion (84%) of those who stated that they end up divorcing or separating from their partner/spouse, where with a high percentage related to age, we note that 70% are aged between45-54 years.

Fig. 4. Distribution of female victims of physical or sexual violence by type of healthconsequences for women



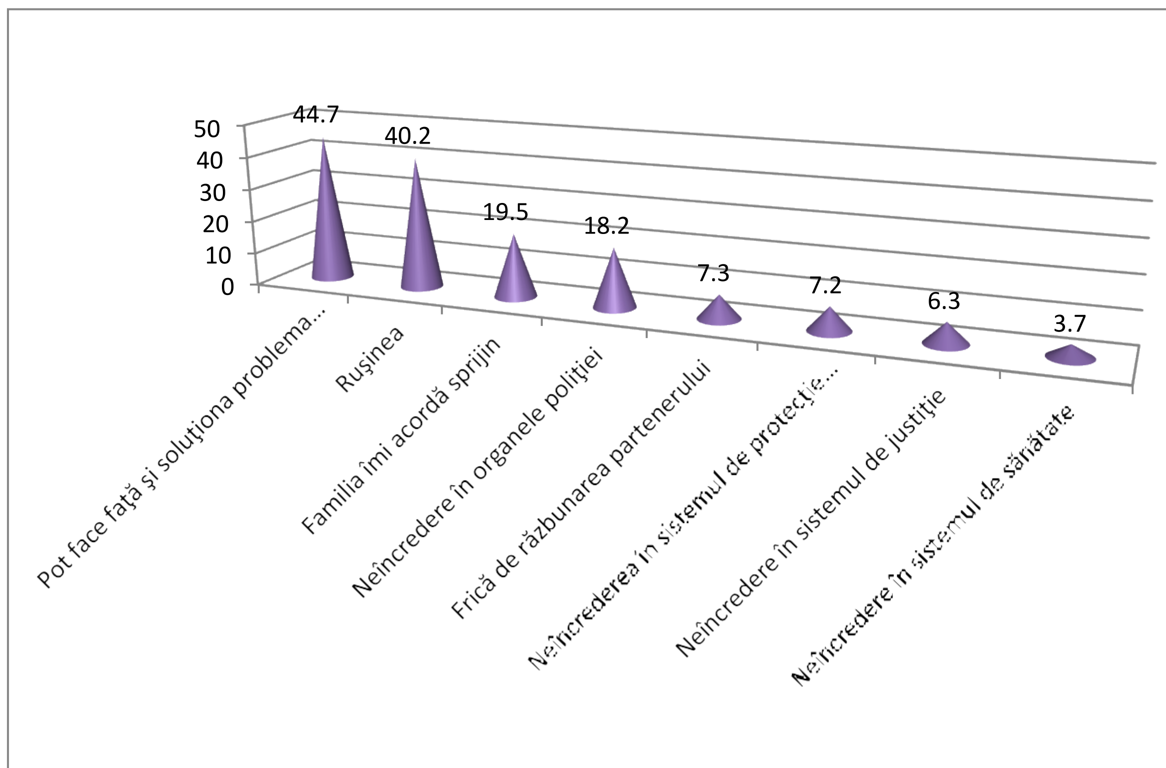
In relation to the distribution of women victims of physical violence throughout their lives, we note that they are victims of partners who consume alcohol (50%), followed by familyproblems (46%) and only 17% do not have a problem related to physical violence due to thesefactors.

Fig. 5. Distribution of female victims of physical or sexual violence by type of consequences on women's health



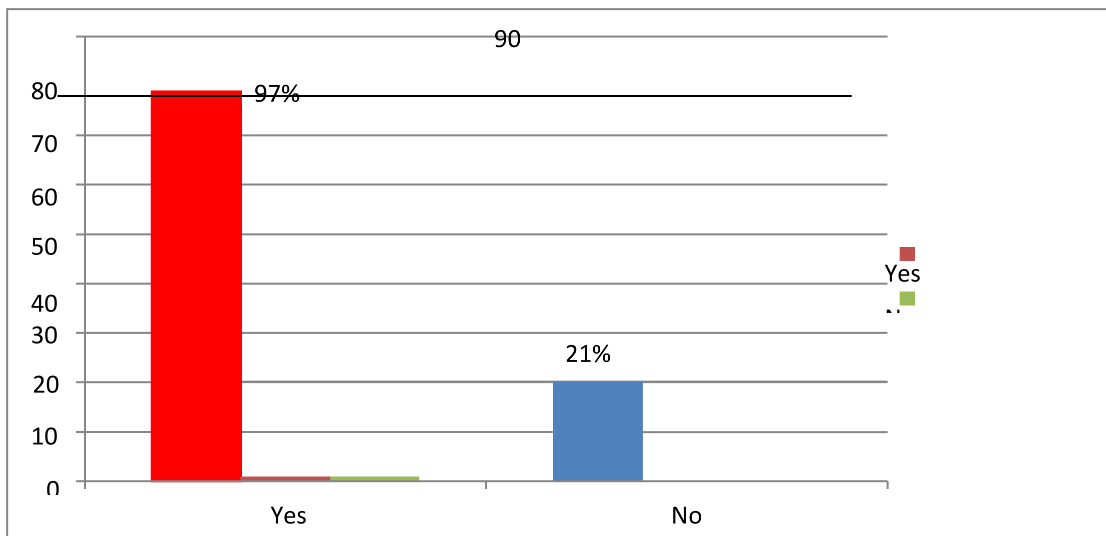
The analysis showed that the highest proportion was due to bruising, *i.e.* 66%, followedby 58% due to pain and only 9% due to internal injuries.

Fig. 6. Share of women by reason for not reporting violence



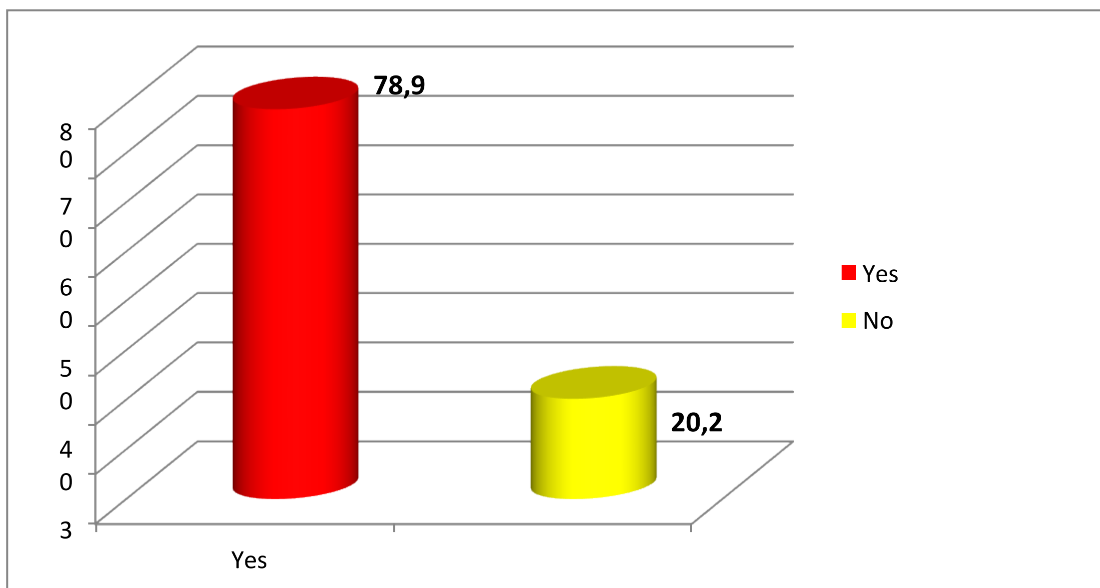
It can be seen that the reason why women do not report violence is due to the fact that 44% of women feel they can cope with it alone and 40% put shame second. It is worth noting that a fairly high percentage (18%) believe that the police do not do their job properly, which leads to mistrust.

Fig. 7. Abused women in the family do not have the courage to leave their homes



It is noted that 97% of abused women do not have the courage to leave home where theyno longer feel safe.

Fig.8. Violence is a learned behaviour



It is noted that 79.9% agreed that violence is a behaviour that is learned through repeatedexposure to violence.

It is constant that social polarisation, the increase in the number of people below the poverty line for various reasons, the decrease in budget quotas for education and support for young families, unemployment, the sharp drop in quality, etc., will maintain and even increasedomestic violence with an increase in the social costs of partial and temporary solutions to manifestations of domestic violence, with long-term negative effects on disoriented youth.

This will be increasingly costly and difficult as long as society as a whole does not develop substantially in economic, financial and educational terms.[3]

In a public health approach to treating and addressing violence, the following four steps must be taken in sequence:[4]

[3] M. Burton, M. Kellaway, *Developing and Managing High Quality Services for People with Learning,* 1998.

[4] Bouckaer, Pollit, *Quality improvement in European public services: concepts, casesand commentary*, London, SAGE Publishing House, 1996.

C. Potie, *Diagnostics of Quality*, Bucharest, Tehnică Publishing House, 2001.

1. Uncovering and learning about all the basic aspects of violence through systematic data collection (the extent, characteristics and consequences of violence at local, national and international levels);

2. Carrying out studies, clinical and epidemiological surveys to determine the causes, correlations, risk factors, factors favouring violence, as well as factors on which it is possible to intervene, positively influencing the phenomenon;

3. Designing means of violence prevention using the information provided by the studies and applying them with a strong focus on evaluation of interventions.

4. Implementing promising interventions in various settings, disseminating information widely and calculating the cost-effectiveness of these programmes.

Thus, I bring to your attention the following *proposals* for this work: keeping services at a high level of quality, documentation and evaluation are essential factors in this work and inthe critical processes to be reviewed.

It is important to involve women and children as beneficiaries of social services in the assessment process. As "end-users" they can provide feedback on what has been helpful and what has not.

This information can greatly improve practices in the future. The main purpose of the quality check is to help review and continuously improve social services. Moreover, both documentation and evaluation must be carefully planned and implemented to avoid abuse.

The fundamental values of quality assurance can be seen as the rights of women forcedto seek protection in a shelter for example.

- These rights can be:
- The right to the integrity of the soul;
- The right to state protection and assistance for them and their children in theform of safe shelter and support from staff, working at a high professional level;
- The right to dignity.

Quality control also contributes through:[5]

- Developing work on women's empowerment;
- Develop strategies to strengthen women's rights in society;
- Developing work on influencing professionals' attitudes towards women victimsof partner violence.

In order to achieve these goals, I believe the following methods are necessary:[6]

- Regular monitoring of work and adaptation of concepts and practice according to the needs of women and children seeking help;
- To monitor their work, the following can be used: (anonymous) questionnaires for victims, interviews with victims, questionnaires for community work professionals, externalevaluation.

However, in order to provide effective services to women, it is necessary to document the facts. Any information must be treated in strict confidence. It is important that the abusive partner does not receive any information. Data should only be passed on to public authorities with the explicit consent of the women involved.[7]

Work evaluation can be carried out internally or externally, depending on the methods and especially on the purposes it can take place permanently or at regular intervals.

In the case of social services, evaluation is seen as a tool to support client-oriented services. This can be done with the help of questionnaires that the woman completes before leaving the shelter. However, feedback should be anonymous so that women are free to expressan open and honest opinion.

The mission and purpose of social services aimed at preventing and combating domesticviolence is to provide, for a fixed period of time, accommodation, supervision, care, legal and psychological counselling, support for adaptation to an active life, professional integration of victims of domestic violence, as well as rehabilitation and socio-professional reintegration for an independent life.

Also, an important aspect of the services offered in the situation of domestic violence isthe issue of the aggressor and the support provided to him.

During monitoring and evaluation visits, social inspectors contributed to the grouping of the work of social service providers in the context of preventing and combating domestic violence, it being important for them to understand the operationalization of quality assurancein terms of urgency of intervention, confidentiality, medical and psychological care, imminentrisk of abuse of the victim (adult and/or child).

The work carried out within the network of services covering all the needs of victims ofviolence requires a

[5] R. Candea, *Managerial Communication*, Bucharest, Expert Publishing House, 1996.

[6] D. Cristina, *Management of Social Assistance Organizations*, Brasov, Transilvania University Publishing House, 2007.

[7] S.M. Rădulescu, *Sociology of Intrafamilial Violence*, Ed. Lumina Lex, Bucharest, 2001.

high degree of flexibility of action and adaptation to the specific needs of the victim, in a context of maximum confidentiality.

Another proposal to improve quality standards in social services is to increase the number of professionals and their capacity to intervene.

The main areas where intervention is needed are:

- Increase the number of social workers recruited in social services;
- Improve the retention of experienced professionals in the system;
- Improving the intervention capacity of social workers.

The professional accreditation process supports health professionals and organisations to improve quality and consists of a systematic and documented assessment of professionals through formal programmes that include competencies, responsibilities, assessment modalities,etc.

3. Conclusions

Several studies have shown that concrete measures taken to achieve gender equality in acountry's public and private life contribute to faster and more sustainable economic and democratic development. Although domestic violence and human trafficking affect both women and men, and all spheres of society, regardless of gender, age, ethnic and religious affiliation.

In Romania, as in many European countries, social polarisation, the increase in the numberof people below the poverty line for various reasons, the reduction in budget quotas for education and support for young families, the economic and financial crises, unemployment, the massive migration of the labour force and the sharp drop in the quality of compulsory education are all being observed, the disinterest of the leaders of political parties, to which canbe added some regional/local causes, will maintain and even increase domestic violence, with an increase in the social costs of partial and temporary solutions to manifestations of domesticviolence, with long-term negative effects on young people who are disoriented, uneducated, increasingly irritable, lacking in prospects and politically manipulated.

The integration of victims and perpetrators is becoming increasingly costly and difficult as long as society as a whole does not develop substantially in economic, financial, mental, cultural, political and educational terms.

In addition to the process itself, behaviour in relation to the beneficiary, judgement and professional judgement are important in achieving the quality of a service, all of which constitute the "quality triangle".

Thus, a large proportion of people working in social care are concerned about the qualityof the services they provide. Quality is important for beneficiaries, staff, carers and helps to reduce costs as well as providing a better service within the same budget.

Those who can directly benefit from quality are the beneficiaries and carers, because their needs are better met and indirectly, *i.e.*, the next time they come for another service, they will have confidence that they will be treated properly.

The national social assistance system is the set of institutions, measures and actions through which the State, represented by central and local public administration authorities, as well as civil society, intervene to prevent, limit or remove the temporary or permanent effects of situations that may lead to marginalisation or social exclusion of individuals, families, groupsor communities.

The issues we discussed are related to the overall prevalence rate of lifetime partner violence (psychological, physical or sexual) from age 15 years onwards, % (violence against women in the family), where we found that 84% of women end up separating from their partnerdue to domestic violence.

As far as female victims of lifetime physical violence are concerned, we noted that mostof them are victims of partners who consume a high proportion of alcohol (60%).

Also, the reason why women do not report violence is primarily because they are afraid,but also because they feel they can cope with it on their own (44%). On the other hand, a highpercentage of women feel that the authorities do not do their job properly (40%), which is whythey remain trapped in domestic violence.

From the above, I believe that it is necessary to include awareness-raising and educationactions to reduce the incidence of domestic violence, especially among young children, throughthe involvement of local authorities. At the same time, increasing the knowledge and awarenessof children, parents, professionals and the general population of all forms of domestic violenceplays an important role by: continuing training programmes for education staff in the area of preventing and combating violence, creating databases of good practices in the area of preventing and reducing violence.

Also, the provision of efficient, accessible social services focused on the individual needs of the beneficiary and the relationship between social service providers and their beneficiaries (use of information means, ensuring confidentiality); the development of human resources involved in the provision of social services and the

improvement of working conditions contribute to the development of quality standards of social services.

PROPOSALS

Increase knowledge and awareness of children, parents, professionals and the generalpopulation of all forms of domestic violence by:

- Campaigns to change the collective perception of violence, focusing on thenegative impact on child development;
- Continue training programmes for education staff in the area of preventing andcombating violence in schools;
- Develop databases of good practices in the field of violence prevention andreduction;
- *Strengthen the capacity of public service providers to prevent and combat all forms ofviolence by:*
- Review the current system for monitoring situations of violence and include teachers in the process of monitoring situations of abuse, neglect and exploitation or any otherform;
- Implementation of the mechanism for reporting, intervening and monitoringcases of violence regardless of the environment;
- Establish a system of indicators for monitoring and evaluating the number ofcases and evaluating the number of cases.

Awareness-raising and education to reduce the incidence of domestic violence, especially among young children, in small communities in disadvantaged, rural areas, involving local authorities

I also recommend that all approaches that focus on domestic violence should be built according to the following principles:

- Avoidance and compensation of interventions;
- Multidisciplinary teamwork, in partnership with the family;
- Ensure and facilitate access to support and specialist services;
- Respect confidentiality and professional rules.

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SHAPING FOREIGN LANGUAGE EDUCATION IN EUROPE TOGETHER: THE EUROPEAN UNION AND THE COUNCIL OF EUROPE

Norica Felicia BUCUR*

Abstract

At present, in many EU countries, students have the possibility to study two foreign languages along their school years and, in addition to that, adults are encouraged to start or continue foreign language learning, as the ability to communicate in a foreign language gives them the chance to come into contact with the cultural values of other peoples, develop their personalities and create wider opportunities for social integration, beneficial to the individual and profitable for the community. This paper attempts to depict the origins and the evolution of the current reality and explain the role played by the European Union and the Council of Europe in setting the trend in this particular field. Using the documentary method of research, this paper aims at providing a diachronic perspective on the events and documents that initiated and laid the foundations for foreign language education not only in the European Union, but also in Europe, at large. Moreover, by critically analysing the recent past related to foreign language education in this region, our paper might offer a useful key to better understanding the present and possibly might help raise greater awareness of the importance of foreign language skills in today's globalized society.

Keywords: *European Union, Council of Europe, language policy, foreign language teaching and learning, lifelong learning.*

1. Introduction

Linguistic diversity is a key feature of Europe's identity and both the Brussels-based EU institutions and the Council of Europe in Strasbourg have actively promoted language learning and multilingualism/plurilingualism. The main language policy agencies within these two institutions are the Multilingualism Policy Unit of the EU's Directorate-General for Education and Culture and the Language Policy Unit of the Education Directorate of the Council of Europe. The work of these agencies is behind the important resolutions, charters and conventions produced by these bodies.

Both the EU and the CoE have developed and promoted policies that (1) place special emphasis on linguistic rights and diversity, mutual understanding, (2) strengthen democratic citizenship and (3) support social cohesion. In recent decades, an impressive number of projects, conferences and meetings have been organised under the auspices of EU or CoE in order to harmonise language learning, considering the general European context, and in order to set out development directions in terms of educational language policies, which should give European citizens the opportunity to learn more foreign languages throughout their lives, so as to become plurilingual and intercultural citizens, able to communicate with each other.

This paper aims at providing the reader with critical insights into the evolution of language education policies in Europe. Thus, by means of documentary analysis, one attempts to give a diachronic overview of the technical instruments (initiatives, recommendations, resolutions, etc.) drafted and put forward by the aforementioned actors, pointing to the possible strengths and weaknesses that characterize the documents meant to function as general guidelines for foreign language teaching and learning in Europe. Hopefully, our concise analysis will allow us to suggest further research directions.

2. The role of the European Union

The EU's interest in human resources issues has progressively increased, at present encompassing policies and programmes covering almost entirely the field of education and training. As a matter of fact, vocational training was the first educational issue to be included on the EU agenda and originally appeared in the Treaty of Rome (1957), being closely linked to the creation of a common market in goods and services, capital and jobs, and education has been a going concern of the EU ever since 1992, when the Maastricht Treaty devoted an article to this particular topic.

Both the European Commission and the Council of Ministers were involved in educational issues during the

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period between the two treaties, organising a wide range of action projects in this area. The formal inclusion of education and training in the Maastricht Treaty[1] proves the importance attached by the EU to these aspects. In article 126 of the treaty, the EU (named the European Community at that time) was asked 'to contribute to the development of quality education by encouraging co-operation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity'. Furthermore, the EU's competence extended essentially to provide incentives for Member States to cooperate with a view to: developing the European dimension, particularly through the teaching of foreign languages; encouraging the mobility of teachers and pupils/students, promoting measures for the recognition of diplomas and periods of study; organising exchanges of information and experience on topics common to the educational systems in the Member States; developing distance learning[2].

The EU's language policy began to take shape more clearly in 1995, when 'The White Paper on Education and Training – Teaching and Learning towards a Learning Society', a reference document on EU lifelong learning, came out, establishing five lines of action: (1) encouraging the acquisition of new knowledge; (2) bringing school and the business sector closer together; (3) combating exclusion; (4) developing proficiency in three Community languages; (5) treating capital investment and investment in training on an equal basis – training should be regarded as an investment, not as an additional expense[3]. Lifelong learning is the concept that underlie all these objectives, and the European Commission points to its significance in economic terms, considering its impact on employment and competitiveness. Also, according to the "White Paper on Education and Training – Teaching and Learning towards a Learning Society", education systems are characterised by inflexibility and compartmentalisation, and by creating opportunities for lifelong learning, there is the possibility of a professional reorientation for those who might need it. Education and training provide those landmarks necessary for the affirmation of collective identity and pave the way for new discoveries in science and technology. In this way, a degree of independence can be achieved and, at the same time, the level of cohesion and belonging increases, with Europeans being able to adapt more easily to the growing challenges, as a result of the impact of the information society, internationalization and scientific and technological knowledge[4].

The fourth objective included in the White Paper (1995), learning three Community languages, must be seconded by the ability to adapt to working and living environments specific to the different cultures envisaged, since, by learning a foreign language, one gives access to the knowledge of a people. More specifically, in the given context, in this way, it is possible to build European identity by becoming aware of the European wealth and diversity, and to achieve a better understanding between European citizens. Also, the White Paper[5] reveals the close link that exists between school outcomes and learning a foreign language from an early age, the studies undertaken demonstrating the positive influence of foreign language learning on the mother tongue, by stimulating intellectual capacity and expanding the cultural horizon. Therefore, in order to achieve the proposed objective, the White Paper proposes the following support measures to be taken at European level:

- supporting the European Community in introducing assessment systems (including the development of quality indicators) and quality assurance schemes, including methods and materials used to teach Community languages;
- defining a 'European quality label' and awarding it to schools that meet certain criteria[6] on promoting proficiency in Community languages;
- supporting the exchange of teaching materials for language learning, suitable for various groups (adults, those with a low qualification, pre-schoolers and schoolchildren, etc.);
- encouraging learning Community languages from an early age, in particular through the exchange of teaching materials and experience in the field.[7]

In 1996, the "Green Paper – Education, Training, Research. The obstacles to transnational mobility" attempted to propose the right solutions to remove the various obstacles (lack of access for the unemployed to transnational training; status problems for those who wish to participate in internships or to perform voluntary work; territorial restrictions on student scholarships; divergences in tax arrangements for research scholarships;

[1] Maastricht Treaty, 1992, art. 126, p. 47.
[2] Green Paper on Education, European Commission 1993, pp. 5-7.
[3] White Paper on Education and Training, 1995, p. 1.
[4] White Paper on Education and Training, 1995, pp. 6-8, 53-54.
[5] White Paper on Education and Training, 1995, p. 47.
[6] The White Paper (1995, p. 49) lays down the following criteria: the use by all primary school pupils of a community language, and by secondary school pupils of two community languages; involvement of teachers from other EU member states; the use of methods to promote self-learning of foreign languages; setting up an organisation to enable contact between young people in the EU from different member countries (including through the use of information technology).
[7] White Paper on Education and Training, 1995, pp. 48-49.

problems with the mutual recognition of university and professional diplomas, etc.) which hindered transnational mobility. The massive focus on becoming proficient in English, French and/ or German, and the lack of knowledge of other European languages represented the main obstacles which restricted mobility. Consequently, in Line of Action 8, dedicated to the reduction of linguistic and cultural barriers, the document stated that 'learning at least two Community languages has become a precondition if EU citizens are to benefit from the personal and professional opportunities open to them in the Single Market'[8].

At the Lisbon European Council in March 2000, the EU set a new strategic objective for the next decade: to become the most competitive and dynamic knowledge-based economy capable of sustained growth, able to offer more and better jobs and a high degree of social cohesion. In this sense, for people to acquire the education and training necessary to live and work in the knowledge society, the European Council set the target of developing a framework defining the basic skills that could be provided through lifelong learning: IT skills, **foreign languages**, technological culture, entrepreneurship and social skills[9]. The conclusions of the EU Council in Lisbon resulted in a document entitled 'A Memorandum on Lifelong Learning', published in October 2000 by the European Commission. The importance of language learning and the formation of new skills in the field of information technology as strategies for lifelong learning were underlined from the first message of the memorandum, suggesting that the acquisition of such skills could ensure universal and continuous access to education for European citizens. Moreover, the memorandum argued that lifelong learning would lead to the formation of active citizens able to face the complex challenges of the contemporary world, paying attention to the lifewide dimension of learning as well, which includes formal, informal and non-formal education, in a complementary relationship[10]. As an annex, the memorandum provided a number of examples of good practice, namely projects and initiatives with a clear European dimension, which illustrated innovative and flexible approaches so that citizens can adopt lifelong learning so as to develop their own potential to the fullest and to feel that they can contribute to building the new Europe.

As a direct consequence of all these initiatives, in order to strengthen political cooperation in the field of education and training, the work programme 'Education and Training 2010' (ET 2010) was launched in 2001, the objectives of which include the acquisition of key competences. Recommendation 2006/962/EC of the European Parliament and of the Council on key competences for lifelong learning supported the work programme, defining eight key competences and describing the essential knowledge, skills and attitudes related to each of them. These key competences provided a reference framework in support of the efforts made at national and EU level to achieve the objectives they defined. This framework was primarily aimed at policymakers, education and training providers, employers and learners. Thus, in addition to communication in the mother tongue, mathematical competence and basic competences in science and technology, digital competence, learning to learn, social and civic competences, a sense of initiative and entrepreneurship, cultural awareness and expression, communication in foreign languages was also included. This key competence, in addition to the main dimensions of communication skills in the mother tongue, also involves the skills of mediation and intercultural understanding.

On the basis of the contributions of the Member States, in 2001, the European Commission formulated several objectives which it included in a report[11], setting out the way forward for education systems to contribute to achieving the strategic goal set in Lisbon. As far as foreign languages were concerned, the Commission's report highlighted the fact that only by improving the teaching of foreign languages could Europe reach its potential, be it economic, cultural or social. Furthermore, the teaching of foreign languages must reflect multilingualism as a defining feature of European society.

In January 1999, the Committee of Ministers of the Council of Europe adopted 2001 as the European Year of Languages, which was subsequently enthusiastically supported by the European Commission, and was endorsed by a decision of the EU Council of Ministers and the European Parliament in the summer of 2000. Moreover, UNESCO and other international organisations expressed an interest in supporting this European proposal[12]. With the main objective of developing and promoting, at European level, a message on multilingualism, the 2001 – European Year of Languages initiative was a real challenge for Europe, taking into account the sometimes very different needs and aspirations of the countries and peoples involved.

Formally declaring 2001 as the European Year of Languages, by both the EU and the CoE, could be interpreted as a celebration of Europe's linguistic diversity. It is an important moment that united the efforts of

[8] Green Paper: Education – Training – Research. The obstacles to transnational mobility, 1996, p. 29.

[9] Lisbon European Council (2000): Presidency Conclusions, para. (26).

[10] A Memorandum on Lifelong Learning, 2000, p. 10.

[11] Commission report on the future objectives of education systems, Brussels, COM (2001) 59 final.

[12] L. King, *The European Year of Languages – taking forward the languages debate*, Language Teaching, vol. 34/2001, issue 01, pp. 21-22.

the CoE's Strasbourg Language Policy Division with those of the European Commission to promote the learning of languages of any kind: national, regional, foreign, neighbouring, rare, etc. The central message was 'language learning opens doors and everyone can do it at any time', promoting language learning as a strategy for seizing the opportunities offered by European citizenship and, in particular, the right to free mobility within the EU. So, the target of this action was mainly the general public. Also, it was taken into account the dissemination of information on teaching and learning of foreign languages among specialists (teachers, trainers, translators, decision makers in the field of linguistic policy, etc.).

As a continuation of the directions initiated in 1995 with the White Paper, the Barcelona European Council of 2002 highlighted the place and role of education among the pillars underlying the European social model and stressed that Europe's education systems should become quality benchmarks of by 2010. As for foreign languages, the Barcelona document called for the development of a language proficiency indicator, leading to an improvement in the level of mastery of basic skills, in particular by teaching at least two foreign languages from a very early age[13].

In 2003, the European Commission adopted ‘Promoting Language Learning and Linguistic Diversity: An Action Plan 2004 – 2006’, after a long process of preparation and consultation, pledging to carry out 45 new actions aimed at encouraging national, regional and local authorities to work towards "a major change of pace in terms of promoting language learning and diversity linguistics"[14] These actions fell into three main categories:

1. lifelong language learning, so that all citizens can benefit from being proficient in foreign languages - the actions in this category aimed at teaching foreign languages at all levels (pre-school and primary education, secondary and higher education, adult education)

2. improving the quality of language teaching at all levels - the actions in this category aimed at creating schools conducive to language learning, teacher training, teaching other subjects in foreign languages, testing language skills

3. building a language-friendly environment by accepting linguistic diversity, building communities conducive to language learning and facilitating their learning (*e.g.*, making learning facilities available to people who needed them)[15].

The European Commission's first communication on Multilingualism, entitled 'A New Framework Strategy for Multilingualism', was adopted in November 2005, complementing the action plan described above. The European Commission’s Communication (2005) established three basic components of the EU's multilingualism policy: (1) ensuring that citizens have access to EU legislation, procedures and information in their own language; (2) emphasising the major role of languages and multilingualism in the European economy and identifying ways of further developing it; (3) encouraging all citizens to learn more than one language in order to optimise mutual understanding and communication[16]. With this initiative, the Commission also invited Member States to draw up national plans to promote multilingualism and, at the same time, to work with them to implement the European Indicator of Language Competence, which was intended to lead to the collection of the most credible possible data on young people's language skills.

The importance of multilingualism to the EU was reinforced by the appointment in early 2007 of a first-ever Commissioner, Leonard Orban, as portfolio holder, although in the 2009 reshuffle of the Barroso cabinet, multilingualism was placed under the responsibility of the Commissioner for Education, Culture, Multilingualism and Youth. Under Commissioner Orban's mandate, the EC produced in 2008 the Communication "Multilingualism: an asset for Europe and a shared commitment", which highlighted the role of language policy as a cross-cutting element contributing to all other EU policies. The Communication explained what needed to be done to turn linguistic diversity into an asset for solidarity and prosperity. According to this document, the two central objectives of multilingualism policy were:

- raising awareness of the value and opportunities of the EU's linguistic diversity and encouraging the removal of barriers to intercultural dialogue;
- creating real opportunities for all citizens to learn to communicate in two languages in addition to their mother tongue[17].

Member States were invited to offer, within their national educational systems, a wider range of languages and effective ways of learning them from early childhood throughout adult education, further valuing and developing language skills acquired outside formal education. Furthermore, the European Commission stated its determination to make strategic use of relevant EU programmes and initiatives to bring multilingualism 'closer

[13] Barcelona European Council (2002): Presidency Conclusions, para. (44).
[14] Promoting language learning and linguistic diversity: an action plan, COM (2003) 449 final, p. 7.
[15] Promoting language learning and linguistic diversity: an action plan, COM (2003) 449 final.
[16] A new framework strategy for multilingualism, COM (2005) 596 final.
[17] Multilingualism: an asset for Europe and a shared commitment, COM (2008) 566 final.

to the citizen'[18].

The European Commission's Communication (2008) was welcomed and supported by the EU Council (2008) and the European Parliament (2009) resolutions, with a focus on lifelong learning, competitiveness, mobility and employability. For example, in 2009, as a follow-up to its predecessor, in the Education and Training 2010 (ET 2010) work programme, the EU Council proposed a new strategic framework for European cooperation in education and training, 'Education and Training 2020' (ET 2020), to respond to the challenges which were still relevant to creating a knowledge-based Europe and making lifelong learning a reality for all. Thus, through this framework, Member States received the support they needed to further develop their education and training systems, as these systems should provide all citizens with the means to reach their potential, as well as ensure sustainable economic prosperity and employability. The framework considered the whole spectrum of education and training systems from a lifelong learning perspective, covering all levels and contexts (including non-formal and informal learning).

In 2011, the European Commission returned with a report[19] on progress since 2008, providing a comprehensive inventory of EU action in this area. The report anticipated the 'Strategic Framework for European Cooperation in Education and Training' (ET 2020), in which language learning was identified as a priority, with communication in foreign languages as one of the eight key competences for increasing the quality and effectiveness of education and training. The report underlined that language skills, by increasing employability, were crucial to the Agenda for new skills and jobs initiative launched in 2010 as part of the ET 2020 strategy. They were also a prerequisite for mobility, thus for the successful implementation of the Youth in Action initiative. In a broader perspective, language skills had the potential to encourage and facilitate the exercise of the right of EU citizens to move and settle freely within the territory of the Member States and to stimulate the trans-national exercise by citizens of a wide range of rights conferred on them by EU laws.

3. The role of the Council of Europe

To some extent, a European language policy has existed since the founding of the Council of Europe in 1949. This intergovernmental organisation, initially made up of 10 members and now comprising 46 European countries, often confused with the European Union or the Council of the European Union, was set out to defend human rights, parliamentary democracy and the principle of the rule of law, by promoting awareness of European cultural identity and diversity, by finding common solutions to the challenges facing European society and by strengthening democratic stability in Europe by advocating political, legislative and constitutional reform.

When the European Cultural Convention (1954) was signed by the Member States, possible directions for action in culture, education and sport were provided. The Convention stated that "the aim of the Council of Europe is to achieve greater unity among its members for the protection and attainment of the ideals and principles which are their common heritage" (Council of Europe, 1954), thus encouraging the study of foreign languages, history and civilisation specific to each member country. According to Trim[20], at that time, learning a foreign language was more a way of gaining access to the culture of another people, with culture meaning the higher culture, the intellectual aspects of a civilisation, the socio-anthropological meaning not being yet noticed. Although a Committee of Cultural Experts (renamed the Council for Cultural Co-operation in 1962) was set up following the signing of this convention to control the funds allocated, until 1959 no common educational strategy was envisaged, the Council of Europe being more concerned with economic and social reconstruction.

In November 1959, a conference of education ministers was held in Paris, which proposed a programme of cooperation in secondary and technical secondary education, including the coordination of curricula and the expansion of foreign language study. Council of Europe representatives participated in this conference and, at the end of its works, it was suggested that the Committee of Cultural Experts should promote seminars on common educational issues. The April 1960 seminar, organised by the French government, aimed to disseminate new methods for teaching foreign languages, specifically French for adults (*Le Français Fondamental*)[21]. A number of recommendations were made in response to this seminar: encouraging the audio-visual method; carrying out linguistic research aimed at selecting a basic vocabulary as well as the main grammatical constructions specific to a foreign language; informing textbook authors; adapting the teaching method to the needs of secondary education; developing carefully designed courses and exchanging teachers and researchers.

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[18] *IbIdem*, p. 8.

[19] Report on the implementation of Council Resolution of 21 November 2008 on a European strategy for multilingualism (2008/C 320/01).

[20] J.L.M. Trim, *Modern Languages in the Council of Europe 1954-1997*, Council of Europe, 2007, p. 5, available at *https://rm.coe.int/0900001680886eae*, last time consulted on 6.02.2023.

[21] K. Morrow, *Background to CEF*, in K. Morrow (ed.) *Insights from the Common European Framework*, Oxford University Press, Oxford, 2004, p. 5.

Subsequent annual meetings of education ministers and conferences organised by the Council for Cultural Cooperation (CCC) elaborated on these recommendations, encouraging the inclusion of primary school pupils in the school population studying a foreign language and advocating the importance of a one-year training period in the target country for future language teachers as part of their initial training. Thus, a series of studies were carried out at the suggestion of CoE and published in 1963, one of which stressed the importance of setting up an institution which could make the results of language teaching research more readily available. Nevertheless, the establishment of a European Centre for Applied Linguistics was not put into practice, as CoE experts focused on creating national centres in universities, establishing international associations for language teachers (FIPLV - International Federation of Language Teachers Associations) or for researchers concerned with language learning and teaching (AILA - International Association of Applied Linguistics) and promoting the *'Major Project, Modern Languages*' programme.

The main aim of the *'Major Project, Modern Languages'* programme was to remove the traditional barriers that fragmented the language teaching profession in Europe, and to promote its coherence and effectiveness as a major force for European integration, while preserving cultural and linguistic diversity. More specifically, achieving this objective involved: organising meetings of those involved in similar tasks in the countries concerned; removing communication barriers between teachers and administrators and creating a close link between theory and practice by getting governments and various institutions, especially universities (concerned exclusively with literary and philological research), to accept and promote research into language learning, teaching and assessment. Between 1963 and 1972 these issues were largely achieved through consultative meetings of experts, in studies carried out at the request of CoE, and, above all, at government conferences held in each of the ten Member States. These conferences led to a growing consensus among decision-makers on language policy and their recognition of the role played by the Council of Europe in the design of language strategy. Thus, according to Trim[22] (2007: 13), Resolution (69)2 'On an intensified Modern-Language Teaching Programme for Europe' (1969) remains an important landmark in the history of language teaching in the twentieth century, as it clearly stated that the purpose of language learning is to enable Europeans to communicate and cooperate freely with each other, while preserving the full diversity and vitality of European languages and cultures; rejected elitism and set as the main goal of national language policies access for all to language learning, within every education system, from primary to higher education and continuing with lifelong learning; recognised the potential of information technology; highlighted the importance of teacher training and reviewed the need to reform examinations and introduce new testing methods; launched a research programme and proposed more effective ways of disseminating research results. Trim also drew attention on the erroneous belief that CoE's concern with foreign languages began in 1971, due to a lack of information or difficulty in accessing information from the earlier period[23]. Moreover, Trim knowledgeably[24] pointed to the fact that the programmes and projects that were subsequently advanced would not have been possible without the debates, research, recommendations and decisions of the period just described.

The three CCC committees (*Committee on Higher Education and Research*, *Committee on General and Technical Education* and *Committee on Out-of-School Education*) were involved in the implementation of the 'Major Project, Modern Languages' programme. The main concern of the *Out-of-School Education Committee* was the development of the concept of lifelong learning and was primarily focused on adult education. This type of education posed problems in terms of organisation and administration, and M.B. Schwartz, a specialist in continuing education at the University of Nancy, suggested to the Committee that certain subjects (which allowed for this) should not be taught or assessed in their entirety, but rather be split up, with examinations taking place at the end of each stage completed, proposing a system similar to the credit-based system used successfully in the USA at the time. The Committee felt that the feasibility of this proposal could be investigated particularly in the field of language learning and teaching, and, after a series of preliminary meetings of experts, a symposium on *"Language Content, Means of Assessment and their Interaction on Language Teaching and Learning in Adult Education"* was held in Rüschlikon, Switzerland, from 3 - 7 May 1971, to examine three aspects considered important for the introduction of a credit system: (1) new forms of organising language content; (2) types of assessment within a credit system; (3) ways of implementing a credit system in language teaching/learning in adult education[25]. Extensive discussions took place at this symposium and, as a direct consequence of these discussions, it was decided to set up a working group to investigate the possibility of

[22] J.L.M. Trim, *Modern Languages in the Council of Europe 1954-1997*, Council of Europe, 2007, p. 7, available at *https://rm.coe.int/0900001680886eae*, last time consulted on 6.02.2023.

[23] *Idem*, p. 14

[24] Trim was directly involved in the development of the Common European Framework of Reference for Languages (CEFR).

[25] J.L.M. Trim, *Modern Languages in the Council of Europe 1954-1997*, Council of Europe, 2007, p. 15, available at *https://rm.coe.int/0900001680886eae*, last time consulted on 6.02.2023.

introducing a European credit system. Within this group of experts, it soon became clear that the role of an international organisation was not to impose arbitrary decisions, but to analyse the needs, interests and characteristics of foreign language learners in order to be able to propose general aims and principles, to provide models which practitioners could adapt to their own circumstances and to encourage the exchange of ideas and experiences between them. So, the group's main priority was to carefully investigate and formulate the fundamental principles on which a long-term European language policy could be based.

Given the 1970s circumstances (internationalisation of various economic and social issues as a direct consequence of the developments in communications and information technology), the demand for practical language skills grew and it was increasingly clear that changes were needed to meet the challenges. The marginal position of adult education was an advantage for the group of experts set up after the Rüschlikon symposium, as it gave the group the opportunity to develop a new approach to language learning and teaching without having to submit to political constraints that would have been difficult to avoid under different circumstances in an intergovernmental organisation, while at the same time having the possibility of exerting considerable influence if it had gained the support of CoE language policy makers. Thus, the group set out to develop strategies involving educational innovation, leading to curriculum and assessment reform; to encourage the development of qualitatively superior courses and teaching materials; and to match the specific types and content of initial and in-service language teacher training. To achieve these objectives, a series of studies were carried out and published (in 1973): (1) Richterich developed a model for describing the needs of adults and produced an analytical classification of categories of adult foreign language learners; (2) Wilkins described the basic linguistic and situational content of a credit-unit system; (3) van Ek presented preliminary considerations of the concept of "threshold level" in a credit-unit system; (4) Trim continued the outline of the fundamental principles on which language learning and teaching should be based[26].

Discussions continued in the expert group, and in 1975 van Ek published the "Treshold Level", a document detailing the minimum language requirements that people wishing to train themselves should achieve in order to be able to communicate in English on everyday matters with people from other countries and to be able to cope and lead a normal life when visiting another country. Until then, a foreign language learner's progress was assessed by their ability to construct correct sentences using the vocabulary items and grammatical structures they had learnt. From Threshold Level onwards, priority is given to situations that foreign language learners might encounter, with an emphasis on how they are expected to use the language in those situations. According to this model, the functions of language were divided into six broad categories: (1) conveying and obtaining information (2) expressing and inferring attitudes; (3) solving problems; (4) socialising; (5) structuring discourse; (6) repairing communication. Subsequently (1976), also under the auspices of the CoE, a version for French appeared (Un niveau seuil), then for Spanish, German, Italian, Danish, Dutch, Norwegian, etc., and in 2001 even for Romanian, the concept inaugurated in 1975 by van Ek for English proving its full value throughout its existence. Moreover, the model did not stagnate and, following research undertaken in the 1980s[27], a revised and extended version was published in 1991 under the name Threshold Level 1990. According to Trim[28], this version of the Threshold Level was to prove extremely valuable for Central and Eastern European countries, which had just joined the Council of Europe and by implication signed the Cultural Convention[29].

When it was introduced, the Threshold Level was considered a low level of proficiency and generated interest to few assessment boards, and for a short time it was even accused of minimalism and lowering the standards of language teaching. However, subsequent research showed that there was a need to set a target that could be reached after only one year of study. Thus, in 1977, the Waystage level was designed by van Ek and Alexander[30], and used as the basis for the development of the *Follow Me* course, developed under the auspices of the CoE and co-produced by the BBC, which was a resounding success, having been watched in 60 countries by over 500 million viewers since 1979. Initially, Waystage was seen as an interim objective, but gradually became a stand-alone level, revised and republished in 1991 as Waystage 1990.

The influence of the Expert Group did not remain confined to adult education, as in 1976 the Committee on General and Technical Education asked the group to adapt *Threshold Level* and *Un Niveau-Seuil* to the needs of schools/school education. Furthermore, the CoE Parliamentary Assembly adopted Recommendation 814 (1977), addressed to the Committee of Ministers, which included the following demands:

(a) asking the governments of CoE member countries to develop language teaching taking into account:

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[26] R. V. White, *The ELT Curriculum – Design. Innovation. Management*. Blackwell Publishing House, Oxford, 1988.

[27] Trim *et al*., 1984; van Ek 1986, 1987.

[28] J.L.M. Trim, *Modern Languages in the Council of Europe 1954-1997*, Council of Europe, 2007, p. 20, available at *https://rm.coe.int/0900001680886eae*, last time consulted on 6.02.2023.

[29] *Idem*, p. 27.

[30] *Idem*, p. 21.

the particular needs of less privileged groups, especially immigrants; the need to diversify the languages taught; the cultural advantages of maintaining linguistic minorities in Europe; the pedagogical aspects of language learning;

b) encouraging the adoption of coordinated educational policies for language teaching based on proposals drawn up at European level;

c) reporting on action taken by member countries following Resolution (69) 2 adopted by the Committee of Ministers;

d) supporting the activities of the CCC in the field of languages, and in particular the research undertaken by the group of experts involved in the development of a European system of unit-credits, with particular emphasis on the different basic requirements for different types of learners (threshold levels).

A meeting in 1977 called for abandoning the overly broad objectives of the *Major Project, Modern Languages* and concentrating available resources on the direction set by the expert group. In fact, the expert group was replaced by a project group of 19 members, representing 13 countries, under the direction of John Trim. The project, which ran from 1977 to 1981, was called: *"Modern Languages: improving and intensifying language learning as factors making for European understanding, co-operation and mobility"*. The proposed objectives were in line with the general principles of lifelong learning which underpinned the work of the CCC. Among others, the aims of the project were: to develop curricula that meet the needs and expectations of learners; to develop systematic procedures for identifying target groups and analysing their characteristics; to provide a detailed definition of communication objectives; to design models and materials adapted to different categories and types of learners; to evaluate educational systems and their outcomes; to reconsider the initial and in-service training of language teachers; to encourage applied research into the conditions under which language learning takes place[31]. Moreover, Holec's study *"Learner Autonomy"*, which was part of this project, is considered one of the main contributions to the communicative approach to language teaching.

The studies carried out as part of this project had a considerable impact on language policy in Europe, which started being seen as a source of cultural enrichment and a means of removing prejudice and discrimination of all kinds. The recommendations were therefore aimed at diversifying the languages taught in schools and stepping up international visits and exchanges, with the declared aim of modernising the professionalisation of teachers in the field, who were still strongly rooted in classical philology studies. Through this project, an integrative framework was built, principles were enunciated, and reliable methods were developed at pilot level to improve language teaching and learning, with those involved aware that "effective innovation required consensus among examiners, administrators, publishers, inspectors, teacher training institutions, teachers and students, and also sustained effort over a long period of time"[32] In addition to that, the report's conclusions stressed that the success of the recommendations included in the project depended to a large extent on political will[33]. As a result, at the suggestion of the CCC, the Committee of Ministers issued Recommendation R(82)18, recommending to member governments the general reform of modern language teaching, and, following this recommendation, the importance of language learning was at that moment recognised at European level and it started being generally accepted that language teaching and learning should aim to develop communicative competence in the target language[34].

The progressive intentions of the CoE, expressed most clearly in R(82)18, were embodied in the project *'Learning and teaching modern languages for communication 1982-1987'*, which was aimed in particular at the changes made by the Member States in lower secondary education. In this respect, we were witnessing the multiplication of direct contacts between project participants through exchanges of experience and documents, which made an essential contribution to the reform of language education policies in Europe. At the same time, no less than 37 international workshops were organised within the framework of the project, in 15 different countries, to improve the professional development of language specialists in terms of attitudes, knowledge and skills.

Following two intergovernmental symposia, *"Language learning in Europe: the challenge of diversity"* (Strasbourg, 1988) and *"Language learning and teaching methodology for citizenship in a multicultural Europe"* (Sintra, 1989), the project "Language Learning for European Citizenship" was launched in 1990 with the aim of developing the principles and models set out in previous projects, giving priority to less researched areas of education and topical issues. This project targeted: primary education, to which attention had been given in

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[31] J.L.M. Trim, *Modern Languages in the Council of Europe 1954-1997*, Council of Europe, 2007, pp. 23-24, available at *https://rm.coe.int/0900001680886eae*, last time consulted on 6.02.2023.

[32] *Idem*, p. 26.

[33] *Ibidem.*

[34] *Ibidem*.

1960[35]; upper secondary education and the interface between pre-university and university education; vocational education, in particular the transition from school to work, advanced adult education based on positive experiences of language learning during compulsory education or in higher or vocational education. The main research topics of this project included: newer and more comprehensive definitions at various levels to take into account recent theoretical developments (the socio-cultural dimension of language learning and teaching); the use of new technologies and media (computer-assisted language learning and exploitation of the opportunities offered by information technology in view of possible access to computers at school or at home); bilingual education; integrating educational links, visits and exchanges into the school curriculum, with particular reference to language learning and teaching; 'learning to learn', helping pupils to acquire the attitudes, knowledge, understanding, skills and strategies needed for lifelong learning; assessment of language skills and learning programmes[36].

In order to achieve the proposed objectives and to cover the topics included in this project, 31 workshops were organised between 1990 and 1996. In addition, following the events of 1989-1990 in Central and Eastern Europe, the project *"Language Learning for European Citizenship"* became part of numerous sub-projects with a view to provide the necessary assistance.

Another result of this project between 1990 and 1996 was the development of a level above the Threshold, called Vantage (van Ek and Trim 2001), at the request of adult language teaching institutions. This level differs from the Threshold in that it involves a refinement of notional and functional categories, an enlarged vocabulary, superior control of conversational strategies, greater socio-cultural awareness, increased ability to understand and produce longer and more complex statements, improved skills for reading a variety of texts, etc.

Formally, the project ended in 1996. The final report contains a series of recommendations, mostly taken from the reports of workshops held during the project, aimed at developing new priority areas and topics, addressed to educational authorities in the member countries and language teaching and learning professionals. The report was submitted to the Intergovernmental Conference held in Strasbourg from 15 to 18 April 1997 and, on the basis of reports from member countries[37], it was shown that the values, objectives and methods proposed and piloted by the CoE since the early 1970s, and even earlier, had been accepted and were in the process of implementation everywhere at national, regional and local level. As a result, member governments could continue to work on developing these directions, especially as from 1994 the European Centre for Modern Languages was inaugurated in Graz (Austria)[38] as an institution of the CoE and which, together with the CoE Language Policy Division, acted as a catalyst for language reform. Moreover, since the Maastricht Treaty (1992), the language policies of the CoE and the EU have started to resemble and have even overlapped as the number of members has increased.

4. Conclusions

EU language policy has been aimed at protecting linguistic diversity and encouraging the acquisition of foreign language skills not only for reasons related to cultural identity and social integration, but also because multilingual citizens are more likely to pursue the educational, professional and economic opportunities offered by an integrated Europe. Thus, the general education and training programmes launched by the EU, its action plans and framework strategies have shared a common goal: to raise public awareness as far as the multiple benefits of foreign language learning are concerned.

According to CoE, the plurilingual and intercultural competence is the ability to use a broad repertoire of linguistic and cultural resources to meet communication needs or to interact with people from other backgrounds and contexts, while enriching it in the process. Plurilingual and intercultural education takes into account the repertoire of languages, as well as the cultures associated with them, which individuals have acquired, with formal recognition in the school curriculum or not – languages of instruction (as a subject or training medium), regional/minority languages, modern and classical foreign languages, languages of immigrants. The CoE has encouraged a holistic approach that develops increased interrelationship between languages, better coordination between teachers, and the exploitation of individuals' transversal skills.

European language policy has evolved progressively and has become increasingly comprehensive, at least

[35] In the UK, in 1963, an experiment was launched on the teaching of French to primary school pupils through the use of audio-visual courses; the results did not meet the expectations and funding for the project was withdrawn in 1975 (Trim, 2007; Jones&McLachlan, 2009).

[36] M. Byram, *Foreign language learning for European citizenship*, in The Language Learning Journal, vol. 6, issue 1, pp. 10-12, 1992.

[37] Delegates representing member governments in the project group were asked to provide information on how the CoE project, *Language learning for European citizenship*, contributed to the promotion of language learning/teaching in their country (Trim, 2007:36).

[38] The European Centre for Modern Languages' mission is to disseminate and implement new language policies, promote dialogue and educational exchanges between different actors in the field, build new networks of specialists and popularise innovative approaches to language learning and teaching.

in terms of documents. The brief review of the main moments, carried out in this article, shows the extremely complex nature of this policy, to a great extent due to the impressive number of documents drafted at the initiative of the CoE and/or the EU. The influence of these documents on language practice is markedly visible in foreign language methodology and assessment: worldwide language teachers have enthusiastically embraced the communicative approach, and the Common European Framework for Languages has become the reference point in assessment scales in Europe and beyond. Thus, it can be said that the efforts made by the CoE, and subsequently by the EU, have had beneficial results on language teaching and learning. Further research might focus on issues related to multilingualism and plurilingualism, as these are the direct result of the foreign language education policy pursued by the EU and the CoE.

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RECONFIGURING THE EDUCATIONAL PROCESS THROUGH THE USE OF DIGITAL TECHNOLOGIES AND THEIR IMPACT

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Abstract

In this paper I aim to highlight the profound changes brought to the educational process through the use of digital technologies and the impact they have had during the pandemic and post pandemic period, as the method of computer-assisted instruction and online course delivery is still used today in combination with the traditional method, especially in university settings.

In the paper I will analyse the following aspects:

(a) European Union policy in the field of digital education;

b) The emergence of socio-educational phenomena that have an impact on development such as: the digital divide (digital segregation), digital literacy and computer literacy;

c) Changing learning behaviour;

d) The effects of using social networks on learners and teachers.

Keywords: *education system, ICT, digital divide, digital literacy, information literacy, e-learning platforms.*

1. Introduction

Effective use of ICT requires a change in teachers' knowledge, practices and conceptions. Teachers need to be open to innovative methods and understand the advantages of ICT technology in their work and undertake appropriate training to be able to include technology in the teaching-learning system. ICT contributes to a rethinking of the teacher-learner interaction process.

The adoption and effective incorporation of information and communication technology (ICT) into teaching and learning in schools/universities is unevenly achieved, although the value and importance of its use is recognized by teachers.

The inertia of education systems and resistance to change on the part of teachers, the high costs of purchasing the necessary equipment, the discrepancies between the education system in urban and rural areas, and the lack of teacher training are factors that lead to low implementation of information technology.

Investment in hardware and software equipment is therefore needed, as well as training for teachers so that they can be used to their full capacity. The more intensively, fully and comprehensively ICT equipment is used, the more justified the economic investment. The mere physical presence of such equipment in classrooms does not mean that the technology contributes to an interactive and developed educational process.

2. European Union Policy in the field of digital education

The European Commission has developed an action plan which includes measures on how education and training systems can make better use of innovation and digital technologies and support the development of relevant digital skills needed in life, work and the profession in an era of change. The plan has three priorities: better use of digital technologies in teaching and learning, developing digital competences and skills, improving education through better data analysis and forward thinking.

Digital competence is one of the eight key competences for lifelong learning, as set out by the European Commission in a framework set of recommendations for all EU Member States.

Digital competence is defined as the confident, critical and responsible use of digital technologies for learning, working life and participation in society.[1]

The Digital Education Action Plan (European Commission, 2018) focuses on the need to encourage, support and increase the conscious use of digital and innovative educational practices through better use of digital technology for teaching and learning as well as through the development of digital competences and skills. We are looking at digital skills training for learners and teachers on the one hand and the use of technology for pedagogical purposes to support, enhance and transform learning and teaching on the other.

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[1] Council Recommendation of May 22nd 2018 on key competences for lifelong learning, OJ C 189, 4.6.2018, pp. 1-13.

The European Digital Competence Framework, also known as DigComp, describes digital competence in detail and divides the knowledge, skills and attitudes needed by all citizens in a rapidly evolving digital society into five areas:

1. Information and data competences (evaluation of data, information and digital content, management of data, information and digital content),
2. Communication and collaboration (interacting using digital technologies, civic engagement using digital technologies, collaborating using digital technologies),
3. Creating digital content (developing digital content, embedding and detailing digital content, copyright and licensing, programming),
4. Security (protecting devices, protecting personal data and privacy, protecting the environment),
5. Problem solving (solving technical problems, identifying technology needs and responses, creative use of digital technologies, identifying digital skills gaps).

Teachers' digital competences and associated teaching and learning practices are also addressed in the European Framework for Digitally Competent Educational Organisations (DigCompOrg). SELFIE (Self-Reflection on Effective Learning by Stimulating the Use of Innovative Educational Technologies) is a free online self-reflection tool for schools, based on DigCompOrg, which helps schools to identify their strengths and weaknesses in using digital technologies for teaching and learning.

3. The emergence of socio-educational phenomena that have an impact on development

As digital technology has advanced, the possibilities for its use in education have increased, and the effects on learners depend largely on how these technologies are used in the teaching-learning process. Digital teacher training is essential in facilitating learning through digital technology.

We note that the increasing involvement of this technology in our lives has led to the emergence of a number of socio-educational phenomena: the digital divide, digital literacy and information literacy.

The digital divide refers to inequalities in terms of access to or use of resources depending on a number of factors, namely: income levels, the urban-rural divide, the lack of digital skills among both teachers and learners, and the lack of financial resources to purchase equipment.

Digital literacy is the ability to retrieve information from multiple sources, assessing their credibility and usefulness, skills related to creating and publishing digital content in the virtual environment, information management.

The main skills related to digital literacy are: use of hardware and software, use of applications, innovation and creativity, information processing (searching, analysing and evaluating data), data and information management, communication, internet security, openness and willingness to learn, adaptability.

Computer literacy encompasses functional skills and competences related to the use of computers and applications (use of ICT-based devices, applications, software and services, ability to design and implement ICT solutions, ability to work with a range of tools, platforms to accomplish complex tasks). Another aspect concerns digital communication, digital creation, digital learning and teaching.[2]

Digital learning is the ability to participate in and benefit from learning opportunities, identify and use resources, digital platforms, use digital tools, ability to manage one's own time and tasks.

Digital teaching is the ability to teach and support learners in the context of digital learning (different educational approaches), to design learning opportunities, to support and facilitate learning by effectively using available digital tools and resources[3].

Artificial intelligence helps the learner to assimilate knowledge and new skills through experiential learning, knowledge of phenomena beyond human perception, facilitating understanding of complex concepts through processing of spatial representations.

4. Changing learning behavior

The digitization of education brings with it new ways of looking at the learning environment, of understanding the place and role of teachers and learners in this process. Digital learning is not about technology but about pedagogy and the teacher has to be the magician of building a quality course, to bring passion to the field they teach. The educational environment must be open to new technological solutions, as ICT leads to new horizons of knowledge and learning.

[2] A. Băban, *Educational Counselling*, Psinet Publishing House, Cluj-Napoca, 2003.

[3] I. Albulescu, H. Catalano, *E-didactics. The process of instruction in the online environment*, Didactica Publishing House, Bucharest, 2021.

Technology can offer the teacher the possibility to make teaching more individualised, more flexible in terms of course content in relation to individual needs and circumstances. It should be noted that the use of technological solutions, educational platforms, various digitised materials does not replace the teacher's work in the classroom. Courses should be blended, not just e-learning. The material and teaching methods should always be adapted to the target group, taking into account the objectives, age, educational level, motivation and the final aim of the course, what are the benefits for the learner.

Learners want to be respected, to be trusted, to matter, to follow their passions and interests, to work in groups and projects, to make decisions, to compete with each other, they want an education that really trains them for professional life.

ICT fosters active learning, provides technical support for mentoring programmes, educational resources, virtual learning communities.

Learning performance is greatly influenced by the ability to use electronic resources, to process and understand digital sources of information. Information is easily accessible, and many young people find the Internet sufficient for learning without having to go to libraries. The downside of online information resources is that they encourage copy-paste behavior without further analysis of the subject. This leads to superficial learning.

The ICT-based learning approach leads to self-management of the learning process.

The learning profile of those using the digital sphere consists of increased speed of task completion, non-linear processing, simultaneous engagement in multiple tasks, preference for images, active learning in unconventional environments, desire for immediate rewards.

They can multitask by processing information simultaneously, but there is also the disadvantage that they have the ability to retain fewer items in a given time and keep them in memory for a shorter time, as well as the longer time needed to complete a task. Preference for pictures over text because they have the ability to visually process different material, but there is the disadvantage that they do not have the patience to read books, texts needed to create a rich, appropriate vocabulary, literature. Random access to information leads to a partial, incomplete understanding of a subject. Immediate reward for effort can have detrimental consequences for learning in terms of difficulty in persevering through obstacles and creates dissatisfaction when reward is not received immediately. Strategies to capture and maintain attention include the use of interactive materials, multimedia, images and graphics[4].

5. The effects of using social networks on learners and teachers

The Covid-19 pandemic has profoundly affected the education system and accentuated existing social inequalities.

In September 2020, the Government together with the European Commission decided to upgrade the approaches to the training and digital education plan with the aim of advancing the vocational training of young people in a new digital era. Digitalization has proved to be the lifeline of the education system. Thus, the most effective method of continuing courses in education systems and adapting to the given situation and conditions imposed by the pandemic is the hybrid scenario. This involves a number of learners taking turns in the classroom while the others take classes online, the process being on a rotational basis[5]

Communication is an important way to re-establish relationships with others, so learning platforms within the online environment are the central points through which learning and communication activities can be carried out in ensuring quality education for all.

They play a fundamental role in times of crisis to guarantee efforts and enable access to effective communication and documentation. There must be a starting point through which learners and others can trust. Digital technologies, social networks and connections are needed more than ever[6].

Digital technologies are vital in the procurement of equipment and platforms and are becoming indispensable to the whole population. In line with the isolation of the pandemic period, they represent and guarantee a life-saving method for a proper social life.

Because of the new activities taking place in our lives online, ensuring security is more advanced than ever. We have to rely on digital technologies to be safe from any dangers of offences, attacks and security in terms of connections. It is necessary for everyone to be able to have advanced security, both while working online and

[4] V. Frunzaru, O. Ştefăniță, *Social dialogue, problems and solutions in education. Online education in pandemic*, Tritonic Publishing House, Bucharest, 2021.

[5] European Commission. Coronavirus: online learning resources. Available at: *https://ec.europa.eu/education/resources-and-tools/coronavirus-online-learning-resources_ro*.

[6] T. Ivan Cretu, *Identifying the psycho-pedagogical problems of learners during the Covid-19 pandemic*.

offline, but also compliance to support digital needs. [7]

Within the online environment, learners have the opportunity to belong to an open environment that facilitates the skills, analysis, beliefs and feedback needed to enhance their needs and develop their capabilities in the learning process. Moreover, changes are made in the role of the teacher as well as in the relationships they undertake with their learners, so that the teacher has the duty to be like a guide, while learners can carry out their activities in the classroom becoming much more active than in the face-to-face learning style.[8]

The most common obstacles in teaching a lesson in the classroom were the difficulties of using technology, namely e-learning platforms, to create sections through which learners could perform their online presence or sections through which, they could add their completed assignments.

Other problems most often encountered were fixing a stable connection, and difficulties in turning on the camera and microphone. These lead to instability of learners' attention.

Teachers organise their courses according to the conditions, on various platforms, but do not provide the guidance needed for learners to accurately acquire the concepts taught by the teacher in the courses. Due to the absence of guidance from teachers, learners have to seek help from other colleagues with wider expertise in a particular field or to find information on various online sources to better understand the information taught in class and to carry out their homework easily. Thus, looking at this perspective, it can be seen that teachers and learners alike are no longer showing the same interest in teaching activities, with the online environment being a hindrance to learning as before.

Teachers feel that by doing homework, learners acquire the information they are taught and practise their knowledge in a particular area, and they feel that there is no need for counselling, as all the work takes place online. If the learner has learning difficulties, teachers upload help materials and tutorials to e-learning platforms.

The use of new digital methods in learning processes has put teachers in a position where they have to focus on devising a different plan for the learning process, which is in line with expectations in terms of communication using digital technologies.

The move to the online environment has also caused difficulties for learners in the distance learning process: an unstable connection, the absence of the new learning style and use of platforms. Another barrier to the learning process among learners was the lack of an appropriate environment, as some live modestly and do not have the necessary environment to be able to attend classes, and the absence of tools according to the process underlying online learning. This learning system seems difficult to access in Romania, and for some it is considered to be a lie, as there are learners who do not have access to the Internet and especially to the tools that make communication between teacher and learner possible. For some children, lack of access to the Internet can lead to dropping out of school. This is a very common situation among young people in Romania who, moreover, end up dropping out of school for various reasons: either they are part of an austere environment, or they come from families with various problems, both personal and financial, and their parents are unable to provide them with the opportunity to continue studying due to living conditions.

Moreover, the pandemic also has a major influence on dropout among learners because of the obstacles they face in learning new skills. Because of this, illiteracy and dropping out of school have become widespread among young people because they cannot get used to the conditions in terms of the education system and leads to irrevocable dropping out of the educational process.

6. Conclusions

Digitization is a way of integrating the whole community and is a factor in the success of future generations.

Thus, integrating the changes brought by the pandemic has created opportunities for the expansion of digital competence in the education system, but also many disadvantages for education at school level, major learning gaps among young people, social and educational differences between people from different backgrounds, those with fewer opportunities to continue their education, to attend an institution, ethnic and linguistic minorities (UNICEF - Building resilient education systems in the context of the Covid- 19 pandemic: Considerations for policy makers at national, local and school unit level,2020).

Lack of computers, specific equipment for quality learning, and lack of access to the Internet have been major shortcomings in the learning process of learners and the possibility of falling behind in the subject matter, which can also lead to dropout. Other countries more advanced in digitisation such as the Nordic countries, Denmark, Sweden, Norway have been caught off guard by the pandemic, but digitally prepared.

Although young people have the opportunity to access a wide range of information, they are not familiar

[7] I. Nicola, *School Pedagogy Treatise*, Aramis Publishing House, Bucharest, 2000.

[8] I. Albulescu, H. Catalano, *E-didactics. The process of instruction in the online environment*, Didactica Publishing House, Bucharest, 2021.

with it. They have access to information, but they do not know how to select it, they do not know what to do with that information, how to integrate it, they use digital technologies for other, not so useful purposes.

Teachers see the use of various digital means used to create an online connection by learners as the way some of them use technologies, not as a necessary learning device.

New circumstances, unused and unadapt, have quickly molded themselves into technical educational process, through synchronous learning, which was initially initiated with uncertainty by most of the teachers, and for the learners was curiosity and pathos.

The learners also encountered difficulties related to e-learning, including the change in the teaching environment, the lack of methodologies to be applied in emergency situations, the adaptation to digital pedagogy and last but not least the lack of required technologies. However, the major challenge faced by teachers was the absence of digital skills.

Due to these circumstances, teachers have been forced to incorporate ICT-based learning programmes to adapt to new technological methods.

The delivery of training through online means, constitutes certain knowledge, skills, not only in terms of integration and management of content, ensuring essential tools for the training process, adaptability of information methodology, but rather in terms of teacher-student preparation for a teaching activity.

Clearly, the new situation will have consequences for the educational process based on learning outcomes and the minimum knowledge of learners.

The interruption of school courses has had a negative impact on the education system. Teachers are offering a long time in learning the new methodology, in addition to the traditional one, but also the fact that it is a much more difficult method to capture children's attention and motivation in the learning process.

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UNIVERSITIES UNDER THE MAGNIFYING GLASS OF GLOBAL UNIVERSITY RANKINGS: THE PERFORMANCE OF ENTREPRENEURSHIP EDUCATION.

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Abstract

The EU and public entities have shown a keen interest in promoting Entrepreneurship Education in universities through policy initiatives and regulations. This study aims to examine the extent to which Entrepreneurship is incorporated into the ranking methodologies of Higher Education Institutions (Universities). Consequently, the research question posed is: How do the indicators employed by global rankings capture the performance of universities in Entrepreneurship Education? Utilizing data from the International Ranking Expert Group Observatory, this study selects Global University Rankings categories, which encompass a total of 30 rankings as the sample. Our findings reveal that while the European Commission strive to create a public framework that supports entrepreneurship education, the sampled international rankings do not consider entrepreneurship as a criterion to evaluate university performance.

Keywords: *Entrepreneurship, Global University rankings, Entrepreneurial universities.*

1. Introduction

The global higher education landscape has experienced significant transformations in recent years, with an increasing emphasis on innovation and entrepreneurship as key drivers of economic growth and social impact. Entrepreneurship education has emerged as a critical component in the curriculum of universities worldwide, as they seek to foster an entrepreneurial mindset and skill set among their students. This paper explores the performance of entrepreneurship education within the context of global university rankings, shedding light on the evaluation criteria used by these rankings and their implications for universities' entrepreneurship education programs.

The importance of this matter stems from the growing influence of global university rankings on universities' strategic decision-making, reputation, and funding opportunities. These rankings not only affect students and faculty but also have broader implications for policymakers, employers, and society at large. As such, understanding the performance of entrepreneurship education within the context of these rankings is crucial for universities aiming to enhance their programs, as well as for stakeholders seeking to identify the most effective entrepreneurship education practices.

To address this matter, the paper will conduct a comprehensive analysis of leading global university rankings, such as the Times Higher Education World University Rankings, QS World University Rankings, and the Academic Ranking of World Universities (ARWU). The analysis will focus on the evaluation criteria and indicators used by these rankings to measure entrepreneurship education performance. Additionally, the paper will explore the relationship between these evaluation criteria.

This research contributes to the existing specialized literature by examining the intersection between entrepreneurship education and global university rankings, an area that has received limited attention so far. While previous studies have explored the general impact of university rankings on higher education institutions and their decision-making processes, this paper offers a more focused analysis on entrepreneurship education, providing valuable insights into the potential gaps and limitations of current ranking methodologies in evaluating this critical aspect of higher education. Ultimately, the findings of this paper will contribute to a deeper understanding of the role of global university rankings in shaping entrepreneurship education and will serve as a foundation for future research.

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2. Paper content

The role of education in fostering societal growth and transformation has become the mission of various international organizations, such as the World Bank, the United Nations, and the United Nations Educational, Scientific, and Cultural Organization (UNESCO). These organizations have sparked interest in promoting and generating actions to address the educational challenges faced by new generations. For instance, on September 25, 2015, the 193 Member States of the United Nations assumed seventeen challenges called the Sustainable Development Goals (SDGs) within the framework of the 2030 agenda; the fourth challenge is titled "Quality Education." Within this transformative role of education, we focus on entrepreneurship, understanding that Entrepreneurship Education (EE) is transformative because it calls for constant movement, identifying opportunities, taking action, executing, and repeating good practices learned throughout the process[1].

Entrepreneurship has been inherent in societal development and has evolved alongside academia over the last 50 years, securing its place in education[2]. As such, EE is defined as an educational approach that enables the development of an entrepreneurial mindset in students and growth encompassing various aspects of academic training, such as intellectual, social, and moral, ensuring that it is not limited to just economic and employment dimensions[3]. The beginnings of EE date back to 1947 at Harvard University, which offered courses on entrepreneurship in 1947[4]; however, it gained significant traction in business schools in the early 1970s[5]. Throughout the 20th century, considerable efforts were made, resulting in more than 800 EE programs in the United States by the end of the century. In the last 30 years, entrepreneurship training programs have experienced tremendous growth, challenging how they are created and sustained over time[6].

Promoting entrepreneurial behavior among students has become a challenge not only for universities but also for businesses and public agents that share this philosophy and wish to promote entrepreneurship as a teaching discipline[7]. It is evident that there is a consensus among international organizations, governments, academic institutions, and the private sector on the importance of fostering an entrepreneurial spirit through effective entrepreneurship education[8]. Academic institutions have developed a wide range of programs to address the growing gap between entrepreneurial action and Entrepreneurship Education (EE) in today's society[9]. Therefore, it is crucial to encourage entrepreneurship from the earliest levels of education, awakening students' interest in the factors that make up an entrepreneurial culture.

In the case of higher education institutions (HEIs), it is necessary to strengthen instruction in methods, techniques, models, and strategies used in the business realities of various economic sectors, thereby promoting attitudes, skills, and abilities that contribute knowledge in a cross-cutting and interdisciplinary manner from EE[10]. Previous scientific publications assert that there are more than 3,000 schools worldwide promoting EE[11]. This is possible thanks to the reach of public, private, and research sector entrepreneurship programs, identifying EE as a transformative engine in academia for economic growth, employment, resource generation, and poverty reduction in a society[12]. It is this transformative capacity that is promoted by universities through various efforts to promote EE, fostering entrepreneurial competitiveness in each economic sector and providing sustainable growth in society. In this regard, the literature identifies the efforts of various academic institutions to promote an entrepreneurial university environment, increasing their development of strategies for implementing best

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practices[13],[14],[15],[16],[17],[18],[19],[20],[21]. Audretsch (2014)[22] claims that the role of the university has evolved into an "entrepreneurial university" as a response to technology transfer and knowledge-based new ventures; thus, the university's role in the entrepreneurial society has expanded to focus on enhancing entrepreneurial capital. In line with this, Fernández-Nogueira et al., (2018)[23] evaluate seven Spanish universities, finding in some cases the use of active methodologies for fostering entrepreneurial universities, concluding in their research a set of best practices that an entrepreneurial university should consider in its management process.

Considering the above, universities are constantly being taken as case studies by various academics seeking to understand the realities of entrepreneurship in HEIs. Both public and private universities are governed within each country's regulatory framework, being monitored and supervised by governments, ministries, or established quality agencies according to their laws or quality standards. Additionally, there are multiple independent non-governmental international organizations that assess university performance. Robinson-García et al. (2013) [24]identified seven main international rankings: Shanghai Ranking's Academic, The Times Higher Education-THE, QS World University Rankings, NTU rankings, CWTS Leiden Ranking, Scimago Institution Rankings, and universities Ranking web. Also, Morris et al. (2013)[25], in their book titled Entrepreneurship Programs and the Modern University, identify four rankings with rubrics that measure the EE inside school of business, such as Princeton Review, Financial Times, Business Week, and U.S. News & World Report. These indices have been updated, expanded, and completed with others, resulting in a wide variety of ranking lists today. The relevance of addressing these international rankings and their contributions is supported by the approach of the European Commission[26], identifying the need for entrepreneurial HEIs to understand the impact of the changes they provoke in their institutional environment and society. In line with this, the concept of an entrepreneurial-innovative HEI combines institutional self-perception, external reflection, and an evidence-based approach. However, as the Commission points out, the measurement of their impact remains underdeveloped.

Scientifics publications as shown the importance of EE in the last two decades. Thus, the bibliometric methodology has experienced a surge in publications aiming to understand the bibliographic evolution of EE in

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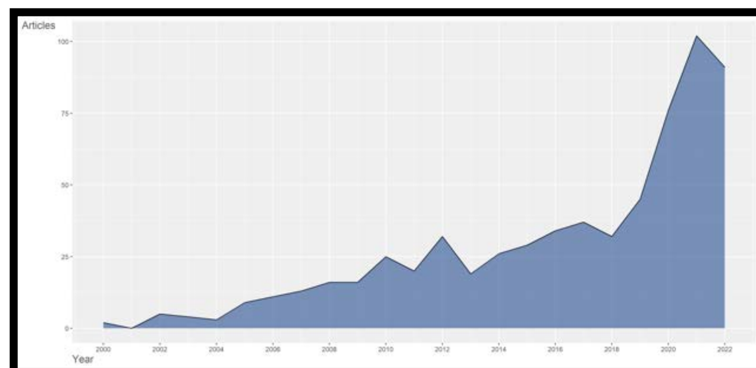
the last five years[27],[28],[29],[30],[31],[32],[33],[34],[35],[36],[37]. Aparicio et al. (2019)[38], academics from the University of the Basque Country (UPV), used the Web of Sciences (WOS) database and analysed 365 articles in scientific journals published from 1987 to 2017. In general, they found that entrepreneurship research has evolved from academia as a strategic part of economic development in society and the education sector. Additionally, the research topics of the publications showed that students, rather than professors, have become the main agents of the educational process. Similarly, the most recent bibliometric review in EE studied 680 documents from the WOS[39], and these authors assert that research in EE has become broad, complex, and fragmented, making it increasingly difficult to examine. However, in their analysis, they found a set of citations that reveal two exploration groups, one focusing on psychological constructs related to EE and the other on entrepreneurial behavior and new venture creation. A significant finding is that existing research focuses on the outcomes of entrepreneurial education, while its pedagogy remains primarily uncertain.

In a search in Scopus, an exhaustive review of 1,139 articles was conducted, of which only publications under the areas concerning: *Entrepreneurship, Entrepreneurship Education, Education, Higher Education, Students, Entrepreneurial Intention, Innovation, Entrepreneur, University, Entrepreneurial Education, Universities, Academic Entrepreneurship, Entrepreneurial University, Entrepreneurial Intentions, Entrepreneurialism, Learning, Student, Social Entrepreneurship, Experiential Learning, University Entrepreneurship, Theory Of Planned Behaviour, Entrepreneurial Learning, Entrepreneurship Programs, Innovation And Entrepreneurship Education, Student Entrepreneurship, and E-learning were considered.* Thus, a total of 647 articles met the thematic search requirements to identify publications in the last two decades. The following presents the proliferation of entrepreneurship as a science that universities and academics are gradually taking as an essential part of their academic training plans.

Illustration 1. Annual scientific production and average citations per year of Entrepreneurship Education



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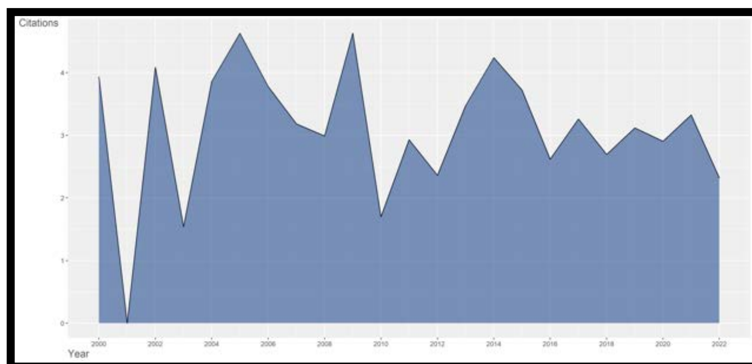

Source: Own elaboration using Bibliometrix R-Package

It is clear that there has been interest in researching, writing, and publishing about EE since the beginning of the 21st century, and as a result, the annual scientific production on the topic has been increasing. Illustration 1 shows the exponential growth of publications in indexed journals about entrepreneurship at the university level. This highlights the rise of academic entrepreneurship within higher education institutions, emphasizing its study, development, implementation, and improvement over the years. Likewise, the second graph shows the average number of citations, with greater interest and citations in certain years, such as in 2005 and 2009.

One of the functions of the university is the development of entrepreneurship in its triple dimension of training, research, and transfer. In fact, it is considered one of its key contributions to society due to its transformative nature and promotion of cohesion and social justice. With this in mind, this dimension must be measured and evaluated just as other university dimensions such as teaching or research are. Along with the measurements that each university can carry out at an internal level, it is essential that it is also evaluated by external agents in university rankings, as they promote transparency and comparability. In this way, the dimension of promoting entrepreneurship would help determine the excellence of university centers.

The IREG Observatory has a list of 46 rankings, categorized as follows: Global University Ranking, Global University Sub-rankings, Global Ranking by Subject, Regional University Ranking, Business School Ranking, and Higher Education System Rankings. To answer the research question posed, an exhaustive review has been carried out only on the methodologies determined by each organization in one category, which is: Global University Ranking taken from the IREG Observatory.

The Global University Ranking category comprises 18 rankings belonging to 16 organizations that annually present the results of their measurements (See Table 1). The first entity to present a global university ranking was the Shanghai Ranking Consultancy in 2003; its methodology identifies 4 criteria (education quality 10%, faculty quality 40%, research outcomes 40%, and per capita performance 10%). Thus, in 2004, four organizations decided to follow the path marked by Shanghai Ranking Consultancy the previous year. These were Quacquarelli Symonds Ltd (QS), Institute of Public Policies and Goods, Higher Council of Scientific Research, and Times Higher Education. We have carried out a comparative study of the methodology of these rankings, and the result of this measurement shows us different criteria and indicators that evaluate the faculty, students, and graduates. There is a significant coincidence in research-related indicators, such as patents, the number of publications in prestigious journals, and citations. However, there is no unanimity in the evaluation of EE; in fact, of the 30 rankings examined from the IREG Observatory, none present any consideration of EE. Some issues that are tangentially related to entrepreneurship could be: networking with other universities and business schools, patents, and spin-offs. Next, Table 1 presents a consolidated overview of four ranges used to systematize the data on these rankings: organization, ranking name, year of the first edition, and entrepreneurship criterion.

Table 1. Global University Ranking

Organization	Ranking Name	First Edition	Entrepreneurship Criterion
Centre for Science and Technology Studies, Leiden University	CWTS Leiden Ranking *www.leidenranking.com*	2008	No
The Center for World University Rankings (CWUR)	CWUR World University Rankings *www.cwur.org*	2012	No

Macmillan Publishers Limited (part of Springer Nature Group)	Nature Index *https://www.natureindex.com/annual-tables/2020*	2014	No
Department of Library and Information Science, National Taiwan University	NTU Ranking - National Taiwan University Performance Ranking of Scientific Papers for World Universities *http://nturanking.csti.tw/*	2007	No
Quacquarelli Symonds Ltd (QS)	QS World University Rankings *https://www.topuniversities.com/qs-world-university-rankings*	2004	No
Reuters News	Reuters Top 100: The World's Most Innovative Universities *https://www.reuters.com/innovative-universities-2019*	2015	No
Instituto de Políticas y Bienes Públicos, Consejo Superior de Investigaciones Cientí-ficas	Ranking Web of Universities (Webometrics) *www.webometrics.info/en/world*	2004	No
RUR Rankings Agency	RUR Round University Ranking *https://roundranking.com/ranking/world-university-rankings.html#world-2020*	2010	No
Scimago Lab	SCImago Institutions Ranking *https://www.scimagoir.com/rankings.php*	2009	No
ShanghaiRanking Consultancy	ShanghaiRanking's Academic Ranking of World Universities (ARWU) *https://www.shanghairanking.com/rankings/arwu/2021*	2003	No
Times Higher Education	THE World University Rankings *https://www.timeshighereducation.com/world-university-rankings/2021/world-ranking#!* THE Impact Rankings *https://www.timeshighereducation.com/world-university-rankings/2021/world-ranking#!*	2004	No
Consortium of organizations Centre for Higher Education (CHE), Center for Higher Education Policy Studies (CHEPS), Centre for Science and Technology Studies (CWTS), Foundation for Knowledge and Development (Fundación CYD), with a number of associate and financial partners	U-Multirank *www.umultirank.org*	2014	No
University Ranking by Academic Performance	URAP University Ranking by Academic Performance *https://www.urapcenter.org/Rankings/2020-2021/World_Ranking_2020-2021*	2010	No
U.S. News & World Report LP	US News Best Global Universities Rankings *http://www.usnews.com/education/best-global-universities/rankings*	2014	No
University of Indonesia	UI GreenMetric Ranking of World Universities *http://greenmetric.ui.ac.id/overall-rankings-2020*	2010	No
Association of Rating, Ranking and Other Performance Evaluations Makers (ARM)	Three University Missions Moscow International University Ranking (MosIUR; Moscow Ranking) *www.mosiur.org*	2017	No

Source: Own elaboration using data from ireg-observatory.org

Based on table 1, university rankings within the framework of the IREG Observatory (Observatory on Academic Ranking and Excellence), it follows that the promotion of entrepreneurship is not included in the global university rankings. It is true that, in general, these rankings allow easy access to information about each

university, establish comparisons between them, and promote the continuous improvement of universities, although there are no references to performance in entrepreneurship. Thus, there is a contradiction between the relevance given to promoting entrepreneurship in universities and the absence of evaluation criteria and measurement indicators of EE in the analysed rankings.

3. Conclusions

The entrepreneurial university has gained significant importance over time, as it plays a crucial role in fostering innovation, economic growth, and societal development. Initially emerging within the fields of economics and business administration, EE has since evolved to become a cross-disciplinary focus within universities. Today, it is evident that EE transcends traditional boundaries, impacting students across various fields of study and preparing them to be proactive agents of change in the modern world.

Given the evolution of the university's mission and the growing emphasis on entrepreneurship, it is crucial for global university rankings to incorporate criteria related to entrepreneurship. These organizations, tasked with evaluating and measuring the services provided by the education sector, should not overlook the importance of entrepreneurship. By including entrepreneurship as a key factor in their assessments, rankings will not only better reflect the universities' contributions to society but also encourage institutions to prioritize and develop their entrepreneurial programs further.

In conclusion, this study highlights the significance of entrepreneurial universities and their evolution over time. To ensure that university rankings accurately represent the changing landscape of higher education, it is essential to include entrepreneurship as a critical criterion in evaluations. Future research could explore the development of more comprehensive methodologies for assessing entrepreneurship within universities and investigate the long-term impact of entrepreneurship education on student outcomes, economic growth, and societal progress. This would ultimately help to drive further improvements and innovation within the higher education sector.

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FROM THE NEXT GENERATION EU TO THE NATIONAL RECOVERY AND RESILIENCE PLAN

Carmen RADU[*]
Liviu RADU[**]

Abstract

This article traces the evolution of the measures taken by the European Union regarding climate change, on which the devastating effects of the health crisis are overlapped. The issue of climate change has been debated since 2016 when the first global agreement with binding legal force was launched in Paris. The agreement was signed in April and ratified by the European Union six months later. This background is rounded by the great crisis caused by Covid 19, crisis that has been spreading rapidly with the European area since 2020. In this context, the European Union decides to establish a temporary financial instrument, the Next Generation EU, with a total value of 750 billion Euros, separate from the long-term budget of the Union. The aim is to provide support to Member States against the challenges generated by the spread of the pandemic. The recovery and resilience mechanism is the main pillar of Next Generation and has an allocated budget of €672.5 billion. The scope of the recovery and resilience mechanism is to provide the necessary support for essential investments and reforms in order to recover and improve the economic and social resilience of the Member States.

Keywords: *climate changes, alternative sources of energy, Paris Agreement, Next Generation, Integrated National Energy and Climate Plan, National Recovery and Resilience Plan, pandemic crisis, energy crisis.*

1. Introduction

In 2020, when the coronavirus pandemic broke out in Europe, the EU was fully engaged in implementing measures to improve the effects of climate change. Starting with Paris Agreement, approved in 2015, it was stipulated that each country should present its own national plan to mitigate greenhouse gas emissions called the "nationally determined contributions" or NDC by which it undertakes to take measures in this respect. By means of this agreement, the EU provided for the funding and transfer of technology and knowledge. Regarding funding, the signatory states committed to mobilise an amount of $100 billion annually until 2025 to help less developed countries meet their climate goals. Furthermore, funding will also be used to support research and development of cleaner and more energy efficient technologies.

In this context, the Romanian Govern adopts Integrated National Energy and Climate Plan (PNIESC) in December 2019[1]. This plan aims the adoption of actual measures for mitigating greenhouse gas emissions and increasing the use of renewable energy in all sectors of the economy. The plan covers the period between 2021-2030 and sets clear and measurable objectives to reach these goals.

After the violent outbreak of the pandemic in Europe, starting with 2020, after a moment of decline, due to the extent of the spread and contagion of the virus, all the measures of the European Union were redirected in this regard. Therefore, the Next Generation plan was launched at the EU level, a recovery and resilience instrument to help Member States to cope with the economic impact of COVID-19 pandemic and to continue the projects already started, to build a greener and more digital future. This funding instrument which is worth €750 billion shall be available to the Member States in the coming years. The major scopes of the project shall be the following:

- Supporting the economic recovery following the COVID-19 pandemic;
- Consolidation of economic and social cohesion within the European Union;
- Stimulating economic growth and competitiveness at the European level.

Next Generation Plan is structured on two major components: on the one hand, the recovery and resilience fund, and on the other hand, just transition fund.

NRRP is the acronym for the National Recovery and Resilience Plan, a document issued by the Government

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[1] *https://energy.ec.europa.eu/system/files/2020-04/ro_final_necp_main_ro_0.pdf*.

of Romania following the approval of the EU of the Recovery and Resilience Mechanism (MRR), the main scope of which is the economic and social recovery of Romania after the effects of COVID-19 pandemic[2].

NRRP represents a national medium and long-term investment strategy targeting a number of key areas, such as infrastructure, energy, environment, health, education and digitization, the stimulation of economic growth and employment, the reduction of regional gaps and the sustainable development of the country are aimed.

The National Recovery and Resilience Plan was developed in close cooperation with civil society, academic environment and the private sector and is to be implemented between 2021-2026.

If the Recovery and Resilience Fund will provide direct funding to Member States to support the reforms and investments that will be made, then the Just Transition Fund will help the regions of the European Union that are most affected by the transition to a greener economy to cope with its economic and social impact. The recovery and resilience mechanism represents an allocation of over €600 billion, which is distributed throughout the EU by means of national recovery and resilience plans. These national plans must be approved by the European Commission and take the shape of investment in areas such as infrastructure, innovation, digitization and the transition to a greener and more sustainable economy. The Just Transition Fund provides temporary financial support of around 100 billion Euros to protect jobs and prevent the risk of unemployment across the Union following the pandemic.

2. What is the Next Generation?

The recovery instrument, called Next Generation EU, will have available a budget of €750 billion, which will be additional to the long-term budget. The money for the Next Generation EU shall be raised by temporarily increasing own resource ceiling to 2% of the EU's Gross National Income. This will allow the Commission to use its very strong credit rating to lend €750 billion on financial markets for the EU for the next generation. All money raised through Next Generation EU and the new EU budget will be channelled through EU programmes[3].

The money raised for the Next Generation EU will be invested across three pillars, by means of €500 billion in grants and €250 billion in loans granted to Member States.

The first pillar is the support to Member States with investments and reforms:

- A new recovery and resilience instrument (Recovery and Resilience Facility), with a budget of €560 billion - distributed in grants and loans. It will support Member States to implement investments and reforms that are essential for a sustainable recovery. Member States will draw up their own national recovery plans, based on investment and reform priorities identified as part of the European Semester, in line with national climate and energy plans, just transition plans and partnership agreements and operational programmes from EU funds.
- A new initiative, REACT-UE, will provide assistance for cohesion to Member States, with a budget of €55 billion. This will be available from 2020 and will be distributed according to a new allocation key, taking into account the impact of the crisis. This will ensure there is no disruption to funding for key crisis recovery measures and support for the most disadvantaged. It will support workers and SMEs, health systems and green and digital transitions and will be available across sectors - from tourism to culture[4].
- To support the green transition, the Commission proposes to provide additional funding for the Just Transition Fund and the European Rural Development Fund. Cohesion policy programmes will also be strengthened in the next EU budget period to also allow greater flexibility.

The second pillar is kick-starting the EU economy by incentivizing private investments:

- The Solvency Support Instrument will mobilise private resources to provide urgent support to healthy companies. Investments will be channelled to companies in the most affected sectors, regions and countries. This will help level the 'playing field' for those Member States that are less able to support through state aid. It can be operational as of 2020, with a budget of €31 billion, aimed at unlocking more than €300 billion in solvency support. Guidelines will be developed to help align investments with EU priorities[5].
- The Commission aims to modernize InvestEU, the EU's main investment programme, by doubling its capacity.

[2] The Council of the European Union, Interinstitutional file: 2021/0309 (NLE), The General Secretariat of the Council, APPENDIX to the Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Romania, Brussels, 22 October 2021.

[3] *https://next-generation-eu.europa.eu/index_en.*

[4] *https://commission.europa.eu/funding-tenders/find-funding/eu-funding-programmes/react-eu_en.*

[5] *https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659264/EPRS_BRI(2020)659264_EN.pdf.*

- In addition to all the above, the Strategic Investment Facility will be created within InvestEU[6]. It will be able to unlock €150 billion in investments thanks to the €15 billion brought to it by Next Generation EU. This will invest in strengthening our resilience and our strategic autonomy for key technologies and valuable chains.

The third pillar is about addressing the lessons of the crisis:

The Commission proposes to create a new autonomous EU4 Health programme with a budget of €9.4 billion. It will invest in prevention, crisis preparedness, purchasing vital medicines and equipment, and improving long-term health outcomes. A number of other key programmes will be strengthened to learn the lessons of the crisis, notably rescEU and Horizon Europe.

In addition to the three pillars, the Commission proposes to develop several programmes from the EU budget. The following are included:

- Common Agricultural Policy;
- European Maritime and Fisheries Fund;
- Single Market Programme and programmes supporting tax and customs cooperation;
- Connecting Europe Facility;
- Erasmus +;
- Creative Europe Programme;
- Digital Europe Programme;
- European Defence Plan;
- Internal Security Fund;
- Asylum, Migration and Integration Fund;
- Integrated Border Management Fund.

New Generation EU is one of the largest investment programmes in the history of the EU and shall have a significant impact on the European economies in the following years. Investments and reforms supported by the recovery and resilience fund will contribute to job creation and will increase economic competitiveness in Member States. Furthermore, investments in the green and digital transition will help Europe meet its climate goals and remain at the forefront of the digital revolution globally. Furthermore, the plan will have a significant impact on economic and social cohesion within the European Union. The Recovery and Resilience Fund will be made available to all Member States.

3. European Union Recovery and Resilience Plan

The European Union launched a recovery and resilience programme to help Member States to cope with the economic impact of COVID-19 pandemic and to build a greener and more digital future. This programme, called New Generation EU, is an important part of the overall EU economic recovery plan and aims to mobilise significant investment in the European economy in the coming years. This study aims to analyse the New Generation EU, as well as provide an insight into how this plan can contribute to strengthening and modernizing the European Union.

New Generation EU is a funding instrument which is worth €750 billion and shall be available to the Member States in the coming years. The plan consists of two components: recovery and resilience plan and just transition fund. The Recovery and Resilience Fund will provide direct funding to Member States to support reforms and investments that will contribute to economic recovery and the digital and green transformation of their economies. The just transition fund[7] will help the EU regions most affected by the transition to a greener economy to cope with its economic and social impact.

3.1. National Recovery and Resilience Plan (NRRP)

The National Recovery and Resilience Plan (**NRRP**) is a significant investment plan launched by the European Commission, within the Recovery and Resilience Mechanism, in order to help Member States of the European Union to cope with the economic and social crisis caused by COVID-19 pandemic. This plan, which is based on the priorities and needs of each Member State, is designed to help boost European economies and support their transition to a green, digital and more sustainable economy. In this context, this article focuses on the analysis of the NRRP and its importance for Romania.

NRRP for Romania

[6] *https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/economy-works-people/european-fund-strategic-investments_en*.

[7] *https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/finance-and-green-deal/just-transition-mechanism/just-transition-funding-sources_ro*.

NRRP is a key-component of the Romania's Recovery and Resilience Plan, being dedicated both to the economic development and to social protection. The total costs of the plan amounts to €29.2 billion, of which €14.5 billion are grant allocation and €14.7 billion are loan allocation.

NRRP has 4 main pillars, respectively:

- Green transition
- Digital transition
- Support for enterprises and innovation
- Infrastructure

Each pillar has a series of concrete objectives and projects, aimed at economic development, social protection, increasing competitiveness and improving environmental sustainability. For example, in what concerns green transition, the scopes of Romania are related to improving energy efficiency, developing sustainable transport and combating climate change by reducing greenhouse gas emissions.

In what concerns digital transition, the objectives of Romania are focused on the development of communications infrastructure and digital services, increasing innovation capacity and increasing the degree of digitization of public and private services. As regards support for enterprises and innovation, the objectives are related to increasing economic productivity and competitiveness by supporting enterprises and innovation.

NRRP represents a unique opportunity for Romania to accelerate the transition to a green, digital and more sustainable economy. The investments proposed in NRRP can help improve transport infrastructure, health system, education system.

The National Recovery and Resilience Plan (NRRP) is an important strategy whereby Romania aims to obtain financing worth €29.2 billion from European funds. This plan is considered an essential instrument for the recovery of the economy after COVID-19 pandemic and to accelerate digital transformation and the transition to a greener economy. We shall analyse in this study, the National Recovery and Resilience Plan and its importance for Romania.

NRRP targets the following components[8]:

	NRRP component	**billion Euros**
1.	Water management	1.9
2.	Forests and biodiversity protection	1.3
3.	Waste management	1.2
4.	Sustainable transport (road, railway, metro)	7.6
5.	Renovation wave	2.2
6.	Renewable energy and hydrogen gas infrastructure	1.6
7.	Government cloud and interconnected digital public systems	2.0
8.	Fiscal and pension reforms	0.682
9.	Support for the private sector, research, development and innovation, and reform of state-owned companies	1.7
10.	Local fund for green and digital transition	2.1
11.	Tourism and culture	0.20
12.	Fund for hospitals and for increasing access to health	2.4
13.	Social reforms	0.233
14.	Public administration reform, strengthening social dialogue and increasing the efficiency of justice	0.137
15.	Educated Romania	3.6

As for programme components, these are subsidiary projects and programmes that are designed and implemented to produce specific outputs and outcomes. These are carefully monitored to ensure the delivery of the intended benefits of the NRRP.

Each component of the programme is linked to the complementary objectives of the NRRP by tracking them. Each component contributes to the delivery of benefits directly or indirectly by means of their impact on the economy, environment or society.

To ensure the success of NRRP programme, it is essential that all components are designed and implemented in an integrated and coherent manner so as to maximize benefits and mitigate risks. In this respect, it is important that each component is monitored and evaluated on a regular basis, to ensure that programme objectives are being met and benefits are being delivered effectively.

[8] *https://www.project-management-romania.ro/articole/planul-national-de-redresare-si-rezilienta-pnrr.*

3.2. NRRP implementation in Romania by sectors

The National Recovery and Resilience Plan (NRRP) is an economic, social and environmental investment and reform plan, which aims to stimulate the recovery and modernization of the Romanian economy after COVID-19 pandemic. NRRP is divided into several investment and reform areas, targeting a wide range of sectors and economic activities. We will detail some of these sectors hereinafter:

- Health and education:

Within NRRP, Romania will invest in the modernization of medical infrastructure and equipment, in the development of the digital health system and in increasing the capacity for testing and vaccination against COVID-19. In what concerns education, Romania will invest in the modernization of school infrastructure, in the digitization of the education process and in increasing the quality of education[9].

- Infrastructure and transport:

NRRP foresees significant investments in the modernization of road, railway and airport infrastructure in Romania, in the development of electric transport and in increasing the energy efficiency of transport. Furthermore, investments shall be made in the development of communications infrastructure, including the expansion of fiber optic networks and 5G technology[10].

- Environment and energy:

In the sector of the environment and energy, NRRP provides for investments in the development of renewable energy production infrastructure, in the modernization of energy distribution networks and in the reduction of greenhouse gas emissions. Furthermore, Romania will invest in protecting biodiversity and developing a sustainable agricultural sector.

- Economy and digitization:

NRRP aims to modernize the Romanian economy by means of investments in innovation, digitization and professional training[11]. Investments shall be made in the development of the private sector, increasing the competitiveness of enterprises and stimulating innovation and technology transfer. Furthermore, investments shall be made in the development of research and development capacity, including in the field of artificial intelligence.

These are just some of the areas of investment and reform stipulated in the NRRP. As a general rule, the plan aims at a broad and diversified modernization of the Romanian economy, by means of significant investments in infrastructure, environment, energy, health, education, innovation and digitization.

3.3. Challenges encountered by Romania in implementing the NRRP

NRRP (National Recovery and Resilience Plan) is an important programme for Romania, which aims to ensure economic recovery and the country's resistance to future shocks by means of investments in infrastructure, digitization, energy transition, innovation and human capital development.

Notwithstanding, the implementation of NRRP encountered certain challenges in Romania. Some of them are detailed below:

1. Bureaucracy: Bureaucratic procedures are often complicated and slow down the NRRP implementation process. This led to delays in the approval of projects and the use of funds.

2. Absorption capacity: The limited capacity of the government and public bodies to absorb the allocated funds was a significant problem. In the past, Romania had similar problems in managing European funds, which were not always used effectively and remained unused.

3. Priority sectors: The prioritization of investment areas and projects in the NRRP has been criticised by some non-governmental organizations and analysts, who claim that funds are allocated inequitably and that some areas, such as education and health, are underfunded.

4. Transparency: The level of transparency in the funding allocation process has also been criticised. There are concerns that the government has allocated funds without being transparent about the selection criteria and that there is a risk that the projects will be affected by corruption.

5. Civil society: Civil society involvement in the NRRP implementation process has been limited, which may affect the level of accountability and transparency of the process.

To conclude, NRRP implementation is essential for the economic recovery of Romania. Notwithstanding, the government must overcome these issues and ensure that projects are allocated in a transparent, fair and

[9] *https://monitorpnrr.eu/componenta-15-educatie/.*

[10] *https://monitorpnrr.eu/componenta-c4-transport-sustenabil/.*

[11] *https://www.old.research.gov.ro/ro/articol/5626/programe-europene-planul-na-ional-de-redresare-i-rezilien-a-pnrr-transformare-digitala-componenta-7.*

efficient manner so as to achieve a real and sustainable impact for the country's economy and citizens.

3.4. The stage of implementation of the NRRP in Romania

The National Recovery and Resilience Plan (NRRP) is an essential instrument for the recovery of the Romanian economy and society after the crisis caused by COVID-19 pandemic. In what concerns Romania, NRRP was officially presented to the European Commission in April 2021. This is structured around 6 pillars and 19 components, and the total value of the investments amounts to over €30 billion. The scope of this paper is to analyse the stage of implementation of the NRRP in Romania and to identify the main challenges and opportunities in this regard.

NRRP was officially launched in Romania at the beginning of September 2021. At this time, there is a clear plan of action for NRRP implementation, involving all stakeholders, including government, private sector and civil society.

NRRP is structured around 6 main pillars, which include:

- Green transition
- Digital transition
- Transport and mobility infrastructure
- Economic competitiveness
- Education and research
- Health and social resilience

For each of these pillars, there are specific components that include investment in development projects and programmes, such as upgrading green energy networks, expanding broadband networks, improving transport infrastructure, supporting start-ups and developing health and education systems.

As a general rule, the NRRP of Romania aims to modernize and digitize the Romanian economy and society, strengthen the research and innovation sector, create jobs and improve the citizens' quality of life. Furthermore, the NRRP of Romania is aligned with the objectives of the European Union strategy, including the European Green Pact and the Digital Agenda.

The implementation of the NRRP in Romania faces a great number of challenges, among which[12]:

- Corruption and bureaucracy, which can affect project implementation and delay the implementation process.
- The limited capacity of public institutions and the private sector to manage large-scale projects.
- Lack of expertise in specific areas, such as renewable energies or 5G technology.

4. Conclusions

The National Recovery and Resilience Plan (NRRP) is an essential document for the economy and social development of Romania in the following years. NRRP was developed in the context of the economic and social crisis caused by COVID-19 pandemic and has as its main objective the revitalization of the economy and the improvement of people's lives.

In what concerns NRRP objectives, they are linked to four important dimensions: green transition, digital transition, social cohesion and economic development. Therefore, NRRP aims to support investments in areas such as renewable energies, transport infrastructure, digitization of public administration, improving education and health system, as well as increasing economic competitiveness.

In what concerns the implementation of NRRP, there are still many questions and uncertainties. NRRP is an extremely complex document, which requires close collaboration between government, local authorities, business environment and civil society. On the other hand, there is also the risk that some of the measures included in the NRRP to be difficult to implement or not to produce the expected effects.

Generally, the conclusions on the NRRP in Romania are mixed. On the one hand, there is a broad consensus on the need for significant investments in transport infrastructure, renewable energies and digitization of public administration. Furthermore, NRRP can be an important instrument to stimulate economic growth and reduce the economic and social gap between different regions in the country.

On the other hand, there are also concerns about issues such as the transparency and efficiency of the funding allocation process, as well as the government's ability to implement the necessary reforms to ensure the success of the NRRP.

The National Recovery and Resilience Plan (NRRP) is a major investment programme funded by the European Union to help member states recover their economies affected by COVID-19 pandemic. In Romania,

[12] *https://romania.representation.ec.europa.eu/events/conferinta-anuala-privind-implementarea-pnrr-2022-11-08_ro*.

NRRP was approved by the European Commission in September 2021, after a period of negotiations and consultations with various stakeholders. The conclusions of the NRRP in Romania are analysed in the following paragraphs.

1. NRRP is a unique opportunity for Romania to modernize its economy and improve its infrastructure.

NRRP provides Romania with a total budget of €29.2 billion to be spent over a six-year period, between 2021 and 2026. This budget is designed to finance projects that contribute to the achievement of four main objectives: green transition, digital transition, social cohesion and economic resilience.

Although the NRRP has a considerable size, it could be insufficient to cover all of Romania's economic needs. Notwithstanding, it is important to remember that NRRP represents a unique opportunity for Romania to accelerate reforms and make investments that will increase the country's long-term competitiveness. Furthermore, this programme can help modernize Romania's infrastructure and improve the living conditions of the population.

2. NRRP can help to improve business environment of Romania

NRRP includes a series of measures the scope of which is the improvement of the business environment of Romania. These include investments in digital infrastructure, education and training, research and development, but also measures to increase the efficiency and competitiveness of businesses. Furthermore, NRRP also provides for the creation of financing and support instruments for SMEs and entrepreneurs.

Improving the business environment in Romania is essential to attract foreign investment and to increase the competitiveness of the Romanian economy. In this respect, NRRP can be an important factor for attracting foreign investments in Romania and for creating a more attractive business environment.

3. There is a risk that the NRRP is affected by corruption and poor governance.

NRRP is an important and complex programme, which entails a series of projects and investments.

In recent months, considerable efforts have been made to develop an NRRP that focuses on key areas that can have a significant impact on Romania's economy. These include: digitization, education, infrastructure, environment and climate, health and economic competitiveness.

One of the main conclusions regarding the NRRP in Romania is that this initiative can bring significant positive change. By means of an adequate funding and effective implementation, the NRRP can significantly improve the quality of life for Romanians, increase the country's economic competitiveness and contribute to sustainable growth.

One of the positive aspects of the NRRP is that it covers a wide range of areas, thus providing the opportunity to address various structural issues. For example, investments in digitization could improve the efficiency of public services, health could be improved by modernizing and expanding the medical infrastructure, and investments in education could improve the capabilities and future prospects of the Romanian workforce.

Furthermore, NRRP can significantly contribute to the reduction of economic gaps between different regions of Romania. For example, by investing in infrastructure and digitization in rural areas, access to public services and economic opportunities can be improved, which could lead to a more balanced economic growth.

Notwithstanding, one of the main issues in what concerns NRRP is the modality in which the funds will be spent and managed. It is important to ensure that the funding is used efficiently and transparently, without the risk of corruption or misuse of funds. A solid monitoring and evaluation system is required to ensure that investments are effective and have the expected impact.

Furthermore, another important point to consider is that NRRP should not be seen as a magic solution to economic problems.

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THE DIGITALIZATION STRATEGY OF THE PUBLIC SECTOR

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Abstract

The main objective of the modernization process of the public administration, a process that takes place in all democratic states, and currently in the member states of the European Union I is given a major importance, is the improvement of public services distributed to the population. To this end, the aim is to simplify administrative procedures by emphasizing digitization, thus facilitating access to information between citizens and public authorities in both directions.

The digitalization strategy of the public sector prepares the management of change, removes administrators' resistance to structural changes, and since digital has become the main means of communication between administration and users, that strategy includes not only the expansion of technical equipment - hard and networks - but also, of even greater importance and greater, the emphasis on professional training, basic or specialized, in the IT field.

The article presents the directions for immediate and/or longer-term action, namely the improvement of the quality of public services by connecting administrations throughout the country with users, individuals or legal entities, and, in a program that will take place over a longer period, increasing the effectiveness of the entire modernized system, which will be reflected in an improvement in quality and productivity.

Keywords: *public administration, simplify administrative procedures, digitalization strategy, quality of public services, increasing the effectiveness.*

1. Instead of introduction. Numerical transformation - purpose and means of modernizing economic and social activity

As a generic term, digitization means the storage of data and their organization so that they are accessible for analysis, thus allowing the use of results in the management of organizations' activities, as well as the forecasting of micro, meso and macroeconomic developments in the short, medium or even long term.

The main challenges of the digital transformation for public authorities are represented by the modernization and optimization of the working environment of civil servants and the way they interact with the public, both in terms of taxation - the unique user code to benefit from administrative services - and monitoring of public expenditures. At the same time, digitization promotes collaborative work within communities, establishing the electronic exchange of data between administrations through the implementation of appropriate digital tools. Also, the use of digital tools makes it possible to streamline communication between teams, so that both workflow and information flow are improved through real-time data transfer, leading to increased productivity and reduced costs.

In this way, the digital transformation of the state, an extensive process with major implications, which can be qualified as a technical revolution, but also in social relations makes possible the development of an ambitious and very necessary project in the current period: rethinking the role of public authorities in the modern state: the modes of action, the relationship with the user, decision-making, collaboration with third parties, etc.

An important extension of digitization is the so-called artificial intelligence (AI). Although there is no common international definition of artificial intelligence (AI), in general terms, AI refers to systems that, based on a large amount of data, can perform various tasks with a certain degree of autonomy. This includes the use of algorithms to identify similarities and patterns, as well as the classification and use of data for analysis, management and forecasting purposes, as well as - a function of great importance - various types of machine learning.

The digitization of the activity of public administrations is reflected on multiple levels: in the citizen's relations with public services; in the efficiency, as well as the good functioning of the respective services, such as public transport, public security and health services, public utility services, such as water, sewage, gas and

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electricity, waste management, public lighting, etc.

The digitization of administrations in relations with citizens implies the optimization of their experience in public services, which depends both on the administrative procedures that the citizen must follow, and on the interactions between him and the different public actors, together being involved in the digital transformation of the public sector. In this sense, the authorities promote digitization as a vehicle for administrative simplification, transparency, modernization of public administration, rationalization of regulations and redesign of existing legislation.

The involvement of citizens in the digital transformation of relations with administrations exerts a substantial pressure on them, to which are added the internal constraints specific to the public sector, such as budget pressures, the need to improve organizational efficiency and the need to adapt to societal changes.

In the field of public transport, the population wants cheaper, but more comfortable, faster and safer public transport, as well as more connected journeys, and public authorities must respond to the ever-increasing demands of citizens for greener public transport, respecting, at the same time, international commitments to reduce CO2 emissions. Thus, the free availability of information about the location of means of transport - using a combination of technologies that makes it possible to determine their position in real time - has led to the launch of mobile applications to improve the quality and accuracy of travel planning and to offer different multimodal routes depending on individual passenger preferences.

The main public actors in the health and social security sectors are the relevant ministries in each country, developing and implementing policy for their areas of competence, guaranteeing the social security of citizens and responding to risks and needs, throughout life, in the fields of illness, old age, dependency, disability and work accidents.

The improvement of health services - through increasingly sophisticated equipment and treatments, including, in large part, digital technology and artificial intelligence, which achieves early detection of symptoms, diagnosis and tracking of activities - leads to a continuous increase in health expenditures, which exerts considerable pressure on the current organization of this sector.

Public utility services refer to the production and distribution of water, gas, electricity, waste management, public lighting, etc. - essential activities for the quality of life of the community. These are commercial public services, defined as institutions that respond to a market logic, having a public service mission, being regulated and controlled by the central or territorial public authorities, the financing being carried out through tariffs and/or from public funds. The digitization of these services has registered a major - and continuous - expansion, if we only mention the energy sector, the energy security of each country being the basic element both for the economy as a whole and for maintaining an appropriate level of quality of life.

2. The role of digitization for increasing the performance of public administration

The informational process developed by the public administrations naturally used forms on paper for the collection of data necessary for the analysis and management of public services. This has always meant a high consumption - expensive and harmful to the natural environment - of wood, which causes the authorities to develop and implement technological strategies that allow the collection and processing of data without this consumption. Analogue techniques were used first – today, to be sure, many analogue services remain in place, but online channels are being added to keep non-editable PDF forms available online – but the move to digitization is increasing. This means, in addition to the classic collection and processing operations, the realization of efficient online interactions, automatic processing and transmission to the responsible public administrations.

In recent years, in most countries of the world - in particular in the member states of the European Union - against the background of the Covid-19 pandemic, when public authorities considered it necessary to introduce quarantine in order to limit the spread of the influenza virus, one of the most used solutions to did not completely interrupt economic activity was online work, which required an extension of the digitization of administrative processes and services, which could thus continue to be provided. The whole process of digitization could be accentuated by the introduction of an increasing proportion of artificial intelligence (AI) and automated decisions in the public sector, which, however, reveals some more delicate aspects, such as those regarding accountability, transparency and risk discrimination. Therefore, the use of AI in the public sector must be carefully regulated in order to protect individual rights and avoid negative consequences for the entire community, consequences that may arise due to poor monitoring of the impact of the authorities' decisions.

Equally important is the ability of civil servants to correctly use IT techniques, including AI, and in this sense the member states of the European Union - in full process of consolidating the introduction of digitization in the entire economic and social life - recognize the fact that they must invest in consolidating the capacity of civil

servants and all other agents from both the public and private sectors. Numerous European national strategies explicitly address the issue of vocational training in the IT field and, moreover, investments in the education sector represent a way to ensure the availability of skilled labor in the future.

3. The digitalization process in the European Union

Digitization of the public sector is considered the main tool for increasing efficiency and, therefore, reducing costs. In this sense, stimulating the economy and creating jobs are the most important motivating factors and the central point of national IT and AI strategies.

Most European national strategies aim to expand the use of digital techniques and artificial intelligence in the public sector, including to provide better services to citizens and entrepreneurs to improve efficiency, by automating routine government processes and coordinating the activities of public authorities at central and territorial level.

In addition, in all development plans that include the implementation of AI there is a theme considered of major importance, namely investments in research and development to benefit from technological advances. That is why some member states have created innovation centers and laboratories to encourage public-private partnerships and to encourage collaboration between economic-social sectors at national level, as well as transnationally, in the European Union and/or outside it.

In order to analyse the stage of the digitalization process in each European country, the European Commission proposed two multidimensional indicators that can highlight the progress of the digitalization process, considered even at the international level - for example, at the World Economic Forum in 2017, it was stated that the economy of the future is closely correlated with the implementation of the IT technique in all sectors of the national economy - as an essential condition for macro-social development in the 21st century.

Thus, the DESI (Digital Economy and Society Index) and I-DESI (International DESI) indicators are built following the evolution of four main axes: a population with digital skills and highly qualified digital professionals, secure and sustainable digital infrastructures, the digital transformation of companies and digitalization of public services. If DESI presents the progress of the member states of the European Union in terms of economic development and the implementation of digitization at the national level and/or of some groups of European states, I-DESI - which also includes macroeconomic indicators different from the European index - allows the comparison of the level of digitization in The European Union with 18 other countries on the world map: Australia, Brazil, Canada, Chile, China, Iceland, Israel, Japan, Mexico, New Zealand, Norway, Russia, Serbia, South Korea, Switzerland, Turkey, the United Kingdom and the United States .

The evolution of the DESI index is the subject of an annual report, published by the European Commission, on the basis of which the progress made by European states in the introduction of IT and AI techniques is analysed, which, in turn, will be used to substantiate and, then elaborate the national and community macroeconomic development strategies with a medium and even long-term horizon.

The methodology for determining the DESI indicator uses the values related to some indicators provided by Eurostat - the official statistical website of the European Union -, as well as a series of other indicators - broadband coverage, retail prices for broadband, Benchmark e-Government, the use of digital technologies -, built by leading institutions such as IHS Markit, Omdia, Point Topic, Empirica, Capgemini and verified by national regulatory authorities in each member state, as well as Ipsos and iCite, for survey results that have been reviewed by Digital Single Market Strategic Group.

With the help of the DESI index, a comparison is made of the stage at which the digitization process was in each member state, a comparison that follows the five dimensions presented by the DESI:

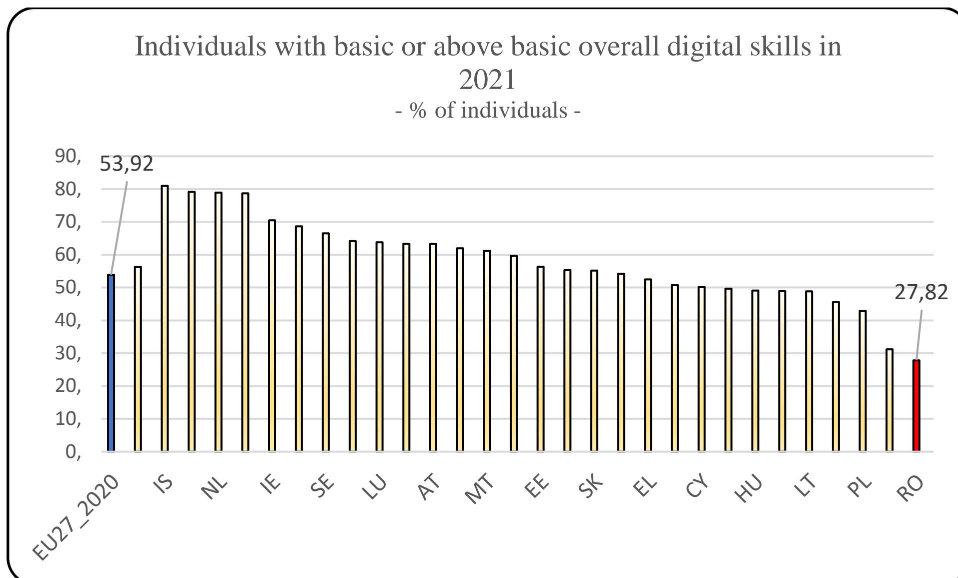
1. *Connectivity*, which shows the deployment of broadband infrastructure and its quality. In the Digital Economy and Society Index (DESI) 2022 report, drawn up by the European Union, it is stated that, despite some general progress in 2021, in many member states a significant gap between urban and rural areas persists, and performance levels vary as speed and capacity. As a target of the digitalization strategy at the level of the European Union for the year 2030, it is expected that economic agents - individuals and legal entities - will end up being served by next-generation broadband networks, with performance at least equivalent to 5G.

2. *The digital skills of human capital*, which must be sufficient to take advantage of the opportunities offered by a digital society.

The major role of employees' digital skills is unanimously recognized, so that one of the most important actions that public and private managers must organize is to ensure the skills of the staff to use IT and AI techniques, through training programs and curricula in appropriate educational programs.

According to the information collected by Eurostat, in the member states digital skills differ considerably from one country to another. Romania ranks last in the European Union in terms of the use of IT techniques and

artificial intelligence, which requires the introduction of broad programs in the national digital strategy that can be addressed to numerous categories of the population - people of different ages and professions, from the environment urban and rural etc.



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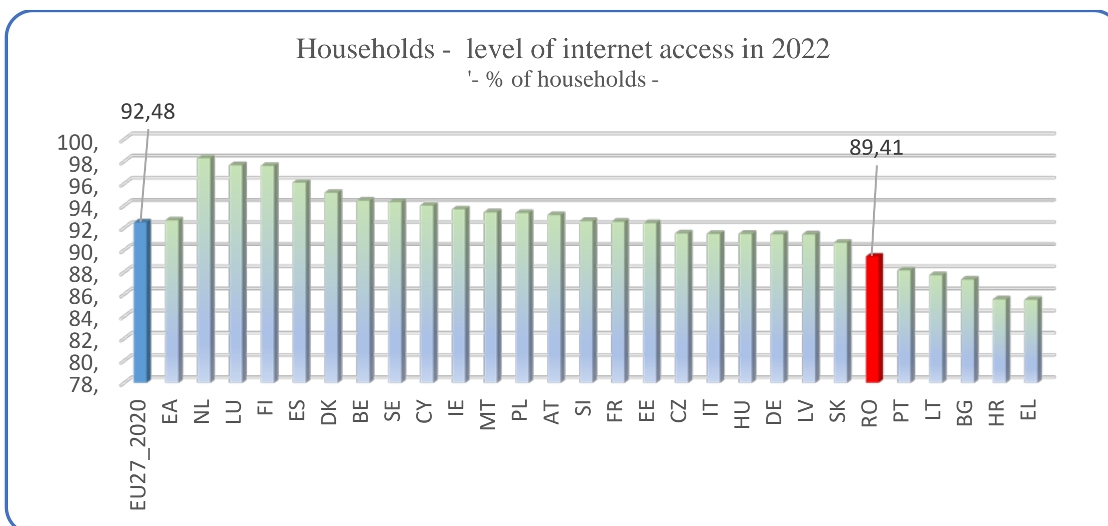
3. *The use of the Internet by citizens* represents another important dimension for the implementation of digitization, because it provides the necessary devices to access IT.

According to Eurostat, in 2022 the number of households with access to the Internet, - regardless of which device: computer, mobile phone, etc. - increased, one of the explanations being the need to communicate during the Covid-19 pandemic, when quarantine was imposed for reasons of health security. Among the member countries of the European Union, Romania is in a somewhat more modest position, although the spread of smart phones has increased in recent years.



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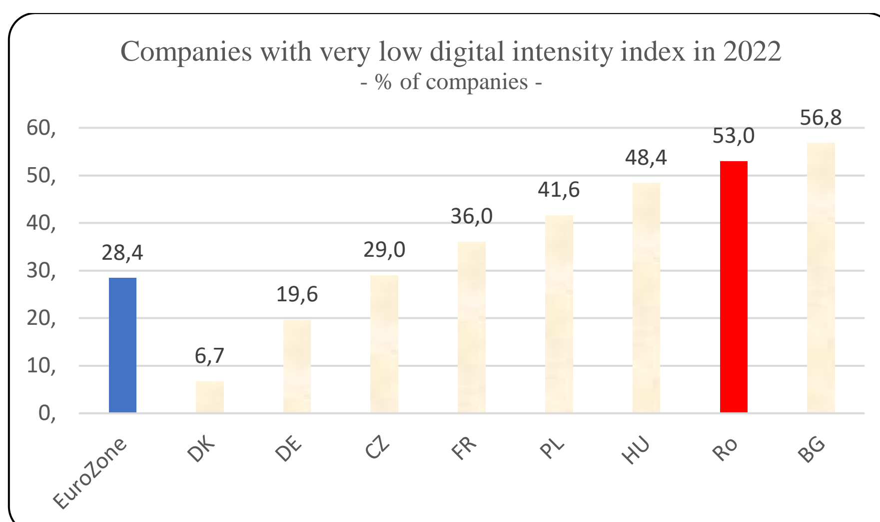
4. *The integration of digital technology* refers to the digitization of companies and the most extensive development of online commerce. The economic modernization policy promoted in the European Union, with a time horizon of 2030, requires that at least 90% of small and medium-sized enterprises implement at least four of the twelve digital technologies currently used by large companies or those in profile, among which include e-commerce, various software systems for managing company resources, social media, AI, cloud computing, etc.



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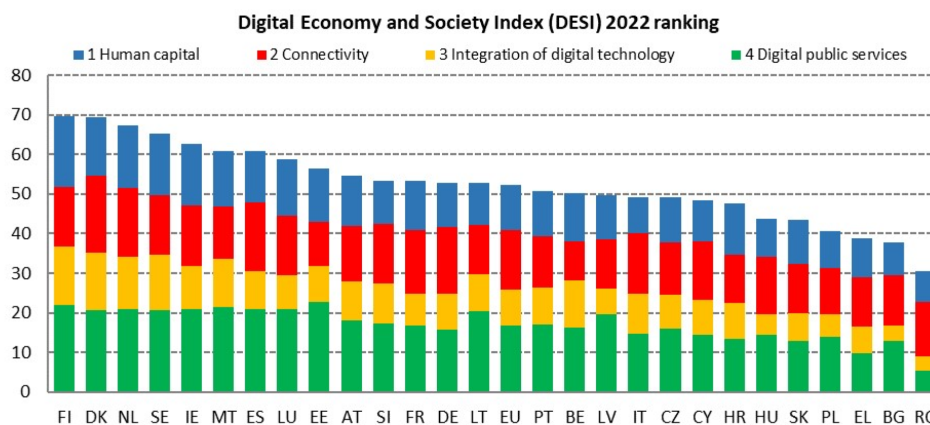
According to the DESI 2022 report, about a third of European companies do not use numerical techniques at an appropriate level, but significant differences are found between the member states. In the graph above, it can be seen that there are member states where companies have implemented digitization to a large extent (Denmark, Germany, etc.), but also European countries where IT is used on a small scale, one of these countries being Romania, in that more than half of the companies present a very poor level of use of IT techniques.

5. *Digital public services*. The DESI indicator on the digitization of public services covers the services that will benefit the various economic actors - individuals and/or legal entities - provided in the public sector by means of IT techniques, generically called e-Government. This name refers both to the instruments implemented to improve citizen and/or entrepreneur relations with public authorities, as well as to the broad approach to the management of the public institutions involved (human resources management, materials, public procurement, proposals for field development strategies, etc.). The targeted digital tools present a great diversity, but they can be classified according to the specifics of the relationships they monitor in four categories: (i) G2C - from the government to the citizen; (ii) G2B - from government to enterprise; (iii) G2G - from government to government; (iiii) G2E - from government to employee.

In the DESI 2022 report, the digital economy and society index, it presents the progress registered in the European Union member states in the digital field during the Covid-19 pandemic, but highlights that there are still directions for intervention to reduce the gaps, for example in terms of skills informatics, the implementation of IT techniques in SMEs, as well as advanced 5G networks. The facility for recovery and resilience, developed at the level of the European Commission for the programming period 2021-2027, respectively the programs drawn up by each member state benefit from approximately EUR 127 billion in funding for economic and social recovery and growth, including digitization.



Source: https://digital-strategy.ec.europa.eu/0_DESI_Full_European_Analysis_2022_2_C01lJgPAatnNf0qL2LL103tHSw_88764.pdf

At the same time, the DESI index shows the big differences between the member states regarding the status of the key areas of digitization. Thus, in 2022, the Nordic states keep their first places in terms of the digitalization of the economy, with Romania and Bulgaria still in the last positions.

To remedy this situation, Romania's Recovery and Resilience Plan (PNRR) distributes 20.5% of Romania's total allocation (EUR 5.97 billion) to the country's economic and social digitization objective, mainly to component 7 (Digital Transformation), but also in all other components, each including measures aimed at implementing IT in the specific field of activity.

4. Conclusions

Since the beginning of computer technology, in the period immediately after the Second World War, public authorities have considered that administrative modernization can benefit from the introduction of digitalization, which was achieved relatively slowly, the material and professional training costs being considered high compared to the perceptible benefits, but due to the political will to improve services, the process gradually intensified.

Currently, the digitalization of the public sector is an essential condition for adopting a citizen-centric approach, but it also makes it possible to considerably increase the efficiency and effectiveness of an organization, being able to satisfy the budgetary constraints faced by public institutions due to savings - financial, human, working time - which can be realized and later reinvested to improve the quality of life of the citizen.

Through internal digital transformation, a public institution in which the automated data management process was implemented offers the possibility of much easier access to the information circulated in various programs that manage the economic and social sectors, decision-making is facilitated by the digital processing of large quantities of data, thus improving the internal efficiency of the institution, but also offering employees multiple possibilities to use IT techniques.

The numerical tools used in the respective processes are of great diversity and increasingly sophisticated: Artificial Intelligence, Internet of Things, robotics, chatbot, virtual reality, etc., which once again underlines the need for high-class professional training of employees.

A much-debated issue is the digital maturity of each state, region, sector, etc. in part. This concept refers to the degree of competence, preparation and organizational availability of public administrations to be able to implement the appropriate programs for a high-performance digitization with sustainable costs, all the more so as the innovations in the field are very fast: artificial intelligence, blockchains, government as a platform or mesh networks, smart cities, but in the conditions where they want to keep, for cost reasons, the existing IT systems.

In the European Union, many member states are increasingly using technologies based on artificial intelligence in the provision of public services, but, in this case, it is necessary to monitor by the competent institutions the lack of transparency that occurs with the use of the algorithm or automated decision-making in the public sector. In this sense, in 2020 the European Commission service responsible for monitoring the development, introduction and impact of artificial intelligence for Europe (AI Watch) was created, which prepares and publishes a report mapping the use of artificial intelligence in public services in the member states of the EU.

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GOOD PRACTICE EXAMPLES OF DUAL SCHOOL APPLICATION IN ROMANIA

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Cristina VERES**

Abstract

In recent decades, in the member countries of the E.U. stakeholders started to understand and recognize more and more the importance of education and professional training. In this regard they have assumed common targets and commitments that emphasize the importance of the initial and continuous education mission. Investing in the training and qualification of employees generates high returns that exceed the costs and provide a long-term effect, as the European Council emphasized in 2006. Even if the system of professional education and training in Romania faces many challenges, examples of good practice are beginning to emerge signalling a shift in the national strategy.

Keywords: *Dual school, education, strategy, mission, vocational education and training.*

1. Introduction

The increase of globalized economy has also increased the competition, therefore companies have started to acknowledge the importance of the vocational education and training in general. Whether we are talking about the initial or continuous form of qualified vocational training, combined with work-based learning, both have the potential to promote the solving/improvement of the employability factor and to support policies and strategies for resilience, innovation, competitiveness and growth of companies and countries. The vocational education training is provided by a multitude of stakeholders and is inseparably linked to the structure of the labour market. It operates in various national, regional, local and sectoral contexts depending on the structure, size and economic culture.

There are many examples of good practices, but still there is a lack of systematic comprehensive knowledge in the field, although a complete and consistent overview is fundamental for the development of policies in this area of professional training[1], matter to which this article intends to answer. There is no quality professional training without the contribution of employers who represent the key to good functioning in a diverse and heterogeneous environment. Work based qualified vocational training is important because it increases the relevance and flexibility of training. It is considered useful both for the induction of newly hired staff as well as for further development of existing personnel.

The challenges presented above are valid on the European level as well. For example, based on the analysis of good practice examples, dual school involves different forms of training, regulations and learning sequences. The form, the design and the practices of the qualified vocational training are somewhat flexible, because they are inevitably conditioned by the type and the particularities of the environment.

The increase in the productivity of the economy is realized through the adequate training of the labour force, and in order to achieve this goal, a national effort must be made - a collaboration plan between the Government, employers, providers of education and qualified professional training and other stakeholders (social partners).

2. Context. Dual education in the EU

A series of crystallized criteria imposed the classification of countries according to the openness of their educational strategies and policies regarding the dual school, whose main component is work-based training. "Depending on the degree of openness, national policies can be classified as '*conducive*', '*just-allowing*' or '*unconcerned*'. *Conducive* policies meet all the criteria, *just-allowing* policies meet only some of the criteria and *unconcerned* policies only verify one or none of the criteria. These operational criteria are:

to acknowledge work-based learning as a regularly accepted training method;

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[1] Cedefop, *Vocational education and training in France: short description*, Luxembourg: Publications Office of the European Union, 2022, available at *https://www.cedefop.europa.eu/files/4205_en.pdf*, last time consulted on 16.03.2023;

to develop work-based learning programmes at all levels (national, regional or sectoral);
to finance work-based learning specific programmes;
to recognise work acquired learning outcomes (non-formal and informal);
the stakeholders to promote, encourage and focus on work -based learning[2].

England has been identified as an example of a country with *conducive* policies. Even though the proportion of students enrolled in the initial vocational education and training is below the European Union average, the number of students that are following work-based training is above the EU average. The attractivity factor of the vocational education and training is a challenge present everywhere due to the lack of systematic comprehensive knowledge in the field, so the British introduced tech level in their attempt to solve part of the problem. This step had the purpose of preparing the students for specific job roles, but also to be relevant in admission to higher education. In order to improve the situation, the stakeholders tracked the relevance of several factors that influence the vocational education and training like:

- the availability of funds;
- the orientation structures;
- the work-based training experience provision;
- the complexity of professional development paths in the VET sector.

The report *English Apprenticeship: Our 2020 Vision* planned to increase the quality and the quantity of apprenticeships. “This publication sets out what is expected of all key stakeholders, employers, education and training providers and government working together”[3].

The contract between the parties consisted in the fact that the employers had to pay the apprentice's minimum wage and the British Government covered the cost of training the apprentices. The Department of Education is responsible for the organisation of education, services and skills. Employers are developing new qualification standards to better meet the skills needs of their sectors. These standards describe the knowledge, skills and expected behaviours that will be demonstrated on the basis of a test. Also, to improve quality, the Institute for Apprenticeships and Technical Education public body led by employers, to be in charge of maintaining the quality of standards. After all, employers best understand the skills, knowledge and behaviours needed for the future, which is why they have the freedom to choose between training their own staff or choosing the best vocational education and training provider.

The Enterprise Act was the law which, among other effects, sought to “protect and strengthen the apprenticeship brand, to introduce targets for apprenticeships in public sector bodies in England and to establish the Institute for Apprenticeships – an independent, employer-led body which will ensure that the apprenticeship meets the needs of the business”[4].

Currently, students and employers are in an unstable and confusing situation in which the multitude of qualifications have an insignificant relevance for both students and employers. Within the framework of the reforms, the development of an easy-to-navigate system is pursued. The multitude of qualifications used affected the overall transparency of qualifications.

”Department for Education (DfE) has published a series of action plans ahead of the introduction of new technical study programmes called T levels”[5]. The T levels and the apprenticeship ensure both a qualified professional training path for employment, as well as for entry into higher education and technical training. The educational programs in Level T have a duration of two years and represent a combination of teaching, workshops and a simulated work environment. Both educational programs are based on the same qualification standards designed by employers. Likewise, T Levels differ from apprenticeships in that most of the learning time is spent in the classroom (80%).

As a result of the reforms proposed in England, the disciples demonstrate their capacity through an assessment specified by employer groups. The creativity and applicability of knowledge, skills acquired in work environments are evaluated. Apprenticeships promotes the adaptability of apprentices to a variety of roles, employers and their capacity for personal development. Apprenticeship standards should also facilitate the

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[2] Cedefop, *Work-based learning in continuing vocational education and training: policies and practices in Europe*, Luxembourg: Publications Office of the European Union, 2015, available at *https://www.cedefop.europa.eu/files/5549_en.pdf*, last time consulted on 16.03.2023.

[3] HM Government, *English Apprenticeships: Our 2020 Vision, 2022*, available at *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/482754/BIS-15-604-english-apprenticeships-our-2020-vision.pdf*, last time consulted on 18.03.2023.

[4] Press release, *Enterprise Act becomes law*, *https://www.gov.uk/government/news/enterprise-act-becomes-law*, 2016, last time consulted on 18.03.2023.

[5] Cedefop. *Developments in vocational education and training policy in 2015-19: England. Cedefop monitoring and analysis of VET policies, 2020*, available at *https://www.cedefop.europa.eu/en/publications-and-resources/countryreports/developments-vocational-education-and-training-policy-2015-19-uk-england*, last time consulted on 18.03.2023.

acquisition of transferable skills – such as creativity, innovation, problem solving, self-management, communication skills, interpersonal skills.

Good productivity is the foundation of economic growth; however, England's productivity is about 20% lower than its international competition, part of the G7 group. England, like the rest of the European countries, has a critical need for professional workers qualified for replacement and also for workers qualified in new technologies. Hence the country's openness to new approaches and the multitude of education and professional training programs. The one of the Government’s way to pursue the competitiveness of the economy and to maintain its current economic strength.

England has taken steps to continuously reform and transform its technical education and bring providers and employers closer together. Their educational strategy is guided by systems of information and feedback which enforced the guidance infrastructure, improved attractiveness of VET through national debate, where all stakeholders had their chance to influence the outcome.

France qualifies in *just-allowing* category. Following a national consultation on the state of the education system in France, a new pedagogy was outlined that promotes multidisciplinary and the personalized support given to students. The resulting concrete measures aimed at the re-evaluation of professional education through:

- new human resources management practices;
- personalized support of routes and careers;
- better financial remuneration;
- promoting skills and mobility.

Within the expected investments, students and teachers occupy a central place. The skills agenda, the upskilling and reskilling of the workforce in the context of the globalization of the economy, the green and the digital transition represent objectives in which intervention is necessary so that France is in accordance with the E.U guidelines on education and professional training recommended for the period 2021-2030. Those who follow the professional path benefit from personalized support, the diversification of the learning offer, guidance towards an easy transition to further studies or the labour market. Also, the investments in the skills agenda aimed at aligning education and professional training to the needs of companies and to emerging needs such as digitization and distance learning.

Apprenticeship has seen a strong dynamic due to the law adopted by the Ministry of Labor that regulates the individuals’ professional future. Apprentice training centers were created where the role and responsibility of mentors were increased, as well as introducing the obligation of quality certification for teachers and trainers from the providing units. The obligation revised the criteria related to qualification and professionalism. Another strong point of the reform was the skills investment plan, that also supported the acceleration of the digital transformation of professional training. Secondary education offers three study paths: general, technological and vocational, its graduation ensuring access to further education and/or to the labour market. Vocational education and training qualifications are provided in initial education, apprenticeships and continuous vocational training through various forms of training.

Is in the apprenticeships where students are alternating between an apprentices training center (CFA) and a company. The Apprentice training centers (CFA) offer complementary general theoretical training for apprentices in order to ensure their social progress and technological and practical training. Also, they ensure cooperation between trainers and teachers. The market for the provision of education and professional training was liberalized, so that even private companies could create CFA to train their apprentices. The laws that reformed the vocational training system created the legislative framework and regulated the obligations and quality standards, as well as the financing of apprenticeship contracts. At the state level, ministries develop standards for VET qualifications in consultation with business representatives, define the regulations for examining and awarding VET qualifications. They deliver VET programmes; recruit, train and pay teachers; and monitor the quality of training, outcomes and resources used. Regions are responsible for the planning and coherence of vocational training activity in their territory. They define their policies according to local economic and social priorities, in consultation with the state and social partners.

Certificates of professional qualification (CQP) are sector or industry specific qualifications, created and recognized by professional branches, which attest to the knowledge of skills. Until 2018, CQPs were classified by activity sector, then starting in 2019, CQPs can be associated with a qualification level and included in the RNCP (Répertoire National des Certifications Professionnelles) register.

In France, the promotion of vocational education was ensured by establishing partnerships between schools and companies, partnerships supported through specialized local offices in school inspectorates, school-business committees and specialized school counsellors. At national level there are particular departments in the Ministry of National Education that set up training programs and schemes like ‘Engineers for schools’ (IPE), which offers the possibility of “detaching engineers and other specialists in the academies, for a fixed period so that

the vocational training system will take advantage of their expertise"[6]. The transformation of the vocational pathway was another factor that ensured the strengthening of the link between the world of education and the world of business. Vocational education and training will play an important role in securing employment, especially for the young generation due to vast budgets allocated to it in economic recovery plans (15 billion EUR are allocated to training actions for skills development).

Bulgaria belongs to the latter category, the *unconcerned.* In 2015, Bulgaria introduced a dual VET system that combines school and workplace, learning to provide students with real opportunities to gain relevant experience that will develop the skills needed for successful integration into the labour market. The Bulgarian vocational education and training system is characterized by the following features:

- qualifications and curricula are coordinated by the state;
- dual vocational education and training still represents a major challenge;
- VET learners represent more than 50% of the total secondary education population;
- there is a high level of skill mismatch regarding the labour market needs.

Cooperation and collaboration between stakeholders are defined according to the purpose of the provided regulations. The National Agency for Vocational Education and Training (NAVET) is the agency that coordinates the national vocational education system. The Ministry of Education and Science, through the Directorate of Vocational Education and Training is responsible for the management of the guidance centres in career. The Ministry of Labour is responsible for medium- and long-term skills forecasts and the Employment Agency – for short term skills forecasts[7].

The National Strategy for Lifelong Learning aims to improve access to guidance and skills development for both students and adults, to promote effective cooperation and internal exchange of information between all agencies in the country with the aim of bridging the gaps between graduates and labour market needs[8].

Current national policies in education and employment seek to equip students with relevant skills, in the context of national and European trends in the labour market and emphasize the importance of transversal skills, or lifelong skills. Also, the legislation empowered local and regional authorities to act for the benefit their labour market particular needs, as Bulgarian industrial enterprises complained that the labour shortages are limiting their activity. The reform increased local and regional authorities' responsibility in VET planification, funding (which is mostly State-financed), equipping schools and organising vocational training for the unemployed.

Bulgaria set up the first career guidance portal, which contain detailed information on the economy of each region of the country, whose main beneficiaries are students with a professional qualification seeking a sustainable placement on the labour market, as well as other stakeholders.

Their vocational education and training strategy launched in 2015 set up to address other issues as low adult learning participation, poor career guidance services, low flexibility in VET provision and to promote modularization. Curricula is coordinated by the state, only school-specific curricula is designed by VET providers (public or private) in order to better synchronize qualifications with the local labour market specific needs[9].

The Bulgarian vocational education and training system's education population share is on the rise because there are incentives for learners. After graduation students receive both a diploma for secondary education, which assures them access to higher education and a certificate for vocational qualification, which increases their employability factor.

3. Good practice examples of dual school application in Romania

We are confident that the vocational training expressed through the dual school represents an excellent investment for the main beneficiaries - the Government and employers. The article aims to further emphasize the benefits by presenting good practice models that have incorporated characteristics of other dual school

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systems from abroad in Romania, creating an alternative that can be integrated in the future reform, which aims at the vocational education and training. These features include greater freedom granted to the employer in setting performance standards of qualification, a better access of external providers to training programs, good orientation structure and high-quality, well-equipped training providers.

Romanian authorities need addressing some pressing challenges:

- increase investments in the educational field;
- anticipate labour market skills needs;
- modularization of training programmes;
- low adult learning participation.

Romania has adopted several strategies as action plans in various fields to emphasize the importance of the quality of education and professional training in the context of new challenges and high expectations in society[10].

Starting with the year 2017-2018, Romania proposes a form of dual school that is provided at the request of companies, which themselves participate in the provision of vocational education and training. The share of learners in dual schools is 4.4% of the total VET population at upper secondary level. The main characteristic of these programs is that they open access to the labour market. Work based learning for initial VET is also offered in schools, its share varying between 15% and 25%, depending on the EQF level. For continuous VET the work-based learning's share can exceed 70%[11].

The creation of training standards for qualifications is coordinated by the National Centre for Technical and Vocational Education and Training Development, approved by the Ministry of Education and Research and validated by sectoral committees, where stakeholders participate and sustain their implementation. Sectoral committees, representatives of different sectors of the economy, are the guarantee of the involvement of stakeholders in the design and evaluation of professional qualifications. Also, stakeholders participate in partnerships at regional (regional consortia) and local level.

An effect of the reforms can be seen through the development and endowment of integrated professional consortia for dual education that contribute to the development of professional education. This aims to increase the number of areas of qualification and graduates who can acquire level 3 - 8 qualifications, according to the National Qualifications Framework. "The consortium represents a centre of expertise for the implementation of national reforms in the field of education and vocational training through dual education, including piloting and further development of tools and methodologies specific to the dual education route"[12]. The mandatory constituents of the consortium are at least one of the following institutions:

- one higher education institution accredited in engineering sciences;
- one professional and technical education unit;
- one administrative-territorial unit;
- one economic operator.

The partnership agreement is concluded for a period of at least 15 years and other entities may be added depending on the evolution of the regional or local development context. This concept is a landmark measure aimed to develop the dual education with a focus on the needs of all stakeholders. The 10 initially planned consortia will be funded through the National Recovery and Resilience Plan (PNRR). This measure is expected to be a success story, as the vocational education and training in Romania had a great prestige before 1989. Back then VET enjoyed success when it was not merely seen as a secondary option; most students opted for a qualification in the technological education, which resembled to dual schools we are trying to set up today. There are multiple successful recipes when it comes to dual school implementation, but it was found that the way, the specificity of the dual model of putting skills into practice from an early age helps to increase the performance of a company.

Dual system education is the new trend in training in Romania. The advantages are many - students learn about the latest technologies; their qualifications are recognised at the European level and have quick access to employment opportunities within the company at an advantageous salary.

[10] E.-B. Cerkez, *Teachers and trainers in a changing world – Romania: Building up competences for inclusive, green and digitalised vocational education and training (VET).* Cedefop ReferNet thematic perspectives series, 2022, available at *http://libserver.cedefop.europa.eu/vetelib/2022/teachers_and_trainers_in_a_changing_world_Romania_Cedefop_ReferNet.pdf*, last time consulted on 27.03.2023.

[11] Cedefop, National Centre for TVET Development, *Vocational education and training in Europe - Romania: system description* [From Cedefop, ReferNet, Vocational education and training in Europe database], 2022, available at *https://www.cedefop.europa.eu/en/tools/vet-in europe/systems/romania-u2*, last time consulted on 29.03.2023.

[12] Ministerul Educației, *Consorții pentru învățământ dual,* available at *https://www.edu.ro/sites/default/files/_fi%C8%99iere/Minister /2022/PNRR/Consortii_dual/*, last time consulted on 18.03.2023.

The economic sector demanded for the dual school to be further extended in the new education law. So, the entrepreneurs and students need to meet on the ground of their common interest more. There are some places in Romania where these conditions have been met. One of them is Kronstadt German Vocational School, which is actually pioneering dual school in Romania. It was founded in 2010 and is backed up by an association of 19 economic agents who wanted targeted work force. They adapted the German model to the needs they had in Romania. Currently they have 7 qualifications with solid plans to enlarge their offer to 10 qualifications. What they have done was to create the conditions for changing the collective mindset regarding the technological education. The marketing budget is large precisely to maintain the attractiveness of their training programs.

Another successful story in Romania is the Bosch Group, which is a partner of schools in the dual system since 2013, developing successful partnerships with several high schools in Cluj and Blaj to ensure a reliable source of technicians adapted to the requirements of a modern production unit and equipment, Moreover, the factory inaugurated in Cluj and in Blaj training centres, which are equipped with specific equipment for the professional training of secondary school students[13].

The Acarom dual school in Mioveni is an education and vocational training project that follows trends and skill needs in the automotive field. At the same time, it is provided as a viable alternative to cover the need for skilled labour for the region's biggest factory - Dacia-Renault. In fact, this is the most advanced project which represented the blueprint for the integrated professional consortia for dual education already mentioned in this article.

Continental Romania is another important stakeholder in the dual school implementation in Romania, with multiple partnerships in different cities. They have locations in Timișoara, Brașov, Sibiu and Carei. It is one of the companies that initiated, in 2012 the reintroduction of the dual vocational education system in Romania. Since then, hundreds of students have been employed in Continental's factories or engineering centers in Romania.

These are only a few examples of successful implementations, but dual vocational education and training is becoming attractive again both for students and for all stakeholders. Other economic agents are benefiting from the share of these pioneer's know-how. Their success stories are a powerful factor that influence the reshaping of the collective perspective regarding dual vocational education and training which should be considered a solid educational alternative with the same potential academic and development outcomes. Positive examples are the driving force that shape societies with a great rapidity and enthusiasm. We must search for and promote such models.

4. Conclusions

Good practice example of dual school in Romania exists and although its implementation history is quite recent, the conclusion is that we cannot talk about high quality technological education and training without the contribution of companies that are willing to invest in the human resources. Entire departments must fully engage in order to promote and sustain attractiveness of their proposed qualifications. Benefits must be explained to the students that choose the paths of dual vocational education and training. There are no limitations to this path, the student and his inclination toward the practical side of the learning process is a natural alternative, the process of fixation of the acquired skills is faster.

One of the research results is to expose the multitude of dual school implementation models in Europe and their complexity. Another result is the presentation of the successful implementation models of the dual school in our country. The expected impact of the research is to improve comprehensive systematic knowledge in the field at the European level and to help create an efficient unitary solution. An overview of the field is fundamental to the development of this unitary European solution. Also, the research aims to improve the Romanian society's perspective on this educational route by presenting and promoting examples of good practice already implemented in our country. That is why, for further research, we intend to launch a questionnaire to collect and analyse the perception of stakeholders regarding vocational education and training in Romania.

The Declaration of the joint Vocational Education and Training providers on the contribution of Vocational Education and Training to the EU 2020 strategy starts with this quotation: "Without the opportunity to learn through the hands, the world remains abstract, and distant, and the passions for learning will not be engaged"[14], emphasizing the E.U.'s commitment to provide the foundation for a healthy and divers educational environment suitable for all. Moreover, this E.U. commitment stems from the emphasis placed on the importance of skills as a pathway to employment and prosperity, enabling people to access good-quality jobs and fulfil their potential. In the context of a global economy in continuous change, skills will determine competitiveness and innovation

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[13] Bosch, *Şcoala duală Blaj – specializări tehnice adaptate nevoilor elevilor și ale pieței*, *https://www.bosch.ro/stiri-si-noutati/scoala-duala-blaj.html*, last time consulted on 29.03.2023.

[14] D. Stowe, *The Wisdom of Our Hands: Crafting, A Life*, Linden Publishing House, 2022.

at European level. Competences are an important factor of development and economic growth. They are the key to social cohesion[15].

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